

# NSW REGULATORY POLICY FRAMEWORK

**Independent Review**

**Final Report | August 2017**

**Regulatory Policy Framework Review Panel**

The Hon Nick Greiner AC, Chair

Su McCluskey

Martin Stewart-Weeks



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## Message from the Chair

When the Panel was formed in late 2016, we noted that the Government faced an inflexion point in how it sets the direction in its approach to regulation. NSW, as the leading state in Australia, needs to ensure that its regulatory framework not only meets the needs of its citizens today, but is prepared for the expectations of communities and businesses of tomorrow.

Regulation and red tape are often viewed as the same thing. They are not. The Panel is unapologetically focused on improving the former in a way which would reduce the latter.

In our discussions with stakeholders, two themes stood out. One was that regulation is often a popular policy response to a problem. That is because it is usually highly visible and allows governments and Ministers to be seen to be active and responsive. Sometimes, of course, good, well-designed and timely regulation is the right response. But sometimes regulation won't be the best way, even if at first it might seem that way. Decision-makers need effective support to consider different ways of achieving desired outcomes. Keeping an eye on the result you want to achieve, and then making well considered and thoughtful decisions about the best way of making them happen, including but not always through more regulation, is usually the way to good policy and a better impact on business, the economy and society.

The second theme was that often the problem is not the regulation itself, but people's experience of that regulation, particularly when intersecting regulation is duplicated or uncoordinated.

Citizens need governments to exercise a more consistent and dynamic approach to managing the lifecycle of regulation. A long-term, forward thinking government must go beyond arbitrary targets such as 'one on, two off' regulatory repeal initiatives. It needs to provide certainty and assurance to the community and businesses that the Government is listening to them, and is alive to their issues and concerns.

This demands a regulatory approach that firstly has a disciplined focus on outcomes (rather than rules), and secondly has the right incentives and levers to sustain this discipline over the long term.

Regulation cannot be a 'set and forget' exercise. It needs regular and frequent engagement and iterative improvement. Like any other public asset, a school or a hospital, regulation needs ongoing maintenance and monitoring to ensure that it remains fit for purpose and in the public interest.

A lifecycle – or stewardship – approach offers a way to address this by making the custodians of regulations more accountable for the ongoing 'health' of those regulations.

In addition, the Panel takes the view that much more can be done at all levels of government to harness digital and data capabilities within the regulatory system. Greater digital literacy across the population is enabling new ways of implementing and streamlining regulation. The ever-increasing data being gathered by businesses and agencies should also be transforming the way governments regulate – much more than we are seeing to date. While the rights of individuals to privacy and data security is still paramount, there remains a vast amount of useful data collected by government agencies that could be accessed, combined and shared across government for better community outcomes.

The Panel supports sharing or reusing of data provided to the NSW Government as standard practice (with relevant privacy and information security safeguards), to support more effective regulatory environments. The NSW community as a whole would benefit if the public sector made much more of its data available – whether shared openly or with the individual providers of that data.

This report also draws on the many previous reviews and research on regulation and regulatory frameworks. The Panel's own findings have largely been in accord with previous reviews, pointing to one clear fact: rather than wait for the next 'burning platform' created by regulatory failures to initiate reform, it is time to take action.

NSW needs to move to a more coherent framework for regulatory policy, built on the results of this review and similar work in other jurisdictions.

The reforms proposed by the Panel are intended as a blueprint for an enduring and effective regulatory framework that will support good policy and decision-making to better position NSW to meet the challenges of the future.

As Chair of the Panel, I would like to take this opportunity to thank my fellow Panel Members, Su McCluskey and Martin Stewart-Weeks. We would like to express our appreciation for the hard work, insights and support from the Secretariat team that has worked on the Review: Dr Kar Mei Tang, Dominique du Cros, Alexandra Mattinson, Patrick Fischer-Reid, Danielle Doherty, Claire Cato and Patrick Chan. We would also like to thank the various agencies, industry stakeholders and individuals who have actively and generously provided feedback to us. Your input has greatly enriched this report and helped inform our insights.



**The Hon Nick Greiner AC**  
**Chair**  
**Regulatory Policy Framework Review Panel**

## Glossary

ACRONYM	NAME
<b>BRS</b>	Better Regulation Statement
<b>Cluster</b>	NSW Government entities are consolidated into ten Clusters reflecting ten broad policy areas of Government
<b>DFSI</b>	Department of Finance, Services and Innovation
<b>DPC</b>	Department of Premier and Cabinet
<b>IPART</b>	Independent Pricing and Regulatory Tribunal
<b>LRC</b>	Legislation Review Committee
<b>OBPR</b>	Commonwealth Office of Best Practice Regulation
<b>Panel</b>	NSW Regulatory Policy Framework Review Panel
<b>PIR</b>	Post-Implementation Review
<b>PPE</b>	Policy Proposal Evaluation
<b>Regulation</b>	Rules set by government that affect the everyday existence of businesses, consumers and communities arising from Acts of Parliament, regulations made under those Acts or by Statutory Instruments
<b>Regulatory agencies</b>	Government agencies with responsibility for developing, managing or implementing regulation
<b>RIA</b>	Regulatory Impact Assessment
<b>RIS</b>	Regulatory Impact Statement
<b>QRS</b>	Quality Regulatory Services

## Executive summary

### Why getting regulation right is important

The regulatory policy framework is the backbone of the public sector and a critical determinant of how the Government delivers its services effectively. In one way or another, regulation (good and bad) affects every single individual in NSW through different stages of their lives.

It is therefore imperative that regulation is managed effectively to deliver the best outcome for NSW businesses, consumers and the community at large.

Good regulation balances multiple public interest imperatives: those of safety and consumer protection, as well as productivity, efficiency and innovation. All these outcomes are important and work together to provide net benefits for society.

Getting regulation right is important. Incidents such as the Grenfell Tower fire in London and, closer to home, discussions around building safety, liquor lockout laws and swimming pool fencing regulation, all attest to the importance of having a robust framework that provides guidance to public servants on regulatory best practice. It also provides Ministers and policymakers with assurance that they have the best evidence available to inform their decisions.

There is a significant cost to NSW businesses for activities to support regulatory compliance, with some estimates of around \$10 billion in compliance costs each year.<sup>1</sup> Compliance with regulatory requirements can also be seen by business as preventing them making changes to grow their business.<sup>2</sup>

Regulation done well could, in the long run, boost the NSW economy by around \$6 billion. This is based on the Productivity Commission's estimate that a 20 per cent reduction in regulatory compliance costs would increase Australia's GDP by 1.31 per cent in the long run.<sup>3</sup>

The NSW Auditor-General's recent report on red tape reduction outlined shortcomings in the Government's ability to prevent or reduce red tape, and lack of sufficient oversight of the regulatory policy process to improve the quality of regulatory proposals.<sup>4</sup>

The Panel's recommendations will raise the quality of regulation in NSW, with the ultimate goal of achieving better regulatory outcomes for the community.

The Panel has identified how NSW's current approach to regulating impacts businesses, consumers and the community. We then considered how those impacts are linked to NSW's current regulatory framework and practices and where these can be substantially improved. The key findings are set out below.

### Key findings

#### A better approach to reducing red tape is needed

Traditional 'one on, two off' type red tape reduction programs offer some benefits but are largely unsustainable after the initial round of reforms. The Panel agrees with the Auditor-General's assessment that overall, NSW Government initiatives to reduce red tape were not effective and that targets did not successfully drive new red tape reforms (although some savings were

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<sup>1</sup>NSW Business Chamber, *2016 Red Tape Survey*

<sup>2</sup>Australian Chamber of Commerce and Industry, *2015 National Red Tape Survey*

<sup>3</sup>Productivity Commission, *Potential Benefits of the National Reform Agenda*, Research Paper, 2006

<sup>4</sup>New South Wales Auditor-General's Report, *Performance Audit Red tape reduction*, 2016

recognised).<sup>5</sup> This is consistent with evidence from other jurisdictions and from broad stakeholder feedback. Furthermore, it is unclear whether the benefits of these programs outweigh the cost of administration, in comparison to the potential value of more carefully targeted regulatory reviews.

**Often the problem is not regulation itself, but people’s experience of that regulation**

Regulation has become, in many cases, synonymous with red tape rather than positive public outcomes. Often this is not because of the regulation itself, but how it is implemented and how it interacts with other compliance obligations faced by users. We need to consider how incremental regulation – particularly when these obligations are not implemented in a joined-up way – reinforces people’s perceptions of regulation as red tape. This means more effective engagement with those experiencing regulation is required to inform and influence the development and implementation of complex regulation in a holistic, user-centric way that is focused on better outcomes.

**Many aspects of the existing Regulatory Impact Assessment framework have become a ‘tick the box’ exercise that adds limited value to the regulatory and policy development process**

The Panel agrees with the Auditor-General’s finding that Regulatory Impact Assessments (RIAs) do not consistently provide a considered assessment of new and amending regulatory proposals. The timing of the assessments (often only at the Cabinet submission stage) and lack of designated oversight contribute to the lack of efficacy of RIAs. A good assessment process should ensure that Ministers are supported as early as possible in the policy cycle to consider all policy options and make informed choices based on the potential impacts of their decisions. This includes the possibility that regulatory interventions may not be the only or best response to achieve the intended policy outcome.

**The current framework lacks sufficient rigour in how regulation is managed, or safeguards to prevent a ‘regulation first’ response to public policy issues**

NSW currently does not have a consistently-applied framework for ensuring policy decisions are accompanied by a proportionate level of assessment of the policy options available. There is also inconsistency in whether evaluations after regulations have been introduced are conducted, to gauge the success of the regulation in delivering the identified outcomes. Without a clear strategy for regulatory policy or strategies for improving regulatory practice it will be difficult for the Government to provide assurance to the community that any regulatory failure is not a failure of the overall regulatory policy framework. The current framework and governance does not have sufficient clarity of role and objectives for accountability, or strong oversight arrangements to ensure that regulatory agencies and regimes are working as intended.

## Effective regulatory policy needs a sustainable framework

It is vital that NSW has a framework that will support and enable decision-makers to make laws that are reasonable and responsive to the economic, social and environmental needs of the community. The Panel’s findings indicate that piecemeal changes to parts of the current regulatory policy framework will not get the Government the results we think it both needs and wants. There is an opportunity to establish a streamlined and modern framework to ensure the NSW Government is in a position to drive productivity and innovation in an environment of emerging business models and digital technology. In total, the Panel has made 26 Recommendations.

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<sup>5</sup>New South Wales Auditor-General’s Report, *Performance Audit Red tape reduction*, 2016



The Panel recommends that these reforms and the overall regulatory framework should have the following features:

### **Engagement should be the regulator's starting point**

NSW citizens will benefit from a regulatory system that puts engagement and clear communication at the centre of regulatory policy development, where every party is clear on its responsibilities and the desired outcomes of regulation.

Government must start with a sound understanding of the outcome required of any policy that might result in regulation. Regulation is just one tool within a suite of options available to government to achieve good policy and service delivery outcomes. To provide good regulatory advice, regulators must also sufficiently understand the end-user experience and be able to apply a clear set of objectives for any government intervention.

The culture and capabilities within agencies will need to support new approaches and new regulatory environments. There will be opportunities to use digital and data driven options, and organisations will need to ensure their staff are able to incorporate new tools and considerations in the decisions around when and how to regulate.

### **Reduce touchpoints with Government: 'Tell Government Once'**

A single NSW Government touchpoint should be adopted where possible, particularly for stakeholders that have to deal with multiple NSW regulators or multiple jurisdictions. Compliance with regulations should be simplified, with emphasis on the quality of the user experience and ease of information access.

Regulatory design needs to better understand complex regulatory environments, including the relationship and/or duplication of requirements across different levels of government. This should provide opportunities for exemptions from regulation and existing schemes, and efficiencies from digital technology and data sharing to reduce compliance costs and increase efficacy of regulation.

Migrating to more digital touchpoints with government, with strong checks and balances, will allow data to be captured and used, where appropriate, to improve regulatory design and create user-centric regulatory services. This data will also provide transparency to the performance of regulators and enable different service delivery options to be evaluated for the effectiveness of different interventions.

### **Regulatory stewardship**

The regulatory policy framework should include clear accountabilities and strategies to provide assurance to business and the community that the process used to develop and manage regulation will provide the best outcome and protection. Regulators and policymakers, and their decisions, need to stand up to scrutiny. Therefore, the regulatory framework needs to set them up with the right tools, information and robust assurance processes to address community and business expectations.

A new statutory framework – which consolidates and streamlines existing requirements – should be established to embed the principle of regulatory stewardship. This will ensure that the stock of regulation is monitored throughout its 'life cycle', in a transparent, targeted and holistic manner. Regular public reporting whether the stock of regulation is 'fit for purpose' will ensure agencies are effectively held to account, particularly in areas with clear benefits from red tape reductions.

The concept of stewardship implies a concern for the performance and condition of an asset both now and into the future. In this case, under a stewardship model, each successive generation of regulators will be expected to hand on the stock of regulations, and an associated regulatory culture, for which they are responsible - in better condition than they found them.

Government agencies will have a duty to develop and manage regulation that is in the public interest, over time and across political and bureaucratic cycles.

The Panel considers that this approach will result in greater long-term benefit for the community and business, and importantly ensure transparency in good regulatory design. The more successful the NSW Government is in implementing regulation that is fit for purpose, the more it can mitigate the costs of unwinding poorly designed regulatory schemes. As it will provide an ongoing mechanism for tracking red tape reduction by agencies, it would also replace the need to meet arbitrary red tape reduction targets which may detract from more meaningful reform efforts.

This framework should be established by streamlining current legislation, through a new *'Better Regulation Management Act'* that positions outcomes focused approaches at the centre of decision-making. The statutory framework would establish an overarching set of objectives, guidelines, clear accountabilities, a code of practice and establish governance arrangements that enables independent advice and assessments of the quality of policy evaluations.

### **A regulatory sector that is continuously learning**

Regulators operate in complex and often highly contested policy areas. Appropriate legislation is essential to establish the right accountability, skills and culture to support a more effective approach to outcomes- focused regulation.

They will also need to engage continuously with stakeholders even when there is no 'burning platform', so they are alive to emerging issues well before they escalate. Regulators need to test the relevance of regulatory responses by fostering a culture of iterative policy development and greater diversity in approaches, skills and staffing to ensure adequate representation of different views and ideas.

### **An independent Commissioner for better regulation**

Clear leadership and advocacy for quality regulation is essential. An independent Commissioner, supported by a central secretariat, will be needed to effectively drive change, provide an assurance function and improve the outcomes of a regulatory policy framework.

The Commissioner will play an important role in working with agencies to ensure appropriate analysis and engagement is undertaken before any decision is made as to whether, and how, to regulate.

One consideration by the Panel, and a question for all governments, is how transparency best serves good decision making by Ministers. While acknowledging the competing views that exist on this issue, the Panel believes that the most useful outcomes – and hence the greater public good – are achieved when processes support public servants offering timely and frank advice. The Panel believes that quality advice in the decision making process should be a priority and can be effectively balanced with transparency (sometimes through the timing of publishing material) to get better decisions and results. This framework seeks to replace a 'tick the box' approach to regulatory proposals and put in place assurance processes that raise the quality of advice to Ministers and provide independent reporting to the community on the quality of this advice.

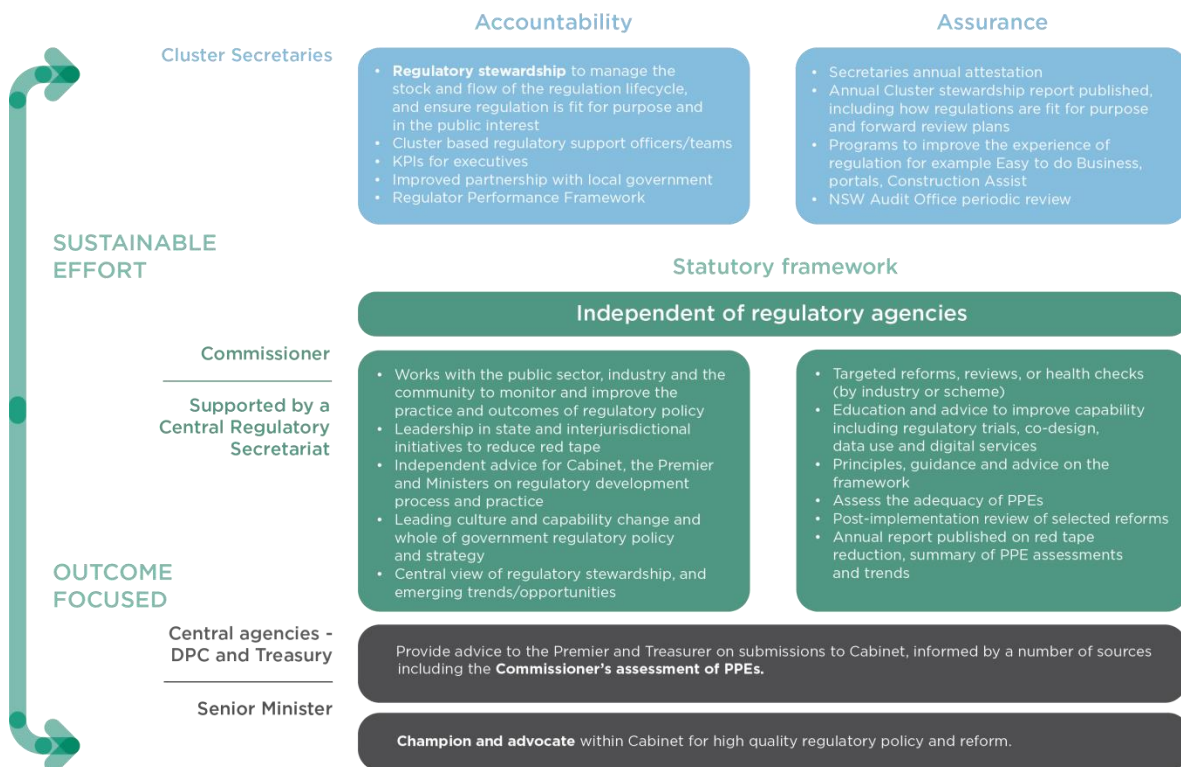
While the framework insists on more rigorous, open and collaborative review and analysis process than is currently the case, it is also designed to work within the practical realities of how governments function. Over time, as the framework matures, it will likely be appropriate to revisit the role of independence and transparency in effective assurance processes. These are, ultimately, key determinants of the success of this framework.

## Elements of the recommended regulatory policy framework

The main elements of the framework are described in detail in the five sections of this report and shown in the figure below. These elements are intended to work together to produce a sustained effort by Government over time, creating better outcome focused regulatory environments, increasing accountability of agencies and providing assurance for the community, through:

- **regulatory stewardship** to ensure government agencies develop, manage and implement regulation that is fit for purpose and in the public interest
- **a statutory framework** to provide clear governance and transparent responsibilities and regular public reporting
- **culture shift and capability building** to capture opportunities from digital services and data use for better regulatory environments, and respond to future technologies and business models
- **better regulation development** focused on the desired outcome, regulating by necessity rather than by default, supported by appropriate analysis and review
- **Policy Proposal Evaluation (PPE)** as a broader and more effective approach to replace the current Regulatory Impact Assessment
- **red tape reduction** by applying constant pressure on agencies throughout the lifecycle of regulation, including reducing touchpoints with government and removing duplication
- **an independent Commissioner** to work with agencies, industry and the community, leading change and monitoring the regulatory policy framework and red tape reduction.

## RECOMMENDED REGULATORY POLICY FRAMEWORK



## List of recommendations

### 1. Reframing regulation for better policy

#### Recommendation 1:

Streamline and consolidate existing legislation through a new '*Better Regulation Management Act*' that:

- a) establishes an overarching set of objectives for NSW regulatory policy consistent with the Government's commitment to productivity growth, customer service, individual and community safety, innovation and enhanced digital government service delivery
- b) replaces the *Subordinate Legislation Act 1989* and removes the requirement for statutory review clauses in principal acts
- c) creates a new obligation for regulatory stewardship on the heads of NSW agencies to ensure a proactive, lifecycle approach to the management of the stock and flow of regulation (including principal legislation, regulations and other statutory instruments), which includes:
  - clear expectations, responsibilities and accountabilities (including key performance indicators) for the heads and executives of agencies
  - requiring an annual attestation by Secretaries and/or heads of NSW agencies that they have appropriate systems in place to effectively develop and manage regulation in accordance with the Act
  - publication of annual reports to demonstrate that the regulations they administer remain fit for purpose and in the public interest, providing a high level of transparency and forward plans on reviews
  - establishing a 'back-stop' ten-year statutory review for regulation that has not already been reviewed or exempted
- d) establishes a Commissioner role to ensure a sustainable effort by the public sector to meet the objectives of regulatory policy and the Act, including:
  - promoting regulatory quality and reducing red tape
  - providing independent advice to the Premier and Ministers on regulatory development process and practice, including an independent assessment of the adequacy of Policy Proposal Evaluations (PPEs)
  - providing assurance to the Government and the community through publishing annually a report on the efficacy of regulatory stewardship, a summary of the adequacy of PPE assessments, and reduction in red tape
- e) provides a code of practice and guidelines for agencies that:
  - covers the development, management and review of regulation (including principal legislation, regulations and other statutory instruments; and policy proposals with an option to implement, remove or transfer a regulatory requirement or any rule that has an expectation of compliance)
  - incorporates the objectives for regulatory policy, including the public interest test (as recommended in the *Australian Government Competition Policy Review*)
  - replaces the current *NSW Guide to Better Regulation*
- f) consolidates exemptions contained in the *NSW Guide to Better Regulation* and Schedule 4 in the *Subordinate Legislation Act 1989*, following a review of current exemptions against clear and transparent criteria, to provide appropriate exemptions from statutory review and PPE requirements
- g) is supported by:
  - a Regulator Performance Framework
  - the NSW Audit Office's undertaking a review of Clusters' performance under the regulatory framework within the first two years following implementation, and then as part of its forward program of performance audits.

**Recommendation 2:**

The guidelines (Recommendation 1(e)) should include a principles based approach to prioritising the review of regulation that:

- a) focuses reviews on regulations that impact significantly on businesses, consumers or the community
- b) assists in identifying priority areas such as overlapping responsibilities between agencies and different levels of government
- c) supports holistic reviews of primary legislation together with any supporting regulations
- d) enables working more effectively with stakeholders on smaller-scale, targeted reviews, using regulatory trials where appropriate
- e) allows agencies to refer priority areas for review to the Commissioner for assistance
- f) includes appropriate exemptions (following the review noted in Recommendation 1(f)).

**2. Changing cultures and capabilities for a digital age**

**Recommendation 3:**

Update the *NSW Consultation Policy*, in consultation with the Customer Service Commissioner, to:

- a) embed a culture of ongoing conversation about regulatory policy
- b) include guiding principles of transparency and continuous disclosure
- c) ensure early consultation with industry and individuals, including those with less capacity to respond, or who bear added regulatory burden (e.g. consumer and community groups, small business, stakeholders in remote areas)
- d) include a process for open conversations, where senior government officials or a Minister make themselves available to answer questions from any interested member of the public
- e) have reference to the *Australian Government Best Practice Consultation* guidance note.

**Recommendation 4:**

The code of practice and guidelines in a new statutory framework (Recommendation 1(e)) should support cultural change in the Government to enable:

- a) regulation to be customer-centric and outcomes focused
- b) appropriate protections for the community or individuals
- c) agencies to rethink the 'regulation first' approach and embed examination of other options
- d) innovative regulatory development and implementation methods such as co-design, trials, regulatory sandboxes and use of digital services and data
- e) substituting non-regulatory arrangements where entities achieve the same outcome by meeting alternative obligations to those prescribed by regulation (where appropriate to the level of risk undertaken)
- f) increased adoption of regulatory technology ('RegTech') to make compliance and enforcement activities faster, easier and more cost effective for both regulators and regulated parties, including greater use of new and cutting edge technologies.

**Recommendation 5:**

Ensure that existing legislation is not a barrier to innovative regulatory development methodologies or new regulatory models. This should include consideration of a legislative framework for fixed-term exemptions to specific regulatory requirements, consistent with Recommendation 8.1 in the Productivity Commission Report, *Business Set-up, Transfer and Closure*.



**Recommendation 6:**

Enhance capabilities across the NSW Government to harness digital technology, and collect and use data more effectively, by:

- a) establishing Communities of Practice for regulators to share resources to foster best practice, particularly in harnessing new methods and digital technologies and to share learnings on key success/failure factors
- b) providing support and guidance for agencies adopting new technologies and using data safely and effectively in their role as regulators
- c) developing a central repository of regulatory tools and responses – particularly examples of digital regulatory tools or data use – to demonstrate options for agencies to consider in the early stages of policy development
- d) requiring agencies to create comprehensive, easy to access registers of the data they fund or hold, listing both data that is publicly available and that which is not (including the reasons why the data is not available for release), and link to [data.gov.au](http://data.gov.au), consistent with Recommendation 6.4 of the Productivity Commission Report, *Data Availability and Use*.

**Recommendation 7:**

To support the use of data for decision making and more effective regulatory environments, the NSW Government should:

- a) consider the types of data that should be collected to monitor and evaluate the implementation of regulatory policies
- b) establish a presumption in favour of sharing or reusing data provided to the NSW Government as standard practice (with relevant privacy and information legislation and security safeguards), with agencies to explain ‘if not, why not?’ if they reject requests for data sharing
- c) where appropriate, ensure new legislation facilitates data collection, sharing and the use of data to achieve better regulatory outcomes
- d) identify legislative barriers to the use and sharing of data currently provided to the Government (other than privacy and security safeguards) and establish priority areas to address, based on clear benefits to the community
- e) consider relevant recommendations in the Productivity Commission Report, *Data Availability and Use*, with reference to the proposed new national Data Sharing and Release Act, new access and use arrangements for data, the management of risks, and broader ethical considerations around data use.

**Recommendation 8:**

The NSW Government should ensure, as far as possible, that commercial arrangements with the private sector allow access to data (or creation of additional data) that would support better policy or regulation outcomes. This may include retaining the right to access, use or reuse data, consistent with Recommendation 6.3 in the Productivity Commission Report, *Data Availability and Use*.

**Recommendation 9:**

The induction processes for new Parliamentarians should include training on the formal requirements under the regulatory policy framework and best practice for the evaluation of regulatory proposals.

**Recommendation 10:**

Identify ‘better regulation’ officers or teams in each Cluster to bring cultural change and work with the Commissioner (Recommendation 1(d)) to improve capability and quality from within the organisation.

**Recommendation 11:**

Pursue targeted two-way secondments, with appropriate probity considerations, for regulatory staff with the private sector.

### 3. Rethinking the regulatory development process

**Recommendation 12:**

The NSW Government should establish a regulatory assurance process that focuses on the desired outcome, regulates by necessity rather than by default, and provides assurance to the Government and the community that the appropriate processes have been followed.

To achieve this, the current statutory and administrative requirements in relation to a process-driven measurement of regulatory burden under the Regulation Impact Assessment (RIA) process should be replaced with a Policy Proposal Evaluation (PPE). The PPE should:

- a) be fully integrated into the policy-making process
- b) clearly articulate the problem statement; i.e. what is the issue being addressed and what the Government wants to achieve
- c) be focused on outcomes when comparing policy options
- d) assess the impact of policy options, including the incremental burden of regulatory options on stakeholders
- e) actively consider industry-led solutions
- f) actively consider data and digital technologies that can help achieve outcomes
- g) provide decision-makers with a clear analysis of the risks of each option, including to the regulated and the end-user
- h) consider how the options will connect with and affect the existing regulatory environment
- i) embed post-implementation evaluation strategies, tools and measures.

**Recommendation 13:**

NSW Government agencies should initiate Policy Proposal Evaluations (PPEs) early in the policy development process under clear guidelines (Recommendation 1(e)) that:

- a) establish a single set of clear PPE requirements for policy proposals that include a regulatory option (including removing or transferring regulatory requirements), or any rule that has an expectation of compliance
- b) define the scope of the PPE requirements including appropriate exemptions (following the review noted in Recommendation 1(f))
- c) ensure PPE requirements are proportionate to the potential impacts of the regulation by including 'tiered' requirements for low, medium and high significance proposals. There will be higher analytical requirements for regulatory proposals of greater significance
- d) provide advice on the timing of PPEs, with reference to the *Australian Government Guide to Regulation*, and include engagement with the Commissioner as early as possible for advice on the level of significance of proposals, evaluation requirements, consultation, publication and whether exemptions may apply.

**Recommendation 14:**

The guidelines (Recommendation 1(e)) should promote better analysis of impacts by ensuring:

- a) that agencies are required to recommend the policy option that would achieve the greatest net benefit for the community
- b) sufficient consideration is given to:
  - innovative regulatory approaches, including the use of digital tools and data
  - preferencing or trialling non-regulatory options
  - potential disproportionate impacts on small business, more vulnerable cohorts in the community or other groups not well represented through consultation processes.

**Recommendation 15:**

Enhance the evaluation of regulatory proposals by including in the guidelines (Recommendation 1(e)) that:

- a) the Commissioner's assessment of PPEs (Recommendation 1(d)) be attached to Cabinet submissions
- b) the Cabinet submission template be revised to indicate consideration of non-regulatory options and a comparison of the benefits, impacts and risks of all options considered
- c) a central platform is provided to publish PPEs
- d) a Post-Implementation Review is undertaken and results published within the first two years after implementation for significant proposals that have not adequately met PPE requirements.

**Recommendation 16:**

Agencies that develop regulation involving regulatory responsibilities for local government should be required to:

- a) engage early with local government
- b) provide information with respect to local government impacts in PPEs guided by Recommendation 1 of the draft IPART report Review of Reporting and Compliance Burdens on Local Government.

**Recommendation 17:**

Amend the *Legislation Review Act 1987* in light of the Commissioner's role (Recommendation 1(d)), to remove the requirement for the Legislation Review Committee to consider compliance of regulations with the regulatory impact assessment requirements in the *Subordinate Legislation Act 1989*. The Commissioner should provide a report on the assessment of PPEs to the Legislation Review Committee.

#### 4. Reducing red tape

**Recommendation 18:**

Reduce the number of regulatory touchpoints with government by making 'tell government once' a guiding principle in the proposed Regulator Performance Framework to increase the incentive for agencies and their systems to work more effectively together.

**Recommendation 19:**

Establish a register of local government reporting, planning and compliance obligations, which should be used by agencies in developing regulatory proposals, to manage the volume of local government regulatory obligations and to avoid creating unnecessary overlap and duplication. This register will support consideration of local government's implementation of regulation in PPEs as required in Recommendation 16.

**Recommendation 20:**

Pursue an agenda for national and bilateral partnerships with other jurisdictions to drive cross-jurisdictional arrangements that reduce red tape and improve the implementation of regulation, consistent with the principle in Recommendation 18.

**Recommendation 21:**

Work with the Commonwealth Government and other jurisdictions to enhance outcomes for NSW businesses, consumers and the community, through:

- a) initiatives to reduce red tape, including regulatory overlap across different jurisdictions and tiers of government
- b) implementing targeted reviews, including those identified in the *Intergovernmental Agreement on Competition and Productivity-enhancing Reform* (Appendix D).

**Recommendation 22:**

Implement a Regulator Performance Framework that enhances the existing NSW Quality Regulatory Services (QRS) initiative, including:

- a) self-assessments of regulator performance
- b) feedback on performance from stakeholders and other regulators
- c) specific targets for data and digital adoption for agencies to create incentives to adopt modern data and digital practices when regulating
- d) benchmarking of agencies' performance and identification of opportunities to share learnings.

**Recommendation 23:**

Introduce accountability mechanisms to reduce regulatory overlap and duplication within and between agencies and between levels of government. These could involve annual reporting on efforts in this area as part of Clusters' regulatory stewardship reports and ensuring that department heads' periodic 360-degree performance reviews include key stakeholder feedback. These stakeholders should include key regulated entities and the Commissioner.

## 5. Institutional arrangements for a sustainable framework

### **Recommendation 24:**

Assign responsibility for regulatory policy to a senior Minister to champion and advocate within Cabinet for high quality regulatory policy and reform.

### **Recommendation 25:**

Establish a Commissioner role, independent of regulatory agencies, to provide a visible and proactive presence for the public sector and the community to:

- a) work with government agencies, industry and the community to monitor and improve the practice and outcomes of regulatory policy
- b) lead and promote initiatives to reduce red tape. This includes identifying significant regulatory review and reform opportunities, particularly in areas of disproportionate or cumulative regulatory burden, sectors experiencing rapid change or those involving multiple agencies (including designating a lead agency where conflicts arise or where there are multiple jurisdictions)
- c) provide independent advice to the Premier and Ministers on regulatory development process and practice, including an independent assessment of the adequacy of PPEs and recommending delay on the progress of proposals if required to ensure adequate analysis in PPEs
- d) promote culture change and skills development across the public sector to ensure better quality regulatory practice and impact, including:
  - developing guidance to support the regulatory stewardship approach
  - coordinating education and providing advice on regulatory best practice
  - engaging with agencies early in the policy development process to support compliance with PPE requirements, including developing practical guidance
- e) be a central driver and point of contact for cross-jurisdictional regulatory initiatives
- f) publish annual reports on the efficacy of the public sector's regulatory stewardship and the management of the stock and flow of regulation. These reports should cover future opportunities for improvement, challenges and trends in the regulatory environment, a summary of the adequacy of PPE assessments, and progress in red tape reduction
- g) publish post-implementation reviews of selected reforms, including (but not limited to) at the request of the NSW Government
- h) be supported by a secretariat with expertise in regulatory development and practice.

### **Recommendation 26:**

Establish a highly-skilled and well-resourced central function (secretariat) to support the Commissioner, that is independent of regulatory agencies, including:

- a) bringing together and refocusing any existing functions or resources related to the administration of a regulatory policy framework, from the Department of Finance, Services and Innovation and Treasury, to support the role of the Commissioner
- b) establishing a staffing mix from across the government sector and private sector to build capability, possibly through the use of short and long-term secondments
- c) the secretariat should be supplemented by a panel of external regulatory experts from the private, non-government and academic sectors, that can be accessed by the Commissioner and agencies when they need to tap into further expertise on complex areas of regulatory reform.

## Introduction

Regulation is a fundamental task of government. In NSW it is a vast web relevant to all aspects of society, business and the environment, from educating children to setting up a business, through to providing aged care.

The NSW Government established the Regulatory Policy Framework Review Panel in October 2016 as part of the NSW Government's response to the Auditor-General's *Performance Audit Red tape reduction report* released in August 2016. The Panel is chaired by former Premier and Treasurer, the Hon Nick Greiner AC, with Panel members Ms Su McCluskey and Mr Martin Stewart-Weeks.

The Panel was tasked with undertaking a broad ranging review of the current NSW regulatory policy framework that underpins regulatory quality across the whole of the NSW Government. This included both policy and statutory requirements that govern how the Government develops, assesses, reviews and reforms legislation and regulations to the extent they impose costs on businesses, consumers and the community.

The Panel was asked to develop recommendations to enhance the policies and institutions that underpin regulatory quality, to establish an enduring framework that best supports community wellbeing and productivity in NSW, now and into the future. The Panel considered how the existing framework might be redesigned to remain responsive to the changing expectations of businesses, consumers and the community over the coming decades.

In November 2016, the Panel released an *Issues Paper* outlining current practice, issues and challenges in the NSW regulatory eco-system, as well as emerging practice and lessons from other jurisdictions. The Issues Paper sought public feedback on how NSW can shape the regulatory infrastructure for the future to go beyond best practice. The terms of reference for the Review are provided at Appendix A.

The Panel met with a diverse cross-section of stakeholders from the NSW Government and non-government sectors, including industry and consumer representatives. The Panel also held roundtables with key state regulators, surveyed many more, and considered written submissions.

A *Draft Report* was released for consultation in May 2017, to seek feedback on the Review's findings and draft recommendations. Appendix B provides a list of the stakeholders who provided feedback during the Review.

Throughout this report, references to regulation cover Acts of Parliament, subordinate legislation (including regulations) and mandatory guidelines which impact primarily on business, consumers and the community. Non-regulatory approaches might include providing better information, education, supporting self-regulation, making data and better analysis available to provide insight and transparency to avoid the need for a formal regulatory intervention, or working with stakeholders under quasi-regulation and co-regulation arrangements.

Suggested reforms in this report, particularly around the proposed Policy Proposal Evaluation (PPE) process, as well as review of regulation, refer to regulations that directly affect businesses and the community. Consistent with current practice this process should not apply to the making of acts and regulations whose primary focus is the regulation of government activities and functions, such as electoral rules, management of the public sector and establishment of government entities.

The size and extent of the regulatory environment is often expressed in the number of instruments and the total number of pages of the legislation, regulation and other instruments. There are currently 883 Acts (with a total of 26,899 pages) in force in NSW, down from 1089 in 2008. There are 605 regulations in force in 2017 (which includes statutory rules, orders etc) totalling 16,671 pages. The number of regulations has not changed significantly over the same period (606 regulations in 2008). However, it should be noted that deregulatory initiatives can sometimes result



in more pages in the statute book for a particular area, where separate older instruments are replaced with consolidated or standardised instruments. In that sense, simple page counts as a proxy for 'good' or 'bad' regulatory performance can be misleading.

The staged repeal program introduced in 1990 was successful in delivering a reduction in the number of pages and instruments. It also enabled the overall statute book of statutory rules to be rewritten, so it is now far more coherent and expressed in plainer language. However, the most significant reduction was in the early years with little to no further impact in recent years. In 1990, there were 976 principal statutory rules that were subject to the staged repeal process in that year. By 2010 this dropped to 351 and in 2016 only 339 were part of the staged repeal process.

Under the current framework, the Government developed and considered an average of 175 new or amending acts or regulatory instruments each year, between 2011 and 2016. This provides an indication of the constant flow of proposals, some very complex and high impact, requiring a regulatory policy framework that drives the most effective processes for development, consultation, evaluation and review of regulation.

# 1. Reframing regulation for better policy

*“We are stewards of public trust... Regulation creates a level playing field [in markets] and can be an asset.”<sup>6</sup>*

## 1.1 Designing and implementing regulation as a public service

The goal of regulation is to enable fair, effective and efficient outcomes for people, businesses and the broader economy. The three main outcomes that good regulation should achieve are:

- improving community safety and consumer confidence
- helping to make markets and companies more innovative and competitive
- driving productivity and efficiency of businesses, society and the economy more broadly.

Throughout the consultation phase, a widely held view among stakeholders and agencies was that a fresh approach to regulation is needed that focuses on the outcomes we wish to achieve. Regulation, if implemented effectively, should carry the minimum cost for the benefit it provides.

Regulation is and should be managed as an asset, and delivered as a public service. If regulation is to be genuinely considered as a service, then it must be focused on outcomes for end-users.

### Customer-centred approach to developing policy

Design thinking approaches on *how* government achieves its desired outcomes should always start with the experiences and needs of end-users.

Maintaining regulation that is fit for purpose requires working with those impacted to understand how they experience regulation. This offers regulators a unique insight into the value and effectiveness of the regulation. As the Office of the NSW Small Business Commissioner notes:

*“User-centred design is based on principles of empathy for end-users, and on designing with, not for end-users.”<sup>7</sup>*

Citizens increasingly expect a user-centric focus in the services and infrastructure they receive from government, particularly with technology enabling greater social connectivity and access to information.

While there are sometimes structural reasons regulators are not able to respond to changing community expectations – such as legislative inflexibility – often the barrier is a cultural one. For example, one stakeholder identified that when a regulator becomes too transactional – that is, focused on outputs over outcomes – they risk losing the capability to think critically about the regulation they are administering.

Recognising this, some agencies are adopting ‘human-centred’ design as part of their design of regulatory schemes. This draws on the principle that the user experience should be the starting point for the design and implementation of regulatory schemes. Instead of just drawing on traditional methods of consultation, the regulator should put itself in the shoes of the regulated party to experience the full compliance journey within that scheme.

The Panel believes that this positive development in the NSW Government’s approach to provide better services should be established across all regulatory agencies where appropriate.

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<sup>6</sup>Roundtable, 7 December 2016

<sup>7</sup>Office of the NSW Small Business Commissioner, Submission, *Independent Review of the NSW Regulatory Policy Framework Issues Paper*, 2016, 5

The Panel notes from discussion with some stakeholders that the use of the terms customer-centric or end-user is problematic when the regulated party is not a willing customer or is not happy with the outcome of the regulation, for example when they are paying fines or being incarcerated.

However, the Panel believes this approach can still be widely adapted to fit most regulatory areas, as in most cases there is either an intended beneficiary (which may be the community more broadly) or useful community insights on effective disincentives to undesirable activities, particularly when considering public safety outcomes.

### **Traditional red tape reduction targets have offered limited gains**

Over time, regulation has often become synonymous with red tape rather than a service. A common insight from stakeholders was that the problem is often with the negative experience of people and organisations responding to, and trying to work with, regulation rather than the objectives of that regulation itself. While the policy intent is often seen as reasonable, it may seem less reasonable when implemented in a way that causes excessive compliance cost or when new regulations do not integrate seamlessly with other compliance obligations.

Traditional red tape reduction targets are easy to measure and hence easy to report on achievement. These targets usually include quantitative measures such as ‘one on, two off’ initiatives or red tape savings generated from standard cost calculators.

The most recent NSW red tape reduction initiative between 2011 and 2015 attracted criticism from the NSW Auditor-General, for example finding the legislative complexity and regulatory burden increased during implementation of the ‘one-on, two-off’ regulation reduction initiative. The Auditor-General concluded that the NSW Government initiatives and processes to prevent and reduce red tape were not effective.

The Auditor-General found that, “in cost terms, the value of total legislative burden increased by \$16.1 million over the same period despite a reduction in legislative instruments”.<sup>8</sup> Figure 1 is a timeline of some of the key Commonwealth and NSW initiatives to reduce red tape, showing a cycle of repeated efforts that mostly focus on the ‘burden’ of red tape.

Some stakeholders, such as the NSW Business Chamber, argue for a new red tape reduction target, in order to drive continued reform of existing inefficiencies in regulatory implementation. Despite their popularity, the evidence for red tape reduction programs is not compelling. As the Productivity Commission reports:

*“Regulatory budgets and ‘one-in one-out’ rules have superficial appeal, but could have perverse effects. On balance, the disadvantages appear to outweigh the advantages.”<sup>9</sup>*

Stakeholders generally agreed that red tape reduction targets can be difficult to sustain after the ‘low-hanging fruit’ is picked, often consisting of reforms that government already intended to implement and potentially diverting resources and focus from more meaningful reforms.

In the Panel’s view, there is greater value in focusing red tape reduction efforts on targeted regulatory reviews of sectors with disproportionate red tape. This should be undertaken as part of a broader framework that has better transparency, engagement and clearly defined accountabilities for the existing stock and flow of regulation.

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<sup>8</sup>New South Wales Auditor-General’s Report, *Performance Audit Red tape reduction*, 2016, 17

<sup>9</sup>Productivity Commission, *Identifying and Evaluating Regulation Reforms*, Research Report, 2011, 59

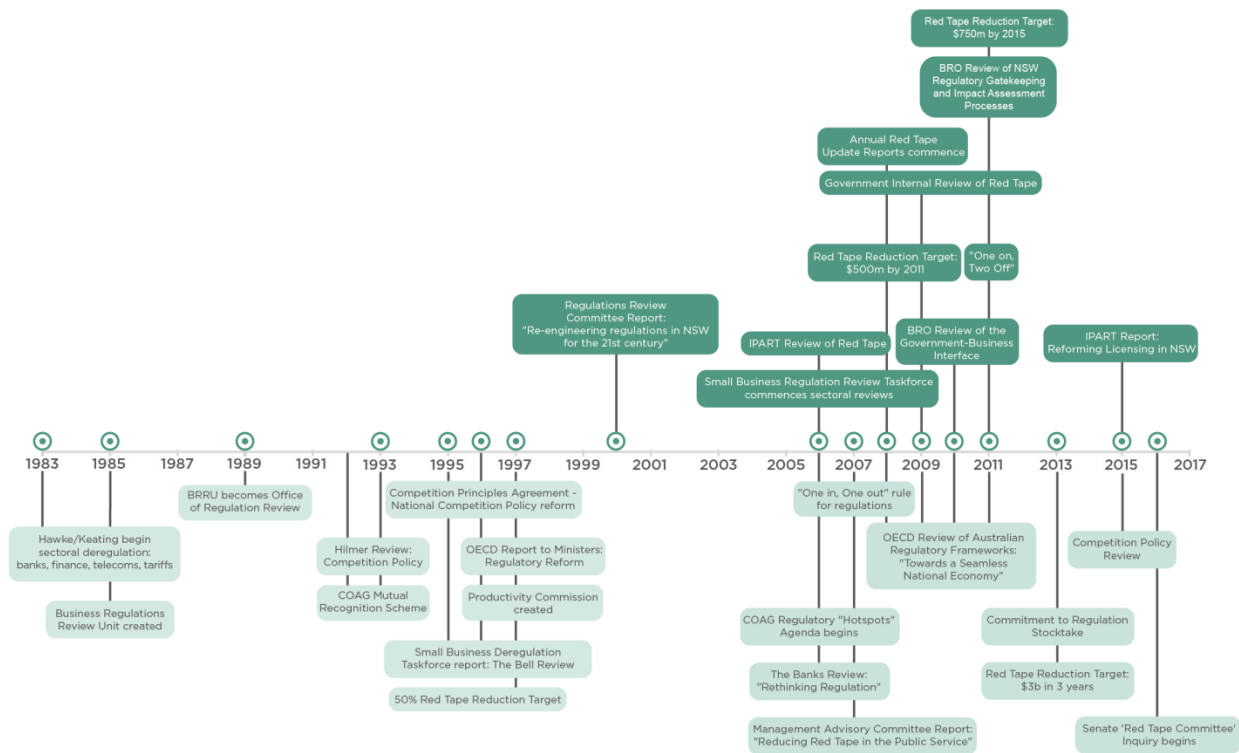


Figure 1. Red tape reduction initiatives

### Clear accountability for regulatory outcomes

Regulatory stewardship requires government to treat regulation as they would any public service or public asset. Like any public asset, regulation can have a recognised value, it is expected to deliver positive outcomes or net benefits, which should outweigh the costs of implementation.

This means that government agencies have a duty to develop and manage regulation as stewards to deliver net benefits over time, having a deep understanding of the performance of those regulations and actively testing that they are appropriate and in the public interest both now and in the future.

The ‘lifecycle approach’ currently used in Canada, and the ‘whole of system’ view taken by New Zealand, offer a useful basis for considering how regulatory stewardship can be executed in government. The duty to persistently manage regulation over its whole lifecycle is a defining characteristic of stewardship.

Managing the stock and flow of regulation requires active monitoring on a continuous basis under regulatory stewardship to ensure that they produce the outcomes required. This is a sharp contrast to the current framework which allows a ‘set and forget’ approach, reliant on a limited five-year staged repeal process. Stewardship also recognises that attention must be given not only to the review of regulations, but also their development and implementation.<sup>10</sup> The regulatory policy framework will need to recognise this duty throughout the lifecycle and promote greater ownership by agencies for the regulations they administer, by setting out clear expectations and accountability to enable a shift in their culture and practices.

There was broad agreement from stakeholders that an active stewardship approach will improve the current framework. More transparent forward planning of regulatory reviews and early engagement, implicit in good stewardship, are considered particularly beneficial by regulated

<sup>10</sup> Government of Canada, *Cabinet Directive on Regulatory Management*, 2012, and Government of New Zealand, *Government Expectations for Regulatory Stewardship*, 2015

parties. Business representatives consistently advised the Panel of this preference for a level of predictability in regulatory settings. While agencies are currently accountable for the regulations they administer, there was support for setting a framework with clear objectives and responsibilities that will help agencies better manage their obligations.

### Case study: New Zealand's Regulatory Stewardship Approach



- In 2013 the New Zealand Government shifted from a 'fixed asset' approach to managing regulations and formally adopted 'stewardship' as a guiding principle for the government sector. This approach recognises that legislative and regulatory regimes are community assets and must be actively managed and improved to get the best return for the community, in much the same way as departments are expected to manage a rail network, hospital or schools. Departments have a statutory obligation to actively plan and manage regulatory regimes they administer as 'stewards'.<sup>11</sup>
- To ensure the expectations were being implemented New Zealand's major regulatory departments were required to publish an annual Regulatory Stewardship Strategy for the first time in 2016.
- New Zealand's Cabinet had agreed to a set of Initial Expectations for Regulatory Stewardship, and in 2017 these were updated and extended providing departments with more direction on how to discharge their regulatory stewardship obligations.
- New Zealand Treasury oversees implementation of regulatory stewardship across government. This includes publication of each agency's regulatory management strategy and building capabilities within the public sector to be good stewards of regulation.

### Objectives for effective regulatory policy

For regulation to be managed under a stewardship approach it has to have clear objectives that focus on achieving the desired public benefits of regulation. Objectives for regulatory policy should align with the Government's commitment to productivity growth, individual and community safety, innovation, and enhanced digital government service delivery. Development and implementation of regulation should align with Government priorities to improve Government services.

An overarching set of objectives for NSW regulatory policy for the development, review and implementation of regulation should:

- be outcome focused and customer-centric
- offer appropriate protection and safety for individuals and communities
- foster innovation and promote productivity growth and enhanced government services
- support regulatory consistency, including with the Commonwealth and other jurisdictions
- promote public trust through transparent and accountable practices in developing, reviewing and administering regulations
- enable flexibility in regulation-making and review practices, including considering a range of tools or models other than regulation to achieve a policy objective
- deliver the best outcomes for the community as a whole (maximises overall public benefit)
- promote data sharing, availability and use, with appropriate privacy assurances
- include a public interest test, as reaffirmed by the 2015 [Australian Government Competition Policy Review Final Report](#)'s Recommendation 8<sup>12</sup> such that the rules should not restrict competition unless it can be demonstrated that the benefits of the restriction to the

<sup>11</sup>New Zealand [State Sector Act 1988](#), Section 2 and Section 32, accessed April 2017

<sup>12</sup>Australian Government [Competition Policy Review Final Report](#), 2015



community as a whole outweigh the costs and the objectives of the rules can only be achieved by restricting competition.

## 1.2 A new framework for regulatory policy

The current NSW Government regulatory policy framework primarily comprises:

- the *Subordinate Legislation Act NSW 1989* which requires the staged repeal of subordinate legislation after five years, and public consultation and Regulatory Impact Statements (RISs) for new subordinate legislation. The staged repeal program ensures agencies assess subordinate legislation and justify their reintroduction
- the *Legislation Review Act NSW 1987* which requires the Legislation Review Committee of the NSW Parliament to review Bills and new or amending regulations
- making provisions in some Acts in NSW to require the Government to review the objectives of the Act, and the terms for achieving those objectives, five years after the Act comes into force
- the *NSW Guide to Better Regulation*, which sets out seven principles to be applied when developing, amending and reviewing regulations.

Effective regulatory policy needs to deliver net public benefits on a sustained basis. These outcomes are enabled by:

- clear accountabilities and assurance
- the right culture and capability in agencies
- effective regulatory development
- better implementation of regulation
- active governance and institutional arrangements.

A statutory framework is needed to support these outcomes.

A single statutory based framework would replace the dispersed requirements under the current regulatory policy framework and provide a single coherent approach to the regulation lifecycle from beginning to end.

Importantly, streamlining and modernising the current framework under a single statutory framework would provide for greater clarity and consistency, with whole of government objectives. It can also set clear accountabilities and assurance processes under the stewardship framework to guide the development and management of regulations over time.

This approach would be a first in Australia. However, it can draw on the approach taken in the United Kingdom, which enshrines regulator objectives in statute, as well as New Zealand's approach of establishing a set of statutory objectives for regulatory stewardship.

### Panel view: A coherent regulatory policy framework is needed

Under the terms of reference of this review the Panel has considered how the policies, institutions and practices that underpin regulatory quality across the whole of NSW Government can be enhanced to ensure NSW laws are reasonable and responsive to the economic, social and environmental needs of our community.

The Panel findings indicate that piecemeal changes to parts of the current regulatory policy framework will not achieve the overarching objective of this review. A new statutory based framework is required.



## Regulatory policy framework

A new framework should drive a **sustainable effort over time**, with a persistent focus on regulatory policy performance and culture across the political and bureaucratic cycles, supported by:

- **A Senior Minister:** To champion and advocate for high quality regulatory policy and reform
- **An independent Commissioner:** A leader in change and capability building, independent of regulatory agencies, to work with agencies, industry and the community to monitor and improve the practice and outcomes of regulatory policy
- **Regulatory Stewardship:** Treating regulation as a public asset, recognising and actively managing its value to deliver the best possible public benefit, now and into the future. This obligation will require a strategy and processes for persistent testing of how potential regulation, current stock and implementation, remains fit for purpose and in the public interest
- **Red tape reduction:** Persistent and constant pressure on agencies throughout the lifecycle of regulation to reduce red tape through regulatory stewardship obligations and reporting, alongside a Commissioner to monitor and lead initiatives with agencies, industry and other jurisdictions
- **Statutory framework:** Outlining the objectives, roles and responsibilities under the framework to ensure clear accountabilities and effective assurance for the NSW Government and the community through ongoing reporting and engagement with stakeholders.

The framework also needs to be **outcome focused**, for regulation to be effective it needs to be focused on measurable outcomes for end-users. This should be supported by:

- **Good policy and regulation development:** The development of policy with a regulatory component should have an effective assurance process, to ensure there is a focus on the desired outcome, regulating by necessity rather than by default, supported by appropriate analysis and review
- **Culture shift and capability building:** NSW Government needs to have a culture and the right capabilities to be in a position to improve regulatory processes, including effective ongoing communication with stakeholders and the ability to respond to new business models and technologies
- **Better implementation:** Initiatives that understand the perspective of end-users – those affected by regulation – to reduce red tape and drive lower business compliance costs.

The Framework needs **clear accountabilities** with a statutory basis consolidating current guidance and statutory requirements, to ensure clear, robust and sustainable regulatory policy, establishing:

- an overarching set of objectives
- the principle of regulatory stewardship
- institutional arrangements to provide central support, independence and coordination
- guidance to ensure transparency and rigour in the development, management and implementation of regulation.

To provide **assurance to the Government and the community** on the implementation of a new framework, a number of transparency and accountability mechanisms need to support the new approach. Clear public reporting requirements, set at various levels of detail and provided for various stakeholders' interest, will be required, including:

- an annual attestation by Secretaries and/or heads of NSW agencies that they have appropriate systems in place to effectively develop and manage regulation in accordance with the Act
- publication of annual reports by each Cluster to demonstrate that the regulations (including principal legislation, regulations and other statutory instruments) they administer remain fit for purpose and in the public interest, and forward plans for reviews
- the Commissioner publishing annually a report on the efficacy of regulatory stewardship and

management of the stock and flow of regulation, a summary of the adequacy of PPE assessments and reduction in red tape

- Post-Implementation Reviews published for proposals that have not been able to adequately meet assessment requirements prior to implementation
- the NSW Audit Office undertaking a regular review of Clusters’ performance under the regulatory policy framework.

**Transition**

The Panel acknowledges that it takes time to establish new legislation and notes that this need not be an impediment to implementing the new framework. The Panel suggests that the NSW Government considers appropriate transitional provisions in the interim to start establishing the stewardship framework, culture shift and Commissioner’s functions while legislation is prepared.

Figure 2 below outlines the elements of the framework described in this report. These elements work together to produce the kind of changes required for a modern enduring framework that will reduce risk, cost and red tape.

RECOMMENDED REGULATORY POLICY FRAMEWORK

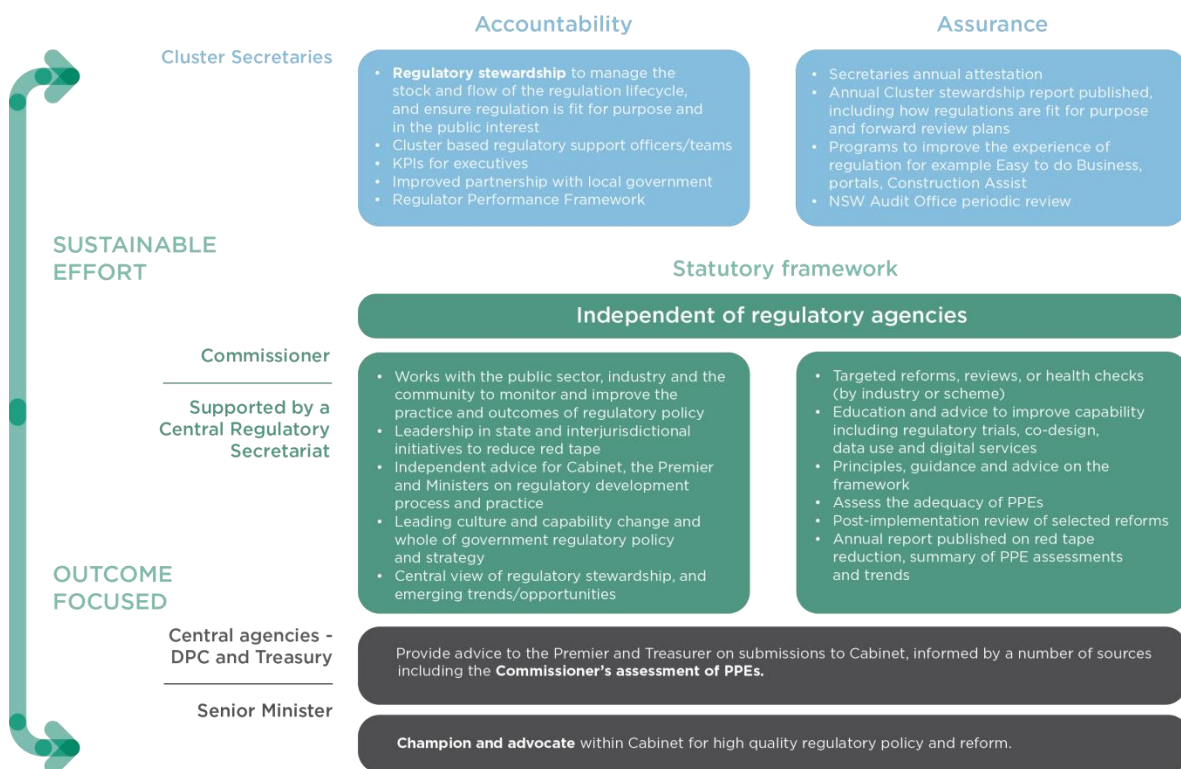


Figure 2. Outline of the recommended regulatory policy framework

### Panel view: A framework for continuous red tape reduction



The Panel agrees with the Auditor-General's assessment that overall, NSW Government initiatives to reduce red tape were largely ineffective and unsustainable and that targets did not successfully drive new red tape reduction reforms.

There is however, greater value in focusing red tape reduction effort on targeted regulatory reviews of sectors with disproportionate red tape, undertaken as part of a broader framework that enables more active and transparent management of the existing stock and flow of regulation.

The framework proposed in this report is intended to provide constant pressure on agencies throughout the lifecycle of regulation to reduce red tape, rather than relying on cycles of arbitrary targets. The key elements for continued pressure for red tape reduction are:

- active management of the existing stock and implementation of regulation, prioritising reviews under regulatory stewardship, and Secretaries' attestation they have effective systems and architecture in place to support this
- a shift in focus to the desired outcome and end-users experience of regulation, to ensure regulators understand what or how regulation is effective and identify unnecessary red tape
- a Commissioner to identify and lead targeted regulatory reviews of sectors with disproportionate red tape, post-implementation reviews and 'health checks', as required
- transparent annual reporting on agencies' assessment of their regulation, as part of their stewardship responsibilities, that continually tests if regulations are fit for purpose and in the public interest.

### Recommendation 1:

Streamline and consolidate existing legislation through a new '*Better Regulation Management Act*' that:

- a) establishes an overarching set of objectives for NSW regulatory policy consistent with the Government's commitment to productivity growth, customer service, individual and community safety, innovation and enhanced digital government service delivery
- b) replaces the *Subordinate Legislation Act 1989* and removes the requirement for statutory review clauses in principal acts
- c) creates a new obligation for regulatory stewardship on the heads of NSW agencies to ensure a proactive, lifecycle approach to the management of the stock and flow of regulation (including principal legislation, regulations and other statutory instruments), which includes:
  - clear expectations, responsibilities, and accountabilities (including key performance indicators) for the heads and executives of agencies
  - requiring an annual attestation by Secretaries and/or heads of NSW agencies that they have appropriate systems in place to effectively develop and manage regulation in accordance with the Act
  - publication of annual reports to demonstrate that the regulations they administer remain fit for purpose and in the public interest; providing a high level of transparency and forward plans on reviews
  - establishing a 'back-stop' ten-year statutory review for regulation that has not already been reviewed or exempted

- d) establishes a Commissioner role to ensure a sustainable effort by the public sector to meet the objectives of regulatory policy and the Act, including:
- promoting regulatory quality and reducing red tape
  - providing independent advice to the Premier and Ministers on regulatory development process and practice, including an independent assessment of the adequacy of Policy Proposal Evaluations (PPEs)
  - providing assurance to the Government and the community through publishing annually a report on the efficacy of regulatory stewardship, a summary of the adequacy of PPE assessments and reduction in red tape
- e) provides a code of practice and guidelines for agencies that:
- covers the development, management and review of regulation (including principal legislation, regulations and other statutory instruments; and policy proposals with an option to implement, remove or transfer a regulatory requirement or any rule that has an expectation of compliance)
  - incorporates the objectives for regulatory policy, including the public interest test (as recommended in the *Australian Government Competition Policy Review*)
  - replaces the current *NSW Guide to Better Regulation*
- f) consolidates exemptions contained in the *NSW Guide to Better Regulation* and Schedule 4 in the *Subordinate Legislation Act 1989*, following a review of current exemptions against clear and transparent criteria, to provide appropriate exemptions from statutory review and PPE requirements
- g) is supported by:
- a Regulator Performance Framework
  - the NSW Audit Office undertaking a review of Clusters' performance under the regulatory policy framework within the first two years following implementation, and then as part of its forward program of performance audits.

### 1.3 A lifecycle approach to managing regulatory regimes

*“Agencies should be encouraged to take a more agile, customer-focused approach to reviewing regulations.”<sup>13</sup>*

Under a stewardship approach, regulations and the regulatory framework in which they operate become subject to proactive monitoring by the responsible departments and agencies to ensure they remain fit for purpose, with any review timeframes and engagement plans clearly set out in advance. This is considered beneficial by regulated parties, with business representatives consistently advising the Panel of a preference for a level of predictability in regulatory settings.

#### Staged repeals and statutory reviews

While NSW has mechanisms to ensure periodic review of regulations and legislation, many stakeholders submitted that it is not an efficient or effective process. NSW has a statutory mechanism in the *Subordinate Legislation Act 1989* for reviewing regulations after five years and some legislation provides for a review five years after commencement. Other Australian jurisdictions review regulation after ten years, or have no automatic repeal mechanism.

<sup>13</sup>Roundtable, 25 November 2016



The principles for the staged repeal of regulations are considered to have merit, with several stakeholders noting that a formal staged review mechanism ensures no regulation goes without review for extended periods of time. It is also a bipartisan trigger for debate on regulatory change. However, the focus on process can sometimes substitute for, or distract from, a proper concern with outcomes and impact.

In practice, reviews of legislation and their supporting regulation often occur at different times, resulting in sub-optimal analysis and duplication in the review and consultation process. There was strong feedback that it is often difficult for agencies to conduct regulatory reviews every five years, given the sheer number of regulations. This affects the quality and timeliness of regulatory reviews. As a result, the staged repeal or remake of a regulation under the *Subordinate Legislation Act 1989* is often postponed by agencies if a review of the primary legislation is already underway.

### Panel view: Requirements for periodic review of regulations



Effective monitoring and evaluation of regulation helps to ensure that the desired policy outcomes are being achieved and enables agencies to identify and manage any unintended outcomes. These ‘health checks’ also provide an opportunity to consider the continued relevance of the objectives of regulation and whether regulation is needed.

The prevailing view across stakeholders is that the current process is resource-intensive and ineffective in ensuring regulation remains fit for purpose. It also fails to recognise that some stakeholders have limited resources to contribute to meaningful consultation. Under a stewardship approach a transparent and principles based approach would allow agencies and stakeholders to prioritise and plan ahead.

In the draft report the Panel asked whether an automatic repeal mechanism is needed, and if not, what timeframe is appropriate. While there was almost universal agreement by stakeholders that staged repeals are largely ineffective, and there was broad support for the regulatory stewardship responsibility to set periodic reviews of regulation, there was not consensus on whether it would be effective without a back stop, with ten years most often put forward.

#### Reviewing and repealing regulation

The existing five-year staged repeal mechanism should be removed by repealing the relevant sections of the *Subordinate Legislation Act 1989* and the requirement for statutory review clauses in principal acts removed, putting in place instead:

- a commitment to regulatory stewardship requiring agencies to actively monitor and evaluate their stock of regulation and repeal regulations that do not meet the public interest test
- a new principles based approach to determine when reviews and ‘health checks’ are required, supporting an ongoing process for the reduction of red tape
- a requirement for agencies to identify areas for priority review and those that do not need regular review, and to create a forward plan that indicates the priority for review of all regulation
- publish annual reports on whether each regulation remains fit for purpose and in the public interest, along with planning for reviews
- a ten-year statutory review process to provide assurance that at some point all regulation is evaluated and its relevance tested
- exemptions that have been reviewed against a clear criteria that is transparent and consistent.

**Recommendation 2:**

The guidelines (Recommendation 1(e)) should include a principles based approach to prioritising the review of regulation that:

- a) focuses reviews on regulations that impact significantly on businesses, consumers or the community
- b) assists in identifying priority areas such as overlapping responsibilities between agencies and different levels of government
- c) supports holistic reviews of primary legislation together with any supporting regulations
- d) enables working more effectively with stakeholders on smaller-scale, targeted reviews, using regulatory trials where appropriate
- e) allows agencies to refer priority areas for review to the Commissioner for assistance
- f) includes appropriate exemptions (following the review noted in Recommendation 1(f)).

## 2. Changing cultures and capabilities for a digital age

*“The best regulation today might not be right tomorrow, or in five years’ time.”<sup>14</sup>*

### 2.1 A new paradigm for regulators

Technological advances, growing data availability and access, and increased connectivity are reshaping how business is done and how consumers engage with markets and government. Government is now regulating in a significantly different environment and it needs to incorporate new tools and considerations as it decides when and how to regulate.

New, often disruptive technologies have significant impacts for consumers, businesses, the community and government by:

- reducing transaction costs for information exchange to near zero, enabling heightened connectivity between people, businesses and government
- transforming data into a valuable asset
- enabling new business models to leverage technology and transparency and achieve similar outcomes to regulation.

People can participate more easily in the regulatory process, but as a result there are more new participants bumping up against regulatory barriers. The ‘sharing economy’ is testing existing regulation with new business models. These peer-to-peer models establish activities for obtaining or sharing access to often under-utilised goods and services, facilitated by digital platforms. Government must ensure that participants, communities and other industries can enjoy the benefits of the sharing economy without losing fundamental protections such as safety and accountability. At the same time digital services are helping individuals become better informed and in a stronger position than ever to make choices, find opportunities, protect their own interests and exert social pressure on markets to perform to expected standards.

Stakeholder feedback suggested that the culture and capability of agencies to develop and manage effective outcomes focused regulation is inconsistent across the NSW Government. Often, insufficient effort is invested in learning about and responding to the gaps in skills, culture and attitude on the part of regulators and agencies. This also suggests inconsistency among senior management across the public service in focusing on building the regulatory culture and capability needed as part of an organisation’s overall performance and service delivery priorities.

### 2.2 More effective communication

*“It’s very 1990s to put a PDF on a website and say that’s consultation.”<sup>15</sup>*

The traditional approach to stakeholder engagement on policy change or regulation relies heavily on written submissions or meetings with peak bodies and industry associations. As a result, government is likely to hear mostly from those stakeholders with the time and resources to make themselves heard.

That makes it harder for agencies to anticipate when regulation is no longer appropriate, or when there is a disproportionate impact on small business or a vulnerable cohort in the community.

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<sup>14</sup>Roundtable, 19 January 2017

<sup>15</sup>Roundtable, 7 December 2016

Often, traditional forms of consultation do a poor job of providing visibility into the experience of regulation for a wider mix of the regulated and for the community more generally. All relevant stakeholders should have the opportunity to have their voice heard in the regulatory dialogue to ensure that government understands what outcomes the community expects and the full range of potential impacts.

The Panel considers that it is important for government to seek wider opportunities for citizens to speak directly with senior government officials or Ministers. For example, online ‘ask me anything’ sessions, where a senior agency executive or Minister makes themselves available at a particular time to answer questions from interested members of the public. The Chief Executive of Sydney Trains periodically hosts ‘Direct Line’ online sessions (most recently in December 2016), while the Social Commissioner of the Greater Sydney Commission hosted an ‘ask me anything’ session through the social media site Reddit in March 2017.<sup>16</sup>

Sometimes policy reforms and cultural change for regulators only occur when there is a ‘burning platform’, where existing arrangements become clearly untenable. A challenge for the Government will be to create the circumstances which compel regulators to have early, ongoing and consistent engagement with their stakeholders about the best way to respond to, or better still, pre-empt, escalating regulatory challenges.

An agency that is regularly accessible to its stakeholders will be in a better position to identify emerging problems and risks and consequently be a better regulator. A new approach needs to be taken to engagement and regulators should consider:

- **Consultation must begin early and not after policy options have already been refined.** Agencies should consult not just on the *what* (i.e. what the regulatory outcomes should be), but on the *how* (including using regulatory and non-regulatory tools). In some cases, the consultation should ask even more basic questions about *why* (i.e. what is the policy objective or the ‘question we are trying to answer’)
- In many cases, traditional approaches to consultation should be replaced by a much more user-centred commitment to **‘look, listen and learn’** with those impacted by proposed or current regulations
- **Creating an authorising environment to consult and identify potential criticisms** and work towards ameliorating them early can be an effective process for agencies and Ministers
- **Online feedback sites, discussion groups and the adaption of tools** such as customer journey and experience mapping and user reviews, offer new ways to consult.

### Panel view: Understanding stakeholders requires more than just listening



Policy-makers need to engage more closely with the lived experience of those they are regulating. Although most small businesses and citizens do not have the time to provide feedback to every regulator they might deal with, this does not mean that their views should not be considered and uncovered in a simple and appropriate way.

A customer-centred approach to engagement – where regulators undertake the compliance journey themselves by putting themselves in the shoes of these regulated parties – would help in better evaluating the practical impact of regulation on these parties.

The Panel recognises that it will take time to transform the culture of agencies and develop a consistent standard of regulatory capability across government.

<sup>16</sup> Heather Nesbitt, *Reddit*, 1 March 2017, [https://www.reddit.com/r/sydney/comments/5wlvym/social\\_commissioner\\_heather\\_nesbitt\\_ama\\_on\\_what/](https://www.reddit.com/r/sydney/comments/5wlvym/social_commissioner_heather_nesbitt_ama_on_what/)

However, the Panel believes that the NSW Government should spend at least as much time on these cultural and capability barriers to performance as it should on the context and design of the regulatory scheme itself. This reflects the Panel's view that culture and capability issues are the single most important factor determining consistently high quality regulatory performance.

### Recommendation 3:

Update the *NSW Consultation Policy*, in consultation with the Customer Service Commissioner, to:

- a) embed a culture of ongoing conversation about regulatory policy
- b) include guiding principles of transparency and continuous disclosure
- c) ensure early consultation with industry and individuals, including those with less capacity to respond, or who bear added regulatory burden (e.g. consumer and community groups, small business, stakeholders in remote areas)
- d) include a process for open conversations, where senior government officials or a Minister make themselves available to answer questions from any interested member of the public
- e) have reference to the *Australian Government Best Practice Consultation* guidance note.

## 2.3 Moving to co-design, sandboxes and trials, and 'Regulation 2.0'

### Co-design

It would be presumptuous for anyone in government or the public to assume that the regulator in a sector is the holder of all knowledge about that sector and that this is the best basis available for regulated parties and regulators to operate effectively.

The most appropriate regulation will not always be developed by regulators working in isolation, but more likely by working in partnership with regulated entities. Co-design and co-development of regulatory models with stakeholders, including the use of regulatory trials and sandboxes, can be an effective policy development tool in complex, uncertain and dynamic environments that demand adaptability from governments.

A culture that supports a new way of working, such as through co-design partnerships, can enhance regulatory outcomes by enabling a better understanding of risks and help establish what policy tools would work best in a 'real world' experience.

*"Co-design is a tool enabling real-time feedback in a complex environment; it allows policymakers to see the process of regulating from stakeholder's perspective and vice versa... it is a process of jointly obtaining more than one perspective; it is an iterative process of asking questions to stakeholders."<sup>17</sup>*

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<sup>17</sup>Roundtable, 13 December 2016

### Case study: Ridesharing regulation



For many years, there were calls to reform the regulation of the taxi and hire car industry to address the increasing cost of services, to increase competition and to facilitate innovation in response to customer demands. However, it was the emergence and rapid growth of ridesharing services – most notably UberX – which created a ‘burning platform’ that disrupted not just businesses in the taxi and hire car industry, but also disrupted regulators in many jurisdictions.

Roads and Maritime Services initially sought to apply and enforce the existing regulations for taxi and hire car services in response to ridesharing services in NSW. This proved difficult as the legislation did not envisage having to respond to these types of services, whose defining characteristic was the absence of a traditional fleet of cars and drivers, but instead provided a digital coordinating platform on which a new cohort of drivers could respond directly with people who needed a ride. An independent review resulted in reforms including:

- removal of restrictive requirements for booked services, allowing greater competition in this sector of the market, including from ridesharing
- maintenance of standards of safety and security through an outcomes focused regulatory regime, enabling adoption of new technological solutions that enhance passenger safety, consumer protection and availability
- removal of the regulation of service quality, with businesses responsible for customer service and other quality issues.

### Sandboxes and trials

Regulatory sandboxes enable targeted regulatory exemptions to allow for innovative products and services – operating within a ‘sandbox’ – to be tested and monitored closely in a live environment. This is consistent with the Productivity Commission’s recommendation of a mechanism to enable fixed-term exemptions to specific regulatory requirements for circumstances where regulators need to be able to respond flexibly and transparently to new business models.<sup>18</sup>

There was widespread stakeholder consensus that greater use of regulatory trials and sandboxes should be encouraged in NSW and the Panel notes that the NSW Government has responded to the needs of the changing environment by launching the Regulatory Sandboxes Program in 2016.

Regardless of the regulatory design method, regulators need to retain the capacity to effectively enforce regulation, where necessary. A partnership approach, like a regulatory trial or co-design of a regulatory model, will only work where different stakeholders work together in a culture of good faith.

It is critical that regulators maintain the capacity to deal with non-compliance and respond rapidly and effectively to serious breaches that threaten public safety. This is especially important in matters relating to human life or the care and protection of those who may not be able to speak for themselves.

### ‘Regulation 2.0’

‘Regulation 2.0’ is another example of a risk-based approach to regulation, which involves holding regulated entities to account through greater data provision and/or transparency obligations, replacing more prescriptive regulations.

Governments have in the past commonly taken a top-down approach to designing regulation, prescribing with specificity how a regulated entity must act. As often happens during times of

<sup>18</sup>Productivity Commission, *Final Report on Business Set-up, Transfer and Closure*, 2015



technological change, there is a tendency to apply the rules from the previous era to any new technology.<sup>19</sup> In today's information based society this approach risks becoming increasingly outdated, increasing barriers to entry, reducing competition, and hampering scope for business experimentation and entrepreneurship.<sup>20</sup>

In contrast, a Regulation 2.0 approach seeks to move away from permission-based rules to information-based rules, granting entities greater market access and freedom to operate in exchange for access to data to provide the accountability for their actions.

To ensure that opportunities from new business models can be realised, Government needs to be able to understand and work collaboratively with new players and technologies. Regulation 2.0 provides a useful framework for regulation in the sharing and internet economy. For example, businesses may be able to enter into an agreement with regulators that exempt them from the requirement to hold a permit for a particular activity, subject to providing data that gives assurance on the risk to consumers.

### Peer-based or consumer-based regulation

NSW Government agencies should be further encouraged to identify and trial new and creative ways to harness data to achieve regulatory outcomes. For example, they can more actively make data public, or share data through the NSW Government's Open Data Portal, in order to give the public more options in voting with their feet when faced with non-compliant or uncompetitive regulated parties.

While some sectors have been leading the way in this – for example, the NSW Food Authority's 'Name and Shame' register, and the Fuelcheck portal with real-time fuel prices across NSW – many of these opportunities remain underused by Australian governments. This is considered an area ripe for exploration.<sup>21</sup>

### Better use of 'RegTech'

Advances in digital technologies not only enable better use of data to achieve regulatory outcomes, but can also help regulated entities better understand their regulatory context and obligations. Regulation technology ('RegTech'), the application of digital and information technologies to regulation, can relieve some of the burden of regulatory monitoring, reporting and compliance, and improve end-users' experience of regulation, reducing the perception of red tape.

For example, RegTech can provide end-users with data analytics and increased efficiency when assessing the compliance impacts and costs of regulation. It also enables automation of more mundane compliance tasks and reducing operational risks associated with meeting compliance and reporting obligations.<sup>22</sup>

RegTech allows end-users to easily survey quantitative and information based obligations with risk identification and management tools, which may include regulatory gap analysis, compliance overviews, health checks, regulatory reporting, and case management.

Australian regulators are at the early stages of promoting RegTech. Certain agencies such as the Australian Securities and Investment Commission (ASIC) are offering informal assistance for RegTech development, while the Commonwealth Scientific and Industrial Research Organisation's

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<sup>19</sup>Nick Grossman, 'White Paper: Regulation, the Internet Way', *Paper Series: Regulation Reform for the 21<sup>st</sup>-Century City*, Harvard Kennedy School, 2015

<sup>20</sup>Abbey Stemler, '*Regulation 2.0: The Marriage of New Governance and Lex Informatica*' (2016) 19(1) *Vanderbilt Journal of Entertainment and Technology Law*

<sup>21</sup>Productivity Commission, *Digital Disruption: What do governments need to do?* Research Report, 2016

<sup>22</sup>Deloitte, *RegTech is the new FinTech: How agile regulatory technology is helping firms better understand and manage their risks*, 2016

(CSIRO) Data61 unit is considering how to maximise the value of regulation as a key data set for government.

### Case study: Regulation as a Platform



- Data61 is conducting a proof-of-concept project that transforms laws and regulation into digital logic to help automate repetitive compliance processes. This will streamline the identification of impacts to more easily understand a business's specific obligations for their activities, even when regulation changes or for planning new activities or products.
- The project starts with parsing large amounts of legal text, automatically converting as much as possible into machine-readable logic. Policy experts and regulators scrutinise the digital logic to ensure the intent of the law is accurately represented. After quality checking, the rules are endorsed for publication by regulators and made publicly available on the Regulation as a Platform prototype. Data61 is currently testing the process by digitising the National Construction Code.
- The ultimate aim is to provide free and open access to legislation and regulation via application programming interfaces (APIs), enabling any third party to develop their own compliance application.
- Data61 has developed a number of exemplar applications to spur RegTech development, including for business process compliance, an automatic concierge for permit and licence processes, and a payroll compliance checker.

Adopting RegTech can make compliance easier by reducing disputes in compliance activity through preventive and real-time information, while making compliance and enforcement activities faster, cheaper and easier for both regulators and regulated parties. The cost-effectiveness of regulatory inspections should also improve with the increasing adoption of new technologies in this area. For example, the Australian business SafetyCulture has developed a mobile application that allows businesses to conduct mobile audits and inspections and collect and analyse relevant data in real time to build customised compliance reports.

The Panel is encouraged by these initiatives and believes more can be done to make regulatory compliance and enforcement easier through new regulatory technologies and applications.

### Recommendation 4:

The code of practice and guidelines in a new statutory framework (Recommendation 1(e)) should support cultural change in the Government and enable:

- a) regulation to be customer-centric and outcomes focused
- b) appropriate protections for the community or individuals
- c) agencies to rethink the 'regulation first' approach and embed examination of other options
- d) innovative regulatory development and implementation methods such as co-design, trials, regulatory sandboxes and use of digital services and data
- e) substituting non-regulatory arrangements where entities achieve the same outcome by meeting alternative obligations to those prescribed by regulation (where appropriate to the level of risk undertaken)
- f) increased adoption of regulatory technology ('RegTech') to make compliance and enforcement activities faster, easier and more cost effective for both regulators and regulated parties, including greater use of new and cutting edge technologies.

### Legislative frameworks to support new options

Governments cannot expect regulators to adopt modern practices if they are hamstrung by outdated legislation that does not take into account recent changes in technology and regulatory methods.

Given the pace of change, the NSW Government should enact legislation that provides flexibility for regulators to apply contemporary best practice in how they work. Importantly, this should include regulations framed in terms of outcomes – not just prescriptive obligations around process – that allow regulators to adopt risk-based approaches to meeting these outcomes.

The Productivity Commission’s Report *Business Set-Up, Transfer And Closure* highlighted that all Australian governments need to ensure that regulatory frameworks are capable of adapting quickly to cope with transformative technology developments and not deter entry by business models that do not fit within the existing frameworks.<sup>23</sup>

The Productivity Commission recommended that this could be achieved by passing general legislation (that is, not specific to any given regulatory area) to empower Ministers, on advice from regulators, to provide fixed-term exemptions to specific regulatory requirements. This will ensure that existing legislation can accommodate innovative regulatory development methodologies, such as co-design, trials and regulatory sandboxes. Regulators will be able to test that the desired outcome is being achieved through means other than that prescribed by existing regulations and not threaten consumer, public health and safety, or environmental outcomes. The ability to test new approaches will then inform future regulatory or non-regulatory responses.

#### Recommendation 5:

Ensure that existing legislation is not a barrier to innovative regulatory development methodologies or regulatory models. This should include consideration of a legislative framework for fixed-term exemptions to specific regulatory requirements, consistent with Recommendation 8.1 in the Productivity Commission’s Report, *Business Set-up, Transfer and Closure*.

## 2.4 Harnessing data to achieve better policy outcomes

*“Need to go beyond doing old things in new ways to doing new things in new ways.”<sup>24</sup>*

### Data should be managed as a regulatory asset

The extraordinary growth and sheer volume of data collected and stored by agencies should be opening up many opportunities for new and more joined-up regulatory approaches across the whole of government.

The Productivity Commission report *Data Availability and Use* recognises the leading role that NSW plays in relation to data.<sup>25</sup> NSW champions data as a key asset in improving productivity and unlocking opportunity. NSW’s 2016 *Open Data Policy* aims to build stronger relationships with the private sector and the research sector to encourage the release of their data to the public and increase their use of public sector data. Other key NSW Government initiatives include the NSW Open Data Portal (publicly available government datasets in one searchable website), the [Transport](#)

<sup>23</sup>Productivity Commission, *Final Report on Business Set-up, Transfer and Closure*, 2015

<sup>24</sup>Dr Ian Oppermann, NSW Chief Data Scientist and CEO NSW Data Analytics Centre, 2016

<sup>25</sup>Productivity Commission, *Data Availability and Use*, Inquiry Report, 2017

*Open Data Hub* (data, APIs and support for developers, innovation showcase) and the NSW Information Asset Register (core datasets shared within government).

The open data policy has built on recent legislation in NSW – particularly the *Data Sharing (Government Sector) Act 2015* and *Government Information (Public Access) Act 2009* – which recognises government information as a valuable public resource and empowers NSW Government agencies to share data with other government agencies, business and the community.

However, more could be done to share data between NSW Government agencies, with other jurisdictions, industry, non-government organisations and the community to achieve better policy or regulatory outcomes.

Government should not presume that it can predict who can usefully use data, or the purposes for which it can be used. This is why the principle of open data, as part of a larger open government platform, is important. A key action that the NSW Government could take to make data held by government agencies more practically useful and accessible would be to adopt the Productivity Commission's recent recommendation to establish (or join existing) data registers that list both what data is available and that which is not.

### **Data sharing between government, regulated parties and the community**

Subject to ensuring appropriate safeguards around privacy and information security, there should be few reasons for *not sharing* data obtained through regulatory and other government activities. In heavily regulated areas such as consumer protection, the release or use of data enables the community and business to participate actively to improve outcomes such as safety or performance.

There is also considerable value in providing data collected through regulatory activities back to the industry from which it was collected. Regulators' engagement with stakeholders can be greatly enhanced where data is 'recycled' and fed back to regulated parties in a useful form and as part of a continuous conversation about regulatory purpose, performance and impact. Ultimately, this makes it easier for these organisations to learn from each other and improve their performance against key regulatory outcomes, like fraud reduction.

While digital technologies can support effective use of data in administration, regulators should also consider how digitalisation might impact on the compliance responsibilities of regulated parties. Even more critically, regulators must ensure that digitalisation does not compromise regulatory outcomes, particularly safety and security.

Several stakeholders noted that open data initiatives should be balanced against the costs and benefits of collecting, releasing or using data. Regulators should also be aware that digitalisation can exclude small businesses that may have language barriers, low digital literacy or poor internet coverage, for example in the construction and agricultural industries, or those living in rural and regional areas.

Data collected for one purpose by regulators or businesses may also have secondary uses that were not originally anticipated. For example, Uber now releases data relating to trips (such as travel times) in several cities around the world, including Sydney, providing valuable information to governments and others about the performance of road networks.<sup>26</sup>

*“Data collected from the regulated should be seen as a product that can be recycled; as a valuable exchange between regulators and the regulated.”<sup>27</sup>*

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<sup>26</sup> Infrastructure Partnerships Australia and Uber Movement, *Driving Change: Australia's cities need a measured response*, 2017

<sup>27</sup> Roundtable, 28 November 2016

The Panel supports building on the existing focus on open data to ensure data can increasingly and more consistently be used and analysed in new ways to deliver better outcomes for the community. Recent examples include the development of a new more equitable pricing model for Compulsory Third-Party insurance arrangements for point-to-point transport services, such as taxis and ridesharing and release of the Opal Card travel data to enable modelling for a wide range of purposes for business and government.<sup>28</sup>

### Panel view: Using digital technologies and data to achieve better policy outcomes

The Panel considers that the NSW Government should promote access to data and use of digital technologies to support better regulatory outcomes:



- by putting more onus on NSW Government agencies to justify why they should not share data and address barriers to sharing data between agencies, especially cultural barriers
- between regulators and regulated sectors, particularly by recycling data collected, where appropriate, through regulatory activities to provide valuable information back to businesses about their industry, and how their own performance compares to that of their peers
- with consumers and the community more broadly, through the establishment of comprehensive data registers, in accordance with Recommendation 6.4 of the Productivity Commission Report, *Data Availability and Use*.

### Building data and digital capabilities

Technology and data specialist skills and expertise are needed as an intrinsic part of the suite of regulatory capabilities.

Adeptly applied digital technologies can help regulators make better regulatory choices, predict risk, and target education, enforcement and compliance activity. Government ICT procurement and assurance processes should not prevent new digital technologies from being trialled or used, but seek to encourage them. Such solutions could modernise government responses by modifying policy or regulatory approaches where traditional regulation would normally have been considered. It would also help the Government to meet the State Priority of conducting 70 per cent of government transactions through digital channels by 2019.

The Panel considers it critical that the Government commits resources to provide practical assistance and support to agencies as they increase data use in policy setting and regulatory environments. To reduce risk, capability is needed in data and digital technologies used for evidence based policy and implementation of regulation.

Given the sustained effort required to boost data analysis capabilities, the NSW Government should consider arrangements to raise the data analytics capability of the NSW Government. This might include assigning formal responsibility to a central body or another appropriate organisation, such as the Public Service Commission, or drawing on expertise in key entities within the NSW Government, such as the Data Analytics Centre.

### Recommendation 6:

Enhance capabilities across the NSW Government to harness digital technology, and collect and use data more effectively, by:

- a) establishing Communities of Practice for regulators to share resources to foster best practice, particularly in harnessing new methods and digital technologies and to share learnings on key success/failure factors

<sup>28</sup>State Insurance Regulatory Authority, *Review of CTP motor vehicle insurance point-to-point transport vehicles*, 2016

- b) providing support and guidance for agencies adopting new technologies and using data safely and effectively in their role as regulators
- c) developing a central repository of regulatory tools and responses – particularly examples of digital regulatory tools or data use – to demonstrate options for agencies to consider in the early stages of policy development
- d) requiring agencies to create comprehensive, easy to access registers of the data they fund or hold, listing both data that is publicly available and that which is not (including the reasons why the data is not available for release), and link to [data.gov.au](http://data.gov.au), consistent with Recommendation 6.4 of the Productivity Commission Report, *Data Availability and Use*.

### Privacy and accountability

Regulators are required to have systems in place to address potential risks to the security and use of data and technology. These include security risks around greater use of digital identities and licences, as well as the privacy requirements affecting data sharing.

The Productivity Commission also noted the public's complex relationship with data, where concerns are frequently and publicly raised on privacy and data use, despite Australia's comparatively high use of new technologies where personal data is required to participate in online services.

The Panel recognises the progress made internationally on reconciling the benefits of strengthening privacy and information security, and the tension that this has wrought to date on greater lawful data access and sharing. For example, the European Union's *General Data Protection Regulation* will require privacy by design, meaningful consent, a right for data subjects to access and transmit personal data, and the 'Right to be Forgotten' through data erasure.

A recent University of New South Wales report on data sharing also identifies a mix of international best practices that could be promoted in NSW.<sup>29</sup> These include cross-sector collaborations to drive social licence for open data, mandated opening of specific government datasets, a 'public interest test' for data access and sharing, in-depth guidelines on anonymisation and de-identification, and cataloguing datasets. Elements of these practices have also been recommended by the Productivity Commission Report, *Data Availability and Use*.

If the NSW Government wants to significantly increase its use of data to support more effective regulatory outcomes it needs to build the trust and confidence of the public. This will include assurance that this data is used and stored appropriately and in a manner that maintains statutory rights to privacy and the protection of personal information.

Critically, agencies must be accountable for meeting their existing statutory obligations around data sharing. The Panel's view is that the most effective way to achieve this would be to define the Government's expectations of the public sector in relation to data and digital technology. A central mechanism will also allow for benchmarking of agencies and Clusters against these expectations and the performance of their peers, which will allow for good performance to be recognised and for areas of weakness to be identified and addressed.

These reporting arrangements could also help the NSW Government as a whole to identify legislative or other barriers to data sharing that are beyond the capacity of individual agencies to address and, over time, build a community consensus around the appropriate balance between the use of government data sets in the public interest and the protection of personal information.

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<sup>29</sup>University of NSW, Report for the Information and Privacy Commission of New South Wales, *Conditions Enabling Open Data and Promoting a Data Sharing Culture*, 2017



### Panel view: Better data use - privacy and accountability



The Panel considers that while there is considerable potential for more extensive data sharing between different government agencies there is a need to properly consider the risks and impacts, and ensure that the community supports any significant changes to the way data is used.

It is therefore appropriate for the NSW Government to pursue improvement and cultural change towards data use and sharing in Government, with a focus on agencies meeting their existing obligations and establishing the necessary capability to adopt best practice around data and digital technologies.

While recognising the serious implications of breaching privacy and information security protocols, the Productivity Commission notes that a complex legislative and policy framework for data, and a lack of understanding about how data is used, has contributed to a risk-averse culture among governments that inhibits data access.<sup>30</sup>

Better enabling the collection and reuse of data gathered by businesses operating on behalf of government (or with government funding) needs to be explored. This might be through clauses in contractual arrangements with private operators of public services, such as bus or hospital services, or through funding agreements with local government or as a condition of grants provided to community groups. This will require NSW Government agencies to understand the public value and potential use of data for improving policy and regulatory outcomes.

#### Recommendation 7:

To support the use of data for decision making and more effective regulatory environments, the NSW Government should:

- a) consider the types of data that should be collected to monitor and evaluate the implementation of regulatory policies
- b) establish a presumption in favour of sharing or reusing data provided to the NSW Government as standard practice (with relevant privacy and information legislation and security safeguards), with agencies to explain 'if not, why not?' if they reject requests for data sharing
- c) where appropriate, ensure new legislation facilitates data collection, sharing and the use of data to achieve better regulatory outcomes
- d) identify legislative barriers to the use and sharing of data currently provided to government (other than privacy and security safeguards) and establish priority areas to address, based on clear benefits to the community
- e) consider relevant recommendations in the Productivity Commission Report, *Data Availability and Use*, with reference to the proposed new national Data Sharing and Release Act, new access and use arrangements for data, the management of risks, and broader ethical considerations around data use.

#### Recommendation 8:

The NSW Government should ensure, as far as possible, that commercial arrangements with the private sector allow access to data (or creation of additional data) that would support better policy or regulation outcomes. This may include retaining the right to access, use or reuse data, consistent with Recommendation 6.3 in the Productivity Commission Report, *Data Availability and Use*.

<sup>30</sup>Productivity Commission, *Data Availability and Use*, 2017

## 2.6 Getting the right perspective

### Ensuring policymakers are kept abreast of regulatory processes and approaches

Some stakeholders noted that Parliamentarians' level of knowledge and approaches to regulating (or not regulating) have a strong influence on the quality of policy development by Government agencies. To that end, it was observed that training on the formal requirements and best practice for the evaluation of regulatory proposals should be provided as part of the induction process for new Parliamentarians.<sup>31</sup>

### Adopting best practice

Stakeholder feedback suggested that there is a lack of consistency across the public service in responding to skills gaps and in investing in its workforce's capability to ensure its overall regulatory performance remains fit for the future. It should be noted that this was recognised as an issue that is not peculiar to the NSW Government sector, with other sectors and jurisdictions also facing challenges in embracing cultural and capability changes.

Creating the right environment which forces agencies to adopt modern practices and improve their performance as regulators would require a mix of strategies. These would include incentives for agencies to do so, greater accountability, and effective leadership at Ministerial and executive levels.

The Panel also believes that identifying a 'better regulation' officer or a small dedicated unit in each Cluster would be beneficial in driving the required cultural change towards better quality and outcomes focused regulation. The officer or unit would act as a 'better regulation champion' and provide internal support to their Cluster, and liaise with the Commissioner on skills development and regulatory quality.

### Bringing the outside view in

Stakeholders generally agreed that government agencies should promote greater diversity in views being reflected in the decision-making process.

The value of an external point of view was reflected by stakeholders who agreed that agencies are not always effective at reviewing their own performance and may be inclined to maintain the position of 'that's the way we have always done it – why do we need to change?'. However, there was also recognition that in a number of areas there is an appetite for real, progressive reform which looked at policy principles, rather than existing practice.

One way of approaching this is to ensure that engagement involves both industry-specific regulators and generalist regulators. This would build up industry-specific expertise while also mitigating risks of regulatory capture by regulators/compliance officers – particularly where regulatory agencies attract people with singular and passionate beliefs or values.

Besides promoting diversity in recruitment, career secondments are often a good way to upskill staff capabilities, with two-way secondments allowing for both participating agencies to gain from the experience without significant additional cost.

In practice, the majority of placements have been between government agencies. Secondments with the private sector have been far fewer and the experiences of staff and agencies that have participated in these have been mixed. Further, the success of secondment programs with the business sector appears to be dependent on whether there is a substantial enough alignment of interests and opportunities.

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<sup>31</sup>IPART, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016

A more flexible approach should be considered to ensure that the true benefits can be harnessed. While secondees generally rated their experiences as a positive one, there is also the question of whether the benefits of such broad-based secondment programs are sufficient to justify the significant effort involved in implementing them.

Furthermore, as noted by the NSW Public Service Commissioner, host agencies need to carefully consider any risks and conflicts of interests arising from secondments.

The Panel is of the view that secondment programs have the potential to be effective, particularly if specifically and carefully targeted in identified industries/sectors so that there is a staffing exchange between the regulated party and the regulator. This would call for a clear mutual understanding of the expectations of each party and negotiation around confidentiality. Implemented well, these can be excellent opportunities to ‘bring in the outside view’ to government agencies and add to the skills base of the agency and should be encouraged.

**Recommendation 9:**

The induction processes for new Parliamentarians should include training on the formal requirements under the regulatory policy framework and best practice for the evaluation of regulatory proposals.

**Recommendation 10:**

Identify ‘better regulation’ officers or teams in each Cluster to bring cultural change and work with the Commissioner (Recommendation 1(d)) to improve capability and quality from within the organisation.

**Recommendation 11:**

Pursue targeted two-way secondments, with appropriate probity considerations, for regulatory staff with the private sector.

### 3. Rethinking the regulation development process

*“Regulatory assessments tend to be used to justify rather than inform.”<sup>32</sup>*

#### 3.1 Regulatory Impact Assessments – an ultimate afterthought?

The process for evaluating regulatory proposals in NSW currently centres on regulatory impact assessments (RIAs). The purpose of a RIA should be to provide a robust assessment of potential policy options – both regulatory and non-regulatory – and evaluate which options are likely to achieve the desired policy objectives with limited unintended consequences. RIAs are usually in the form of a Regulatory Impact Statement (RIS) or Better Regulation Statements (BRS).<sup>33</sup>

However, stakeholders reported that the quality of RIAs is inconsistent and that robust assessments are far from the reality. In many cases RIAs were little more than a ‘tick the box’ exercise and, in some cases, RIAs are not prepared at all. Further feedback suggests that RIAs are often done late in the policy process to align with a pre-determined policy decision. This can create the impression, if not the reality, that RIAs are frequently little more than a perfunctory exercise and an administrative burden on those undertaking them.

A better assessment process will help address perceptions of a ‘regulation first’ approach reflecting a preference for a regulatory response to an issue, which can often be encouraged by specific stakeholder campaigns for a regulatory approach even when the impacts are not well-quantified. A more transparent assessment and engagement process will provide decision-makers and stakeholders with better information, particularly when there are significant regulatory impacts to be considered.

Ministerial choices are a significant and crucial part of how governments reach decisions, as they reflect a wider range of considerations than may be captured in a RIA. A good assessment process will not attempt to bypass this, rather it will support Ministers as early as possible in the policy cycle to consider policy options, including on regulation options, and make informed choices based on the potential impacts of their decisions. In addition, a best practice regulatory framework will also focus on the experience of regulating; that is, assessing and implementing these policy decisions in the best way possible.

Stakeholders also identified that RIAs often lack robust evidence and a genuine comparison of the costs and benefits of different policy options. There are also differences in opinion on whether all of the relevant impacts are adequately identified and quantified. For example, the Housing Industry Association (HIA) pointed to the recent passage of the *Strata Schemes Management Act 2015* and the *Strata Management Regulation 2016* as an example of where, in their view, the current arrangements for evaluating policy proposals have not worked.<sup>34</sup>

The HIA highlighted concerns that the RIA was only released six months after the Act was passed, during the making of the associated regulations. This was argued to give rise to the impression that the substantive policy changes had already been decided on before a regulatory impact assessment process had been carried out.

<sup>32</sup>Roundtable, December 2016

<sup>33</sup>Significant new and amending regulatory proposals must demonstrate that the Better Regulation principles have been applied, and a Better Regulation Statement (BRS) must be prepared. The *Subordinate Legislation Act 1989* requires a Regulatory Impact Statement (RIS) to be prepared before a principal statutory rule is made (such as regulations and by-laws). There is some duplication in the documentation required by the NSW Guide to Better Regulation and the *Subordinate Legislation Act 1989*. The NSW Guide to Better Regulation recognises this and provides for an enhanced RIS to be used in place of a BRS.

<sup>34</sup>Housing Industry Association of NSW, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016

It is understood, however, that the development of the proposal occurred over a five year period with extensive consultation with stakeholders in the form of roundtables, expert working groups, a discussion paper and a position paper. The agency also engaged an independent consultant to undertake a cost benefit analysis of the proposal and the report was tabled in Parliament before the passage of the reforms. However, while much of the work required of a RIA was in fact undertaken, a formal RIA document had not been produced and consulted on in the earlier stages of the process, highlighting how lack of transparency can lead to stakeholder concerns.

### Change must be driven from the top

How Ministers view regulation is pivotal to good policy development. The Panel considers that the level of political commitment to robust policy evaluations has a significant influence over how well regulatory and non-regulatory options are assessed by government agencies.

The Productivity Commission shares this view, as its study of jurisdictions' regulatory development processes found that lack of political commitment and leadership is a central barrier to robust evaluations of regulatory and non-regulatory options by government agencies. Although the evaluation process is generally understood to be led by agencies, the reality is that:

*..."policy solutions are regularly framed by the Minister, Government or COAG before the RIA process starts (that is, it is often a top-down process) ... The incentive for agencies to conduct high quality RIA is driven to a large extent by perceptions of what Governments and individual Ministers expect."<sup>35</sup>*

As the elected representatives, Ministers are responsible for not only influencing the debate around regulating, but are ultimately responsible for the quality of the proposals that they present to Cabinet.

It is the role of agencies to ensure Ministers are fully informed in their decision-making. Robust analysis of policy options, shared early with other agencies advising Cabinet Ministers, will support informed choices on why an option is being proposed, its impacts and consequences, and alternative options.

Where urgent and rapid decisions are called for, greater transparency around the assessment of proposals, coupled with the discipline of post-implementation reporting under the stewardship framework, is perhaps the key to reducing 'tick the box' concerns.

## 3.2 A new approach to finding the right option

*"RIAs can contribute to systematically better policy only if it is [part of] the policy development process."<sup>36</sup>*

This section discusses an approach to improve the evaluation of regulatory proposals, which includes:

- establishing a process which consciously shifts the focus to policy outcomes
- measures to enhance information and transparency
- a focus on evaluating early and streamlining reporting requirements
- enhancing guidance on assessing impacts.

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<sup>35</sup>Productivity Commission, *Regulatory Impact Analysis: Benchmarking Research Report*, 2012

<sup>36</sup>Centre for International Economics, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016, 3

The NSW Government needs to think differently about how it uses regulation to achieve desired policy outcomes. Agencies need to appropriately consider all options in the policy toolkit – both regulatory and non-regulatory options – early in the policy development cycle.

Instead of treating regulation as a panacea, policy developers need to ask the question: *what outcomes are we seeking to achieve?* By asking that question at the outset, RIAs can more effectively provide Ministers, as decision-makers, with an early and genuine assessment of regulatory and non-regulatory options to achieve a desired policy outcome. While this may appear to be a simple requirement, all too often it does not appear to be reflected in good policy practice. Stakeholders noted that policy actions tend to require either a monetary cost or a regulatory cost (or both), and that regulation is often seen by default as an attractive solution in the presence of budget constraints.

In the Draft Report the Panel posed a question about the need to rename RIAs to signal the new focus and enhanced practice. This simple name change – from RIA to Policy Proposal Evaluations (PPE) - was broadly supported by business and agencies, as it was deemed important to flag a step-change for future 'RIAs'.

### **Panel view: Replacing Regulatory Impact Assessments (RIAs) with Policy Proposal Evaluations (PPEs)**



Replacing the current requirement for RIAs with Policy Proposal Evaluations (PPEs) will reinforce the requirement for agencies to focus on the best available options to achieve a desired policy outcome, rather than just on regulatory impacts.

This shift in focus will promote a more holistic evaluation of regulatory and non-regulatory policy options than is currently practiced, and a more active consideration of both the incremental and cumulative impact of regulation. A new set of guidelines issued under a new statutory framework should describe the purpose of PPEs and emphasise this shift.

The Panel believes that changing both the scope and the name of the assessment process shifts the focus to policy outcomes rather than purely on regulation. Stakeholders indicated broad support for the change in focus to support better policy making, including general agreement that moving away from RIAs to PPEs would be an important signal of the shift in approach.

### **Recommendation 12:**

The NSW Government should establish a regulatory assurance process that focuses on the desired outcome, regulates by necessity rather than by default, and provides assurance to the Government and the community that the appropriate processes have been followed.

To achieve this, the current statutory and administrative requirements in relation to a process-driven measurement of regulatory burden under the Regulation Impact Assessment (RIA) process should be replaced with a Policy Proposal Evaluation (PPE). The PPE should:

- a) be fully integrated into the policy-making process
- b) clearly articulate the problem statement; i.e. what is the issue being addressed and what the Government wants to achieve
- c) be focused on outcomes when comparing policy options
- d) assess the impact of policy options, including the incremental burden of regulatory options on stakeholders
- e) actively consider industry-led solutions



- f) actively consider data and digital technologies that can help achieve outcomes
- g) provide decision-makers with a clear analysis of the risks of each option, including to the regulated and the end-user
- h) consider how the options will connect with and affect the existing regulatory environment
- i) embed post-implementation evaluation strategies, tools and measures.

### A single set of PPE guidelines

In NSW, the *Subordinate Legislation Act 1989* requires a RIS to be prepared for statutory rules, and at the same time NSW Guide to Better Regulation requires a BRS prepared for significant new and amending regulatory proposals. These arrangements can be duplicative, and given the costs and timeframes that can be associated with the different processes, any lack of clarity is inefficient.

The proposed PPE approach aims to position regulatory assessment more clearly within the policy process to ensure more effective consideration of all options.

### What is in and what is out – scope and exemptions

Some agencies were concerned that the use of the term ‘Policy’ in PPE rather than ‘Regulation’ broadens the scope to all policy beyond initiatives that have regulatory implications. Conversely, others were concerned that retaining ‘Regulation’ in the term presupposes a regulatory option as the answer.

To avoid confusion, agencies would benefit from practical guidance on what is in scope for PPE requirements.

Consistent with the aim of the Review to improve the outcomes of regulation on businesses and communities, the PPE requirements should apply to all policy proposals where one of the possible policy options is regulation or any rule that has an expectation of compliance. This will also include proposals with options that recommend removing an existing regulation or transferring the regulatory requirements to a new mechanism, such as a trial, exemption, or contractual arrangement.

PPE requirements should apply to policy proposals that impact on consumers, the community or business, and not regulations that primarily regulate government activities (i.e. do not appreciably impact business or the community). By this definition, a number of the current exemptions in Schedules 3 and 4 of the *Subordinate Legislation Act 1989* and the *NSW Guide to Better Regulation*, such as electoral rules, public sector management, and the establishment and management of government entities, are considered to be out of scope of this review.

Allowing certain policy proposals to be granted an exemption from PPE requirements increases the flexibility of the PPE process, particularly to accommodate political imperatives such as election commitments. This flexibility can also accommodate special or unforeseen circumstances.

There was support from stakeholders for maintaining the current categories for exemptions. Some regulators suggested that exempt proposals should provide information on potential risks or focus on post-implementation reviews.

The [Australian Government Guide to Regulation](#) includes a category of regulatory proposals that are eligible for an exemption granted by the Prime Minister, and several categories of regulatory proposals that are subject to limited evaluation requirements. A similar approach in NSW could involve including a category of regulatory proposals eligible for a Premier’s exemption, such as urgent or sensitive matters; and a category of regulatory proposals eligible for limited PPE requirements (e.g. for implementing election commitments or where the necessary policy evaluation has already been conducted in another form).

### Timing is everything – early is best

Stakeholders noted that bringing forward the requirement to undertake a PPE earlier in the policy and legislative process could ensure checks and balances are in place from the outset. Regulatory burden can emanate from primary legislation, not just in the subordinate legislation or administrative measures.

The Commonwealth Government similarly recognises the importance of doing assessments early in the policy development process. For example, the Office of Best Practice Regulation (OBPR) makes a preliminary assessment of Commonwealth agencies' regulatory proposals to determine whether a RIS is needed, and provides advice on the process and assessment requirements. In NSW, however, there are currently no requirements that specify at what point in the policy development process regulatory options need to be identified and evaluated. This would appear to be a significant omission that needs to be addressed through both process and leadership strategies.

Several stakeholders noted that currently many RIAs are undertaken only at the point when the Cabinet submission is being prepared; and by this stage there may already be a predisposition to a particular course of action. The lack of formal oversight arrangements in NSW may play a role here.

The measures proposed by the Panel for PPEs are consistent with the Productivity Commission's proposed strategies to help ingrain early evaluation of regulatory options.<sup>37</sup>

### How much assessment – tiered according to significance

The current requirements in the *NSW Guide to Better Regulation* are designed to be flexible, leaving agencies to determine the appropriate level of analysis according to the significance of the proposal. On the other hand, the requirements in the *Subordinate Legislation Act 1989* are relatively rigid and there is no provision to vary the level of analysis depending upon the significance of the proposal.

At the Commonwealth level, the OBPR drives the evaluation process, where early engagement in the policy process is a key feature valued by stakeholders.

*“The Commonwealth's process is the gold standard for Australia: it is the most robust because the Office of Best Practice Regulation engages early in the policy process.”<sup>38</sup>*

The Panel supports recommendations made by the NSW Business Chamber and other stakeholders that the NSW Government should develop a similar approach: i.e. to introduce tiered PPE requirements according to the level of significance of regulatory proposals.

The Commonwealth's process requires all Cabinet submissions to have a RIS, so that for proposals with no impact, or minor impact only a short-form document is prepared. Stakeholders noted that a 'short-form' PPE document could be useful as a pre-assessment tool to determine whether regulatory proposals are low, medium or high significance. If a proposal is low significance, a short form assessment may be all that is required.

Consistent with Commonwealth Government practice, agencies should engage with the Commissioner as early as possible to get advice on the level of significance of proposals, evaluation requirements, and whether exemptions may apply.

IPART supports a risk-based approach to PPE requirements according to significance, to enable agencies to better focus their resources. The criteria used by the Commonwealth Government to determine whether proposals are low, medium or high significance are outlined in Appendix C:

<sup>37</sup>Productivity Commission, *Regulatory Impact Analysis: Benchmarking, Research Report*, 2012

<sup>38</sup>NSW Business Chamber, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016

- Low significance – initial or preliminary assessment sufficient with limited or no public consultation required, e.g. a short-form impact assessment tool.
- Medium significance – full evaluation process without compulsory public consultation but including targeted consultation, e.g. with regulated parties.
- High significance – full evaluation process including appropriate public consultation, e.g. broad and targeted.

Further, the NSW Business Chamber considered that determining the significance of regulatory proposals should have regard to:

- the likely magnitude of impacts of a proposal based on a pre-assessment of the costs and benefits, potentially through a short-form impact assessment tool, similar to the Commonwealth's
- potential for alternative policy options to represent a better policy option, if costs and benefits are inaccurately assessed (i.e. the marginality of the decision)
- whether the accuracy of an estimate can be improved within reasonable costs.<sup>39</sup>

The lead agency responsible for the policy proposal should initially assess its significance, supported by the advice of the proposed Commissioner.

### Panel view: Single set of evaluation (PPE) requirements



The Panel considers the current requirements for evaluating regulatory proposals in NSW can be duplicative, confusing and inefficient for agencies. The Panel recommends that NSW establishes guidelines to create a single set of clear PPE requirements for regulation (including principal legislation, regulations and other statutory instruments) that have significant impacts on the community and/or business. While this will consolidate current requirements for RIAs and Better Regulation Statements, to be effective its application needs to be broader and capture all policy proposals that include a regulatory option (including removing or transferring regulatory requirements), or any rule that has an expectation of compliance.

#### PPE requirements and exemptions

In some cases, the application of full PPE requirements may not be appropriate. Enabling certain proposals to be eligible for a limited PPE or exempt from PPE requirements (such as for urgent or sensitive matters) will provide greater flexibility to the process. The greater flexibility afforded by exemptions and limited PPE requirements would help promote adherence to PPE requirements by Ministers and agencies, including the appropriate level of analysis.

The Panel considers that tiered PPE requirements, according to low, medium and high significance proposals (similar to the OBPR) will enable agencies to better target their resources for the preparation of PPEs, reducing administrative inefficiencies.

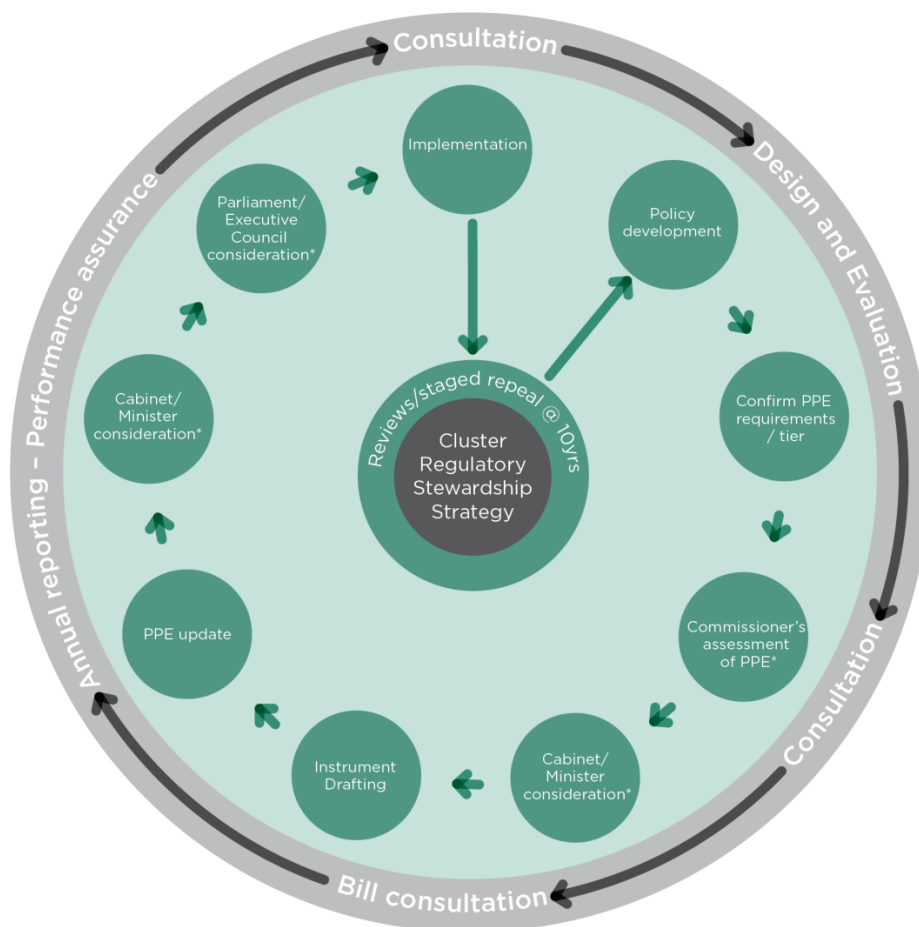
Where reasons for non-compliance are published, clear exemptions and guidance on eligibility for limited PPE requirements can provide greater transparency as to why a proposal does not comply with full PPE requirements.

### Regulatory stewardship throughout the regulatory lifecycle

The regulatory policy framework recommended in this report considers the lifecycle of regulation under the principle of regulatory stewardship, supported by a cultural shift to ongoing communication with stakeholders and a single 'early' and broader approach to traditional regulatory impact assessment in PPEs. These steps are outlined in Figure 3.

<sup>39</sup>NSW Business Chamber, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016

## REGULATION LIFECYCLE



\*Exact steps or timing will vary according to the policy/instrument and type of approvals required.  
PPE - Policy Proposal Evaluation

**Figure 3. Regulation lifecycle**

### Recommendation 13:

NSW Government agencies should initiate Policy Proposal Evaluations (PPEs) early in the policy development process under clear guidelines (Recommendation 1(e)) that:

- establish a single set of PPE requirements for policy proposals that include a regulatory option (including removing or transferring regulatory requirements), or any rule that has an expectation of compliance
- define the scope of the PPE requirements including appropriate exemptions (following the review noted in Recommendation 1(f))
- ensure PPE requirements are proportionate to the potential impacts of the regulation by including 'tiered' requirements for low, medium and high significance proposals. There will be higher analytical requirements for regulatory proposals of greater significance
- provide advice on the timing of PPEs (with reference to the *Australian Government Guide to Regulation*), and include engagement with the Commissioner as early as possible for advice on the level of significance of proposals, evaluation requirements, consultation, publication and whether exemptions may apply.

### 3.3 Better analysis of net benefits and impacts

#### Require agencies to recommend the greatest net benefit policy option

The Panel considers specifying that agencies should recommend the policy option that would achieve the greatest net benefit for the community, would improve the current NSW Better Regulation Principles. This must be broader than just economic benefits; it should consider broader factors such as safety, environmental impacts, consumer protection, productivity and innovation. Both quantitative and qualitative analysis will help to support the identification of the greatest net benefit option.

To this end, the new statutory framework should retain the current requirement in the *Subordinate Legislation Act 1989* (Schedule 1) for Ministers to have regard to the principle that the option with the greatest net benefit, or the least net cost to the community, should be chosen from the range of options to achieve the objectives. As noted by NSW Treasury, this would also be consistent with COAG's principles of best practice regulation:

*“COAG has agreed that all governments will ensure that regulatory processes in their jurisdiction are consistent with the following principles: ... adopting the option that generates the greatest net benefit for the community.”<sup>40</sup>*

#### Better analysis of regulatory impacts

Stakeholders identified several areas that need to be improved in evaluations of regulatory proposals:

- **Impact on small business:** evaluations often do not differentiate small businesses from larger industry players. The NSW Business Chamber provided an example where a RIA did not adequately assess potential impacts on small businesses as a result of broad, untargeted regulatory requirements. Evaluations need to recognise the higher relative impacts that can be experienced by small businesses because of regulatory changes, particularly with respect to the cumulative impact of regulations and how regulatory proposals interrelate with other existing regulations affecting small businesses.
- **Customer impacts:** quantitative assessments can often fail to adequately measure customer preferences. Customer and community feedback, particular where there is a significant consensus for change, needs to be better taken into account. Further, consumer preferences to make certain trade-offs (e.g. speed versus the cost of achieving an outcome, say in lodging applications for approval) can provide decision-makers with better information on the potential benefits of alternative proposals.
- **Potential implementation impacts:** failing to properly consider implementation issues leads to sub-optimal outcomes and unintended impacts. For example, reforms to scrap metal industry regulations were identified by at least one stakeholder to illustrate how there can be unintended impacts where practical compliance with those requirements are not considered adequately. The Panel considers that in these cases a reform will warrant a post-implementation evaluation.
- **Physical harm impacts:** Better guidance on impacts of injury and death – including plain English explanations of technical medical terminology describing these impacts – would be helpful in better evaluations of proposals. For example, reforms to compulsory third party

<sup>40</sup>NSW Treasury, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016, 9

insurance schemes include consideration of types of injuries and levels of permanent impairment.

#### **Recommendation 14:**

The guidelines (Recommendation 1(e)) should promote better analysis of impacts by ensuring:

- a) that agencies are required to recommend the policy option that would achieve the greatest net benefit for the community
- b) sufficient consideration is given to:
  - innovative regulatory approaches, including the use of digital tools and data
  - preferencing or trialling non-regulatory options
  - potential disproportionate impacts on small business, more vulnerable cohorts in the community or other groups not well represented through consultation processes.

### **3.4 Assurance and transparency**

Robust and transparent practices send a positive signal to businesses and the community that the NSW Government is committed to an effective assessment process and consequently to better regulatory outcomes. The NSW Business Chamber noted that making evaluations publicly available, together with information on the Government's regulatory reforms would:

- allow the public to gain a whole of government view on how decisions are made
- support knowledge management within government
- allow external stakeholders to gain a better understanding of the history of particular issues
- facilitate better coordination in circumstances where policy areas overlap.

This approach has the added virtue of reinforcing and extending the wider commitment to open government. As highlighted by the Centre for International Economics, transparency is more than simply making information available to the public; it is ongoing, publicly accepted scrutiny of the benefits and costs of policies.

Currently agencies must publish a BRS or a RIS on their websites after a Bill is introduced into Parliament, or a Regulation is published in the Gazette. However, current practice is inconsistent and as a result it is often difficult for the public to monitor or locate these on agency websites.

The Panel is of the view that PPEs should be made publicly available via a central online portal. The Panel acknowledges that as sensitive NSW Cabinet material, PPEs should not be published until after a Cabinet decision has been made, and that there may be some PPEs that Cabinet decides are too sensitive to be published.

Lack of an independent review function is a key shortcoming in the current regulatory framework in NSW. An assurance process is needed to support rigorous and robust analysis in the development of policy and decision-making, particularly when there are potentially significant impacts on the community and economy.

Stakeholders were generally in favour of the NSW Government establishing an independent assurance process to review and provide advice on PPEs before proceeding to Cabinet. This assessment focuses on the adequacy of the PPEs and the standard of analysis, testing compliance with requirements for PPEs. This is consistent with other assurance processes in NSW Government that provide independent review at key decision points of a project or program's lifecycle to provide decision-makers with the confidence it will be successful and deliver defined outcomes.



The governance arrangements recommended by the Panel include a Commissioner, independent of regulatory agencies, whose role would include providing an independent assessment of PPEs' adequacy. Guidance on the standard of PPEs would be sought and given by the Commissioner, prior to finalising PPEs. However, if a PPE is inadequate for proper decision making and requires more work, the Commissioner may advise the Premier or Ministers that consideration of the proposal should be delayed to ensure adequate analysis in the PPE.

### **Panel view: Using PPEs for decision making**



The current template for Cabinet submissions requires agencies and Ministers to provide a summary of any regulatory impacts of the proposal.

This is expected to continue, and the new PPE guidelines should facilitate greater rigour and consistency in capturing these regulatory impacts to inform decision-making. The information provided to Cabinet should be enhanced by:

- revising the regulatory impact section in the Cabinet submission template to indicate consideration of non-regulatory options, and a comparison of the benefits, impacts and risks of all options considered
- including the Commissioner's assessment of the adequacy of the PPE and, if a PPE was not prepared or inadequately prepared, the reasons the proposal was exempt from PPE requirements.

It is expected that, for Cabinet submissions seeking approval for significant proposals, a long-form PPE would be made available as well.

#### **Information for Cabinet decision making**

Government needs a process that discourages a 'last minute' 'tick the box' approach to evaluation.

Enhancing the information provided in Cabinet submissions will support all Ministers in making decisions with the full awareness of the benefits, impacts and risks of different options. The Commissioner can work with agencies and provide guidance on PPEs in the development process. Including the Commissioner's independent view and frank assessment of the PPE within the Cabinet system aims to provide an incentive for high quality advice in the PPE prepared by an agency.

Governments often experience a tension between transparency, provision of information and effective assurance processes. The Panel believes that honest, complete and rigorous advice in the decision making process should be a priority and can be effectively balanced with transparency (sometimes through the timing of publishing material) to get better decisions and results.

#### **Publication of PPEs and assessments**

The proposed regulatory policy framework includes reporting arrangements to increase transparency. This will include the Commissioner publishing a summary of overall PPE quality and compliance by agencies, providing the opportunity to identify issues and areas for improvement.

PPEs should be made publicly available via a central online portal. The Panel acknowledges that PPEs will vary depending on the proposal and process required for consultation or decision making. Where PPEs form part of the Cabinet material, PPEs may not be published until after a Cabinet decision has been made, or a Bill introduced into Parliament.

Where a Cabinet decision is made to proceed based on a proposal that has not adequately met PPE requirements, then it will be subject to a post-implementation review and published within two years.

### **Post-implementation review**

Publication of Post-Implementation Reviews (PIRs) will provide an additional layer of transparency to support good regulatory outcomes. This is particularly relevant in addressing the challenge of ensuring robust evaluation of policy proposals when a decision is pre-determined, reflexive or politically driven.

Commonwealth Government agencies are required to undertake a PIR within five years for all regulatory changes that have major impacts on the economy, and within two years for regulatory proposals that did not comply with formal evaluation requirements. In Victoria, high impact proposals (where the impacts are greater than \$8 million per annum) trigger a midterm evaluation that must be done three to five years after implementation.

As the *Australian Government Guidance Note to Post-Implementation Reviews* points out, PIRs provide valuable information for both policymakers and stakeholders on whether a regulation is meeting the desired policy outcomes:

*“A PIR is intended for both decision-makers (for whom a balanced assessment of the performance of the regulation is critical) and stakeholders (who have a right to accurate, timely, transparent, and accessible information about government decisions affecting them).”<sup>41</sup>*

### Panel View: Post-implementation reviews



Publishing PIRs not only provides an effective layer of transparency for the PPE process, but also promotes good regulatory outcomes. PIRs should be best practice for all policy proposals.

Under regulatory stewardship agencies should have a good understanding of the most appropriate point in time to do a PIR. The Panel considers that following the Commissioner’s independent assessment of PPEs, NSW Government agencies should be required to undertake a PIR particularly where:

- a proposal has not met PPE requirements – including where there are identifiable limitations in providing a robust assessment of policy options or impacts – but a decision was made to implement the proposal
- a proposal is eligible for certain ‘fast tracked’ exemptions from PPE requirements e.g. urgent or sensitive matters, that are high impact proposals, such as election commitments.

A PIR should be undertaken by the relevant agency within two years, assisted by the Commissioner, following implementation of the policy proposal. A PIR should:

- be conducted openly at all stages and engage external stakeholders as well as other government agencies, and its results should also be made public
- outline the original problem and the Government’s desired policy outcomes
- evaluate evidence on the actual impacts of regulation
- consider findings from stakeholder consultations
- evaluate whether the regulation is fit for purpose and achieves the desired policy outcomes effectively and efficiently.

By publishing the results, PIRs serve as an additional check and balance on the original decision-making process, particularly where any exemption was provided. Evidence on the effectiveness of formal PIR requirements should be collected and evaluated periodically, to help identify strengths and weaknesses of current requirements and making meaningful improvements over time.

<sup>41</sup>Office of Best Practice Regulation, *Post-Implementation Reviews*, 2016

**Recommendation 15:**

Enhance the evaluation of regulatory proposals by including in the guidelines (Recommendation 1(e)) that:

- a) the Commissioner’s assessment of PPEs (Recommendation 1(d)) be attached to Cabinet submissions
- b) the Cabinet submission template be revised to indicate consideration of non-regulatory options and a comparison of the benefits, impacts and risks of all options considered
- c) a central platform is provided to publish PPEs
- d) a Post-Implementation Review is undertaken and results published within the first two years after implementation for significant proposals that have not adequately met PPE requirements.

### 3.5 Developing regulation with local government

Local Councils implement a substantial amount of state government legislation. On that basis, agencies that develop regulation implemented by local government should consider impacts on, and collaborate with, local government throughout the development process.

This will require effective collaboration with the local government sector during the policy development and design process by NSW Government agencies. Requiring PPEs to provide information on this collaboration is a way of assuring that meaningful engagement has occurred. This engagement should also seek to understand and address the different challenges in implementation for the variety of local government bodies, particularly between rural, regional and metropolitan areas.

In its draft *Review of Reporting and Compliance Burdens on Local Government*, IPART recommended that agencies should be required to provide information with respect to local government impacts when preparing evaluations (see box below).<sup>42</sup>

In particular, NSW Government agencies need to work closely with their local government partners to evaluate how regulatory proposals may affect them, especially if establishing a jointly provided service or function. This collaboration should involve developing policy objectives, design, standards, shared funding arrangements and developing an implementation and compliance plan.<sup>43</sup>

#### IPART Draft report - Review of Reporting and Compliance Burdens on Local Government



Draft Recommendation 1 in the IPART draft report states that the *NSW Guide to Better Regulation* should be revised to include requirements for agencies developing regulations involving regulatory or other responsibilities for local government, as part of the regulation-making process, to:

- consider whether a regulatory proposal involves responsibilities for local government
- clearly identify and delineate State and local government responsibilities
- consider the costs and benefits of regulatory options on local government
- assess the capacity and capability of local government to administer and implement the proposed responsibilities, including consideration of adequate cost recovery mechanisms for local government

<sup>42</sup>IPART, *Review of reporting and compliance burdens on Local Government – Draft Report*, 2016

<sup>43</sup>IPART, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016

- take a coordinated, whole of government approach to developing the regulatory proposal
- collaborate with local government to inform development of the regulatory proposal
- if establishing a jointly provided service or function, reach agreement with local government as to the objectives, design, standards and shared funding arrangements
- develop an implementation and compliance plan.

### Recommendation 16:

Agencies that develop regulation involving regulatory responsibilities for local government should be required to:

- a) engage early with local government
- b) provide information with respect to local government impacts in PPEs, guided by Recommendation 1 of the draft IPART report *Review of Reporting and Compliance Burdens on Local Government*.

## 3.6 Role of the Legislation Review Committee

The Legislation Review Committee (LRC) considers regulations from a technical or legal basis. That is, it considers whether proposed regulations have complied with the requirements contained in the *Subordinate Legislation Act 1989*. It also reports to Parliament on any regulations that breach personal rights, adversely impact businesses, overlaps with or duplicates other regulations, or are inconsistent with the objectives of the primary legislation (*Legislation Review Act 1987* s9). It is a technical review body that does not have a mandate to influence policy making.

The LRC's Chair, Mr. Michael Johnsen MP, noted that the LRC's role in reviewing regulations is:

*"...important to drawing the Parliament's attention to possible issues in regulations which may have a higher chance of otherwise remaining unnoticed as they pass through Parliament".<sup>44</sup>*

Alongside its regulatory review role, the LRC reviews and reports on any bills being introduced to Parliament that do not adequately protect personal rights and liberties, inappropriately delegate legislative powers (*Legislation Review Act 1987* s8A).

Originally, this was a separate function from reviewing regulations. A Regulation Review Committee was established in 1987 and in 2003 its role was combined with the current Legislation Review Committee. The Panel does not propose to make recommendations with respect to the LRC's role in reviewing bills, as this is not relevant to the Panel's Terms of Reference.

However, the combined legislative review and regulatory review functions raise a number of issues. A recent review of the NSW Legislative Council committee system noted that throughout the inquiry it heard that combining both functions in the one committee was inefficient. In practice, the LRC's scrutiny of regulations has been gradually diminishing.<sup>45</sup> As IPART noted in its submission to the Panel, the LRC does not routinely comment on non-compliant regulations. The Productivity Commission also found that although Parliamentary scrutiny mechanisms should add to public

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<sup>44</sup>Michael Johnsen MP Chair, NSW Legislation Review Committee, 'Comparative approaches to legislative scrutiny', presentation to the Australia-New Zealand Scrutiny of Legislation Conference, Perth, 11-14 July 2016

<sup>45</sup>Select Committee on the Legislative Council Committee System, Legislative Council, *The Legislative Council committee system*, 2016

accountability for regulations, it is not clear whether they have achieved their full accountability potential.<sup>46</sup>

The Panel notes that during 2016, the LRC reviewed and reported on 18 regulations. The LRC's reviews mostly related to potential infringements on personal rights and liberties, impacts on business and the community, and inappropriate delegation of powers. The Panel acknowledges the importance of reviewing regulations with respect to such matters; however, none of those reviews concerned compliance with the regulatory impact assessment requirements in the *Subordinate Legislation Act 1989*.

As pointed out by IPART, LRC's expertise and focus relates to reporting on legal issues, rather than an assessment of the adequacy of regulatory proposals from an economic point of view.<sup>47</sup> On that basis, IPART has recommended that the LRC's role of reviewing compliance with RIA requirements be transferred to an independent body, but that it retains its legal review functions.

The Panel notes that a Select Committee review of the NSW Legislative Council committee system recommended a Regulation Committee be established on a trial basis. It would not replace the current functions of the LRC, but would focus on substantive policy issues concerning a small number of regulations and examine trends relating to delegated legislation.<sup>48</sup>

The Productivity Commission, observing the limited effectiveness of Parliamentary scrutiny committees to ensure accountability for regulations, considered that efforts to enhance accountability should focus on transparency around decision making. This can be achieved by having an independent body review the quality of PPEs and provide advice to Cabinet. IPART suggested that such an independent body could also provide a copy of their independent assessments of PPEs to the LRC, together with any decisions to grant exemptions from PPE requirements.<sup>49</sup>

### Panel view: Role of the Legislative Review Committee



The Panel is not convinced the LRC should retain a review function with respect to regulatory impact assessment requirements, currently under the *Subordinate Legislation Act 1989*, or any revised formal PPE requirements.

Based on the evidence provided, the LRC's role is not focused on reviewing and reporting on whether regulations have complied with RIA requirements contained in the *Subordinate Legislation Act 1989*. There is insufficient evidence that the LRC is adding value to ensuring regulations are being made in accordance with good regulatory policy practice.

On that basis, the current role of the LRC with respect to assessing regulatory proposals for compliance with regulatory policy requirements (which are currently contained in the *Subordinate Legislation Act 1989*) should be transferred entirely to the proposed Commissioner, who would have the appropriate expertise to assess regulatory proposals proceeding to Cabinet.

### Recommendation 17:

Amend the *Legislation Review Act 1987* in light of the Commissioner's role (Recommendation 1(d)), to remove the requirement for the Legislation Review Committee to consider compliance of regulations with the regulatory impact assessment requirements in the *Subordinate Legislation Act 1989*. The Commissioner should provide a report on the assessment of PPEs to the Legislation Review Committee.

<sup>46</sup>Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Research Report, 2012

<sup>47</sup>IPART, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016

<sup>48</sup>Select Committee on the Legislative Council Committee System, Legislative Council, *The Legislative Council committee system*, 2016

<sup>49</sup>IPART, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016

## 4. Reducing red tape

*“Most businesses want to be able to understand their regulatory obligations and comply; businesses are more concerned with the quantum of regulatory burden they experience rather than which level of government is contributing to the burden.”<sup>50</sup>*

End-users often just want to know how to comply with regulations. It is often the experience of regulation - *how* governments administer regulations - rather than *what* those regulations are, that can cause frustration or create problems for regulated parties and consumers.

Stakeholders have identified the continuing challenges of finding consistent and clear information on how to comply with regulatory obligations as particularly hindering to the effective implementation of regulation. Such challenges contribute to an annual compliance burden of around \$10.6 billion on NSW businesses.<sup>51</sup>

Compounding these challenges is the requirement to meet multiple regulations, often administered by different regulators across several levels of government. The administration time invested in duplicated compliance obligations detracts from business productivity and discourages growth without necessarily improving protection for businesses, employees and consumers.

While Australian governments have worked hard to address this by reducing regulatory overlap and duplication, more can be done. Anything that reduces or removes unnecessary burdens of regulation will reduce cost and complexity of compliance. This requires regulators to consider the cumulative effect of regulation from the perspective of how regulated parties and/or consumers experience regulation. As Professor Martin Lodge of the London School of Economics observed, the experience of end-users is often at its most negative where they face poorly aligned and articulated sets of regulatory requirements.<sup>52</sup> These poorly designed intersections of otherwise acceptable regulatory regimes are often where they face the most difficulty in complying.

Chapter 1 outlines the fundamental role of a stewardship approach to ongoing accountability by agencies to identify and reduce red tape. To further improve the implementation of regulation, regulators should also consider:

- **Streamlining regulatory touchpoints:** Identifying opportunities for streamlining the number of interactions with government (‘touchpoints’) for an activity. Digital technologies can reduce the number of times end-users need to provide information to government regulators – making ‘tell government once’ more of a possibility.
- **Reducing regulatory overlap and duplication:** Identifying how many regulations apply, or how many agencies regulate, the same activity or sector. This involves considering end-users’ experience of complying with regulations across different tiers of government – and whether the same or better outcomes can be met with more harmonised regulatory instruments and participants.

### 4.1 Streamlining regulatory touchpoints

Stakeholders have pointed out that one of the most effective ways to improve end-users’ experience is to reduce the number of times they are required to provide similar consumer or business information to different government agencies.

<sup>50</sup>Roundtable, 30 November 2016

<sup>51</sup>NSW Business Chamber, *2016 Red Tape Survey*

<sup>52</sup>Professor Martin Lodge, April 2017



One of the best ways to do this is to centralise the information required for end-to-end compliance with regulation, and to streamline multiple user touchpoints through a ‘one-stop shop’ for multiple regulatory activities that help end-users to ‘tell government once’. This is particularly relevant for businesses and individuals who deal with multiple NSW Government regulators.

The Panel acknowledges NSW has had success in this area with the expansion of Service NSW. The experience of Service NSW shows that better regulation from the perspective of end-users can sometimes be as simple as improving an application process and offering multiple transactions through a single shopfront or online portal.

The Panel also believes that the Commerce Regulation Program and Easy to do Business pilot have shown that there are significant opportunities for cross-agency partnerships to reduce duplication and complicated practices.

### Case study: Initiatives making it easier for business



#### Commerce Regulation Program

- The Commerce Regulation Program was introduced in 2016 as part of the NSW Government’s commitment to reducing red tape and the time spent meeting regulatory requirements.
- The [Construction Assist](#) online portal created under the Commerce Regulation Program is designed to make it easier for small businesses in the home building industry and consumers building and renovating their property.
- The portal provides consumers and contractors with relevant industry information on regulatory requirements and changes, compliance issues and check lists, licensed contacts, and other business management and consumer resources. This information is sourced from multiple regulators including SafeWork NSW, the State Insurance Regulatory Authority, NSW Self Insurance Corporation, NSW Fair Trading, and related organisations.

#### Easy to Do Business pilot

- A frequent complaint by businesses is that considerable time and effort is required to comply with regulatory requirements managed by different regulators.
- The Easy to Do Business pilot is a joint initiative between Service NSW, the Office of the NSW Small Business Commissioner, NSW Customer Service Commissioner and Parramatta Council. It centralises the information, application forms and other processes required to establish small businesses in NSW.
- This digital pilot aims to slash the average start up time for new Parramatta cafes, restaurants and small bars from 18 months to three months. This includes replacing up to 48 forms across 13 different agencies, with a single online form used to share information within the Government, to reduce duplication for business and improve compliance.
- After the six-month pilot it is anticipated that other councils and industries, including retail and construction may be included in the program.

Some of the common challenges faced by agencies involved in regulatory consolidation are:

- ensuring appropriate access to data and systems
- maintaining the security, integrity and assurances for data and systems, including potential misuse or misinterpretation of information beyond the original context
- developing appropriate governance arrangements between agencies
- managing legislative changes
- mitigating disruption from organisational changes.

Despite these challenges, there is still untapped potential to do more. As pointed out by the Office of the NSW Small Business Commissioner, few regulators practice ‘tell government once’. The

reality is that despite a desire for whole of government approaches, there is still not enough communication or knowledge sharing between agencies.

The Panel believes that an independent Commissioner role can help break some of those barriers down, by facilitating information and knowledge sharing across portfolios and encouraging a more holistic approach to developing policy outcomes. Inter-agency communities of practice also provide a forum for regulators to learn and share best practice and promote a whole-of-government approach to end-user centric regulation.

#### **Recommendation 18:**

Reduce the number of regulatory touchpoints with government by making ‘tell government once’ a guiding principle in the proposed Regulator Performance Framework to increase the incentive for agencies and their systems to work more effectively together.

## 4.2 Reducing unnecessary regulatory overlap or duplication

### **Working with local government to get better implementation and outcomes**

To enhance end-users’ experience in complying with regulations, there is a strong case for NSW Government agencies to better support local government. Local government is the implementation agent for a significant amount of state government regulation. Where regulation occurs on a cost-recovery basis, the capacity for local governments to provide comprehensive administration of multiple regulations is stretched, particularly in regional NSW. As individual local councils are only responsible for the implementation of regulation, in practice this is likely to be influenced by the priorities of their constituencies, resources and available capabilities.

The Panel recognises that local government experiences the cumulative impact of new or amended regulation over time. In a review of reporting and compliance burdens on local government, IPART found that the NSW Government needs to monitor the cumulative ‘burden’ of regulation experienced by local councils in administering regulation. This includes avoiding overlap and duplication with existing local government obligations or delegated powers.

Local governments may partially overcome the constraints by exercising a large degree of discretion. But stakeholders have noted this increases the burden generated by local government arrangements on end-users, particularly where local governments become a regulator for end-users working or living across several local government areas. For example, businesses, such as mobile food vendors, that need inspection/approval for one local government area may not be recognised in other local government areas.

The Panel suggests these experiences highlight the need for NSW Government agencies to better engage and coordinate with local governments throughout the lifecycle of regulation, from design to implementation. It follows that if state agencies operate as stewards of regulation focused on outcomes, there should be a strong focus on designing regulatory schemes that take into account the implementation opportunities and challenges faced by local councils.

The Panel notes that IPART made similar recommendations in its draft report *Local Government Compliance and Enforcement*.<sup>53</sup> Despite these challenges, some agencies have taken steps to improve coordination with local government on implementing regulation. For example, the Food Regulation Partnership is acknowledged by IPART as regulatory best practice and is strongly

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<sup>53</sup>IPART, *Local Government Compliance and Enforcement – Draft Report*, 2014

supported by local councils and Local Government NSW as the preferred model for regulatory practice between state and local government.

### Case study: Food Regulation Partnership between state and local governments



- NSW retail food businesses' compliance with legislated food safety requirements is regulated by local councils, which are appointed as enforcement agencies under the *Food Act 2003*. Local councils are supported in their execution of this function by the NSW Food Authority through a statutory arrangement known as the Food Regulation Partnership (FRP).
- The Food Authority provides essential support to councils through food safety training and access to specialist support functions in areas of food policy and legislative advice, communications expertise, critical operational responses, investigations and other technical support. These functions are made available to all enforcement agencies to avoid duplication of these functions across councils.
- The FRP provides a single touchpoint for all retail food businesses in relation to food safety, simplifying and streamlining arrangements for what is just one of various regulatory functions delivered by local councils. It also facilitates comprehensive consultation with key stakeholders, including retail food businesses, three times each year.
- The FRP provides a consistent regulatory regime across councils, delivers a consistent retail food safety compliance rate of 95 per cent and promotes transparency through mandatory reporting of councils' food safety inspection activities.

The Panel also supports IPART's recommendation that the NSW Government maintains a register of local government reporting, planning and compliance obligations, which should be used by agencies in developing regulatory proposals. This will help manage the volume of local government regulatory obligations, and avoid creating unnecessary overlap and duplication.<sup>54</sup>

### Recommendation 19:

Establish a register of local government reporting, planning and compliance obligations, which should be used by agencies in developing regulatory proposals, to manage the volume of local government regulatory obligations and to avoid creating unnecessary overlap and duplication. This register will support consideration of local government's implementation in PPEs as required in Recommendation 16.

### Partnering more effectively with the Commonwealth and other states and territories

More broadly, the NSW Government has pursued national harmonisation efforts with other Australian jurisdictions through the Council of Australian Governments (COAG), ministerial councils or other similar channels.

National arrangements are appropriate and worthwhile responses to significant policy problems that cross state and territory boundaries. However, they frequently require significant negotiations, usually with Commonwealth leadership (and incentive payments) and negotiations can be lengthy and challenging. National arrangements can also add additional costs to businesses operating in a single jurisdiction, which may be required to adapt to new arrangements following harmonisation, but not realise any of the efficiencies experienced by larger businesses operating in multiple jurisdictions. For example, national harmonisation of work health and safety national model laws made sense for large scale, national businesses but was less applicable and practical for small business to implement.

<sup>54</sup>IPART, *Review of reporting and compliance burdens on Local Government – Draft Report*, Recommendation 2

Understandably, jurisdictions tend to consider potential changes from their own best interest which may not always benefit regulatory end-users working and living in multiple jurisdictions. Further, the negotiated nature of national frameworks can limit the ability of state-based regulators to operate effectively and apply modern best practice. Several stakeholders identified concerns about outdated arrangements, the sluggishness of change and how tensions between government priorities can negatively affect key outcomes.

While the NSW Government should continue to pursue valuable reforms through COAG and other interjurisdictional forums, it is worth remembering that harmonised national reforms take time to implement and, at times, can be a product of compromise.

Given the broad-brush impact of negotiated national arrangements on regulated entities and regulators, the NSW Government should also explore opportunities for smaller scale reforms with other states and territories, such as bilateral agreements with other jurisdictions to improve arrangements in cross-border regions. The [ACT-NSW Memorandum of Understanding on Regional Collaboration](#) is an example of a bilateral initiative which deals with practical arrangements on a range of cross-border regulatory and service delivery issues, including transport, economic development and land use planning.

Non-government stakeholders have noted the detrimental impact of the traditional siloed approach taken by governments on how their specific requirements interact with those of other governments. Recognising the regulatory end-user experience is often made more complicated by compliance with obligations across multiple governments, the NSW Government should use national regulatory streamlining initiatives such as the National Business Simplification Initiative to consolidate touchpoints and centralise information across different tiers of government.

### Case study: National Business Simplification Initiative



- In November 2016, all Australian jurisdictions agreed to work together under the National Business Simplification Initiative to “reduce the complexity of regulation for businesses and make dealings with government easier”.<sup>55</sup>
- The initiative is an example of how different levels of government can work together in practical ways to improve the way they regulate in areas of shared responsibility and to streamline the way businesses receive and access government information. Through the Easy to do Business Initiative trial to simplify the process and reduce the time it takes to set up a café, restaurant or small bar in the Parramatta area, businesses can to apply through a central digital portal for multiple registrations from NSW Government, local government and Commonwealth agencies, streamlining processes and reducing the duplication of data. Also the Western Australian and Tasmanian Governments are investigating initiatives to streamline regulation and processes to make it easier to start and run nature-based tourism businesses.<sup>56</sup>
- Critically, the initiative is framed around not just changing or reducing regulation, but improving the way in which governments interact with the regulated – in other words, improve the experience of regulation.

### Recommendation 20:

Pursue an agenda for national and bilateral partnerships with other jurisdictions to drive cross-jurisdictional arrangements that reduce red tape and improve the implementation of regulation, consistent with the principle in Recommendation 18.

<sup>55</sup>Department of Industry, Innovation and Science, [New national simplification initiative to make it easier to get on with doing business and creating jobs](#), 18 November 2016

<sup>56</sup>Australian Government, [Agreed Statement, National Business Simplification Initiative](#) November 2016

### 4.3 Targeted reviews and reforms to ensure ‘fit for purpose’ regulation

The *Australian Government Competition Policy Review* recommended that all Australian jurisdictions recommit to reviewing regulations, including local government regulations, by applying the *public interest test* to remove unnecessary impediments to competition.<sup>57</sup> The Review’s final report pointed out that such a process ensures regulation serves the long-term interests of consumers, where the onus of proof is on the party wishing to maintain an anti-competitive regulation to show it is in the public interest.

Given that agencies have limited resources to review regulation and legislation, and stakeholders have limited resources to meaningfully engage in consultation, it is critical that reviews are prioritised according to the likely benefit from review and reform efforts. The Productivity Commission identified this ‘payoff’ will likely be greater when the:<sup>58</sup>

- scale of the positive impact is high for those affected by the reform, which is dependent on the size of the problem and the extent to which regulation can address the problem
- impacts across the community are broad, for example spread across businesses, consumers and the community. The distribution of the benefits will also affect the payoff from reform efforts, and (all else equal) would favour reforms where the benefits were more likely to accrue to the most disadvantaged in the community
- costs of planning and implementing the reform are low in comparison to the benefit.

The *Intergovernmental Agreement on Competition and Productivity-enhancing Reform (IGA)*<sup>59</sup> signed by NSW in December 2016 identifies priority areas for regulatory review and reform drawing on – but not limited to – the recommendations made in the 2015 *Australian Government Competition Policy Review*. A number of those areas present opportunities for jurisdictions to jointly undertake reviews to maximise the benefits of reform, including in occupational and professional licensing, mandatory product standards, road transport, water infrastructure and pricing, and pharmacies. The relevant priority areas are outlined in Appendix D.

A National Partnership Agreement under the IGA that focused on removing unnecessary regulatory barriers to competition was announced in the Commonwealth Government Budget in May. The Panel considers that the NSW Government should act quickly and decisively to pursue the reform opportunities through this process, or through bilateral agreements, to maximise benefits for NSW businesses.

The Panel considers that the program of reviews should be overseen by the Commissioner to ensure a strong and persistent approach to maximise the opportunity for reform and associated funding.

In addition, stakeholders consulted for this review pointed out a range of areas where there is overlap or serious regulatory barriers that the NSW Government should target for review (Appendix D). Noting that some of these key areas are already subject to consideration, the Panel considers that these areas are significant and worthy of a detailed review.

#### **Recommendation 21:**

Work with the Commonwealth Government and other jurisdictions to enhance outcomes for NSW businesses, consumers and the community, through:

- a) initiatives to reduce red tape, including unnecessary regulatory overlap across different jurisdictions and

<sup>57</sup> Australian Government *Competition Policy Review, Final Report*, Recommendation 8, 2015

<sup>58</sup> Productivity Commission, *Identifying and Evaluating Regulation Reforms*, Research Report, 2011

<sup>59</sup> Council of Australian Governments, *Intergovernmental Agreement on Competition and Productivity-enhancing Reforms*, 2016

tiers of government

- b) implementing targeted reviews, including those identified in the *Intergovernmental Agreement on Competition and Productivity-enhancing Reforms* (Appendix D).

## 4.4 Resetting NSW's approach

### An outcomes focused performance framework for regulators

Ministers, agencies and the heads of those agencies – particularly agencies that have a high level of regulatory responsibility – should be responsible for demonstrating a commitment to the quality of the regulatory output.

One approach to this could be to include specific and measurable KPIs around regulatory reform in the performance agreements of senior agency executives, starting with departmental secretaries. However, this tool has been subject to overuse in the past and the current approach is to consider secretaries' performance using a 360-degree approach that includes stakeholder feedback. These stakeholders could include key regulated entities or the Commissioner.

Another option is to make use of reporting mechanisms to call out specific issues or metrics, for example in relation to regulatory quality or reducing red tape. This should be through an annual report by a Commissioner on the efficacy of the NSW Government's regulatory stewardship, as proposed under the governance arrangements in this report. Agencies should also consider (where relevant) the costs and benefits of standalone NSW regulation compared with national harmonisation when considering policy developments, with potential assistance from the Commissioner as part of their remit to engage with stakeholders about changes in the regulatory landscape. This type of benchmarking could be included in Secretaries' annual Cluster reports on their regulatory stewardship strategies.

The Panel notes that the NSW Government has already worked towards a more customer-centred approach of regulatory performance through the Quality Regulatory Services (QRS) initiative. Established in 2012, the QRS initiative sought to minimise regulatory costs and maximise regulatory outcomes through an outcomes- and risk-based approach to regulation. Thirty-seven NSW regulators with compliance and enforcement responsibilities have applied the approach by aligning their regulatory activity with outcomes, prioritising resources towards those that present the highest risk to regulatory compliance and reducing regulatory burden on those that are compliant.

The Panel notes a slightly different focus in the Australian Government's Regulator Performance Framework, allowing Commonwealth regulators to focus on policy and regulatory outcomes and not solely on compliance and enforcement. The Commonwealth model sets out key performance indicators that allow stakeholders such as the regulated parties and peers (other agencies in the same regulatory space) to rate the performance of a regulator or agency.<sup>60</sup> This can include a comparison with similar organisations in Australia or overseas.

### Panel view: Implement a Regulator Performance Framework



The Panel considers that the existing NSW Quality Regulatory Services initiative should be enhanced and elements of the Australian Government's Regulator Performance Framework adopted to improve the framework for NSW. The framework should be flexible enough to allow the assessments to be tailored to the size and responsibilities of the regulator. In addition, like the Commonwealth model, they should include stakeholder consultation mechanisms for external validation.

<sup>60</sup> *Australian Government Regulator Performance Framework*, 2014



These enhancements would assist NSW regulators to improve stakeholder engagement and receive targeted feedback from stakeholders, which could also be used to increase regulator transparency and accountability.

The framework should include public and measurable outcomes-based goals. Suggested ways of achieving this include key performance indicators and 360-degree assessments for heads of NSW Government agencies and regulators.

### **Recommendation 22:**

Implement a Regulator Performance Framework that enhances the existing NSW Quality Regulatory Services (QRS) initiative, including:

- a) self-assessments of regulator performance
- b) feedback on performance from stakeholder and other regulators
- c) specific targets for data and digital adoption for agencies to create incentives to adopt modern data and digital practices when regulating
- d) benchmarking of agencies' performance and identification of opportunities to share learnings.

### **Recommendation 23:**

Introduce accountability mechanisms to reduce regulatory overlap and duplication within and between agencies and between levels of government. These could involve annual reporting on efforts in this area as part of Clusters' regulatory stewardship reports, and ensuring that department heads' periodic 360-degree performance reviews include key stakeholder feedback. These stakeholders should include key regulated entities and the Commissioner.

## 5. Institutional arrangements for a sustainable framework

*“The ultimate purpose of central oversight should be to ensure that the best policy options are considered by government and to prevent poorly prepared proposals from being relied on by decision-makers.”<sup>61</sup>*

### 5.1 The need for a central review and advisory role

Since the abolition of the NSW Better Regulation Office (BRO) in 2013, responsibility for review of regulatory proposals’ alignment with NSW Better Regulation Principles has rested primarily with DPC and NSW Treasury when they review Cabinet submissions prior to Cabinet consideration.

Under the current arrangements, DPC advises whether a matter is suitable for Cabinet or Cabinet Committee consideration. DPC also provides the Premier (and some Committee Chairs) with independent whole-of-government policy advice on Cabinet submissions.

NSW Treasury’s review of Cabinet submissions is characterised by a particular focus on markets, financial, economic and competition impacts, including technical advice on assurance processes such as cost-benefit analyses. NSW Treasury is also responsible for the development of the state’s regulatory reform agenda in relation to national agreements.

The Panel also notes that following the creation of the Innovation and Better Regulation Portfolio, a Better Regulation Division was established in 2016 within the Department of Finance, Services and Innovation (DFSI). This division is currently responsible for administration of the *NSW Guide to Better Regulation* and some regulatory efficiency initiatives and programs (e.g. QRS and the Commerce Regulator Program). There were a range of views from stakeholders on the role of DFSI in regulatory policy, with most agreeing there is a lack of clarity of their role, although there was positive recognition their of programs to enhance regulatory practice.

The Panel notes there is currently no area in the central agencies with a specific mandate or dedicated expertise to provide focused and persistent assurance of regulatory policy performance, quality and impact across the whole of government.

These arrangements are unique to NSW, as other jurisdictions generally have a clearly designated unit or body for managing regulatory policy, regulation making and reducing red tape.

The Auditor-General’s 2016 report raised concerns for NSW including:

- regulatory impact assessments developed by agencies did not consistently provide a considered assessment of the impacts, benefits and costs of introducing regulation
- ineffective management of conflicts of interest with the same agency assessing regulatory quality and implementing regulation; and whether regulatory principles were met or the proposed regulatory burden was justified
- no designated oversight of continued regulatory reform and burden minimisation
- lack of central oversight of the policy assessment process to ensure all options and alternatives are genuinely considered
- lack of independent and objective advice on the impact of policy approaches on the overall regulatory burden on businesses and individuals.<sup>62</sup>

The New Zealand Productivity Commission report, *Regulatory Institutions and Practices*, reviewed policy responses to 18 major ‘disasters’— such as mining tragedies and the mis-selling of financial

<sup>61</sup>NSW Business Chamber, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016, 15

<sup>62</sup>New South Wales Auditor-General’s Report, *Performance Audit Red tape reduction*, 2016

products – to test how failure of regulation may have contributed to these incidences, and to identify what aspects of regulatory architecture, institutional design and practice need to be present and working well to avoid recurrences.<sup>63</sup>

This work found a number of factors related to the design and governance of institutions contributed to the failure of regulation. It recommended that institutional design needs to include clarity of roles and objectives for accountability, and strong monitoring and oversight arrangements, to ensure that regulatory agencies and regimes are working as intended.

Similarly, the Panel finds it is currently unclear who in NSW Government is responsible for an overarching government strategy for regulatory policy or clear strategies for improvement of regulatory practice at each stage of its lifecycle. If NSW is faced with a significant regulatory failure in one area, this will make it difficult to provide assurance to the community that it is not a systemic failure of the regulatory policy framework. It will also be more difficult to assure the community that policy decisions are based on robust assessment of all possible options.

### **Operational models considered**

A comparison of the key features of models in a number of other jurisdictions was provided in the Panel's draft report to prompt discussion with stakeholders. These ranged from dedicated central independent oversight and support for regulatory quality, to more devolved models of quality assurance by individual agencies (Appendix E). The Panel posed a question in the draft report to get stakeholders' views on the most effective arrangements for NSW, and a better understanding of potential models in the NSW context.

Stakeholder discussion on the best arrangements canvassed the pros and cons of maintaining the status quo, or designating greater accountability for regulatory policy oversight to an existing central agency, an independent body or an independent body with Cluster-based regulation units.

There was general agreement that the current approach in NSW, with a lack of central regulatory policy functions, does not offer sufficient support for a robust system or sustainable improvements throughout the regulatory lifecycle. There was strong agreement among stakeholders that a central function would be valuable in championing, supporting and assessing best practice in regulatory design and implementation.

Some stakeholders highlighted the need for a dedicated centralised governance body that is both independent and well-credentialed in evaluating proposals' assessment, yet sufficiently close to subject matter experts, so that it has a deep understanding of the area and outcomes sought.

Business stakeholders strongly supported a strong central role to improve practice and drive the reduction of regulatory burden. Overall, government stakeholders agreed that there is a case for a central body that provides capability building, assistance and coordination of the regulatory system across government. They were less certain of the efficacy of an independent gatekeeping body outside the system, with minimal access or visibility of the Cabinet process. Government stakeholders noted the difficulties of reconciling a prescriptive critical approach for regulatory quality assessments and the non-confrontational, collaborative approach required for regulatory capability development to drive culture change.

There was consensus that a visible high-level Government commitment is needed to leverage the opportunities that can be gained for NSW from a new regulatory policy framework and better regulatory practice.

These views align closely with OECD recommendations to its members to establish mechanisms and institutions to actively provide oversight of regulatory policy procedures and goals, support

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<sup>63</sup>New Zealand Productivity Commission, *Regulatory Institutions and Practices*, 2014

and implement regulatory policy and thereby foster regulatory quality.<sup>64</sup> This includes a standing body close to the centre of government to ensure that regulation serves whole of government policy.

## 5.2 Key features of governance arrangements needed to drive change

The Panel considers there are five key features needed for governance arrangements to improve practice and reduce risk in regulatory development, management and implementation:

- a visible and sustainable commitment across political and bureaucratic cycles (i.e. elections, changes in government, and changes in bureaucratic leadership, functions and people)
- independent quality assurance
- transparency
- effective capability building
- strong advocacy for statewide benefits.

### Ministerial responsibility and leadership

There was strong consensus among stakeholders that a Ministerial champion for regulatory quality was vital for effective advocacy of good regulatory policy and practice. Stakeholders agreed that such a custodian or ‘champion’ should have the authority to lead and support sector-wide cultural change, and be a strong voice in Cabinet on matters of regulatory quality.

However, stakeholder views on the appropriate Minister to be responsible for advocating regulatory policy and the powers of such a Minister were mixed. The NSW Business Chamber thought that any central function should report directly to a responsible Minister, the Premier or Cabinet as a whole; and IPART considered that, at least initially, the Premier should be responsible. The Panel notes, as IPART pointed out, that BRO was not as effective as it could be due to its lack of independence, inadequate resourcing and ineffective ‘championing’ of regulatory quality within the Government.<sup>65</sup>

The Panel heard from some stakeholders that assigning regulatory policy and reform to the Treasurer would align with the Treasurer’s portfolio interests in economic growth, productivity improvement and competition reform. Ministerial responsibility for regulatory policy lies with the Treasurer in Victoria, Queensland, Western Australia, South Australia and the Northern Territory.

Stakeholders have pointed out that there are conflicts of interest for Ministers who take this role and have responsibility for regulatory activities. However, this conflict of interest would arise for a number of Ministers, as well as both the Premier and Treasurer, given their responsibilities for balancing broader policy and economic priorities.

Also, many stakeholders expressed concern over the effectiveness of resurrecting a model similar to the previous BRO. A number expressed doubt that Minister-led regulatory policy functions alone would be sustainable over successive changes in machinery of government and resolving political pressures.

A model similar to the Victorian Government overcomes this issue with an independent Commissioner as the enduring central focus and leadership, working with the public sector to improve regulatory practice, supported by an office within the Victorian Treasury.

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<sup>64</sup>OECD, *Recommendation of the Council on Regulatory Policy and Governance* 2012

<sup>65</sup>IPART, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016

In the NSW context, an independent Commissioner would be a central champion and enabler for driving culture change and accountability for regulatory policy by working with agencies in a way that supports the regulatory stewardship principles. This role will provide a persistent and strategic focus on regulatory policy performance and red tape reduction across political and bureaucratic cycles and changes.

An effective Commissioner will have a deep understanding of the current challenges for business, markets and government, and of the opportunities that can be realised through improving regulatory environments. The most significant skill for this role will be the capacity to lead change in culture and capability to support new ways of doing things across government.

The Panel is of the view that this type of leadership will achieve more effective outcomes than the status quo, or than the alternative of an independent compliance monitor that would open itself up to similar issues as those faced by the former BRO model.

### **Independent assurance framework for regulatory proposals reduces risk to Government**

*“...only with repeated independent, contestable analysis, will government agencies establish trust amongst the community.”<sup>66</sup>*

The Panel considers the lack of an independent review function for regulatory proposals in NSW as a key shortcoming in the state’s current regulatory framework. It is also a key concern of a number of stakeholders.<sup>67</sup> This was reflected in comments from stakeholders such as the Retail Council, which said:

*“A team of independent experts would be able to assess the appropriate level of assessment that is done for each regulation. Without an independent authority to decide this and conduct the work there is a risk that a tiered system implemented by individual departments would see a bias towards selecting the lowest level of assessment being done as often as possible.”<sup>68</sup>*

An assurance process is needed to ensure decision making is supported by rigorous and robust analysis, particularly where there are significant impacts on the community and economy. Independent assurance frameworks have recently been established in NSW for major capital and recurrent expenditure on infrastructure and reform programs for these reasons.

The Panel considers evaluation of agencies’ regulatory proposal analyses by a Commissioner who is independent of the agency, is critical to maintaining regulatory quality. Independence in governance arrangements will also:

- mitigate any perception of a conflict of interest for Ministers with responsibility for improving regulatory performance, alongside administration of regulation or other competing priorities
- promote trust in robust policy development
- enhance transparency of, and accountability for, regulatory outcomes.

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<sup>66</sup>Centre for International Economics, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016, 9

<sup>67</sup>NSW Treasury, IPART, NSW Business Chamber and Centre for International Economics

<sup>68</sup>Retail Council, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016, 3

Stakeholders were generally in favour of an independent assurance role to review and provide advice on the evaluation of regulatory proposals proceeding to Cabinet, and to ensure compliance with best practice regulatory policy.

A key part of the Commissioner's role will be to work with government agencies from the early stages of policy development to improve the quality of regulatory proposals and PPEs. The benefit of a Commissioner that is independent of regulatory agencies, though not independent of government, will be the ability of the Commissioner to provide advice to Cabinet, Ministers and agencies throughout the submission development process. This would include providing comments on submissions in the Cabinet system, which may recommend a delay to Cabinet's consideration to ensure adequate analysis in PPEs. This continuity throughout key stages of the policy development process creates an effective assurance mechanism and better support for decision-makers.

An assurance framework for regulatory development may increase public confidence in the reasoning behind regulatory proposals and reduce the risk and cost to government of having to 'undo' reforms that do not achieve desired outcomes and/or have significant unintended impacts.

### **Transparency and accountability for regulatory outcomes**

Transparency makes clear to stakeholders the reasons why a decision was made, and whether it was made with appropriate policy advice.<sup>69</sup> This makes government accountable to the community for regulatory outcomes and strengthens the incentive of government to prepare regulatory proposals that stand up to scrutiny. As the Auditor-General's report notes:

*“Public access improves regulatory outcomes and accountability by allowing the community to scrutinise decisions as they are being made.”<sup>70</sup>*

Transparency makes government more accountable. The Panel considers that an effective accountability mechanism requires clear reporting and publishing requirements set at various levels of detail and provided for various stakeholders' interests. This should allow public scrutiny of the public sector's overall performance. It should include publication of:

- assurance that agencies and regulators have the appropriate systems and capability in place to meet the requirements of regulatory policy. This should be in the form of an annual attestation by Secretaries and/or heads of NSW agencies, on the adequacy of systems and processes put in place to implement the regulatory policy framework
- an annual report by Clusters on their regulatory stewardship strategy that includes whether each regulation remains fit for purpose and in the public interest, forward plans for reviews and strategies for improving culture and capabilities
- an annual assessment by the Commissioner on the adequacy of the public sector's implementation of regulatory stewardship, including progress in red tape reductions and PPE quality across the public sector
- Post-Implementation Reviews for proposals that have not been able to adequately meet assessment requirements prior to implementation
- periodic reviews by the Auditor-General as part of its program of work, to provide an independent evaluation of the operation and effectiveness of the Government's overall framework.

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<sup>69</sup> NSW Business Chamber, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016

<sup>70</sup> New South Wales Auditor-General's Report, *Performance Audit Red tape reduction*, 2016, 4



**Panel view: Public statement on regulatory stewardship**

It is important to provide assurance to the community that agencies and regulators have the appropriate systems and capability in place to implement a stewardship approach. The Panel considers that NSW Government agency heads should make an annual public statement, or attestation, similar to those currently used for internal policies such as risk management and information security. These statements are typically in the form of a statement that specified minimum requirements were met in the previous financial year.

A template for a Regulatory Stewardship Statement by Secretaries and/or heads of NSW agencies would be expected to include attestation that:

- appropriate systems and strategies are in place to effectively develop and manage regulation, and an associated regulatory policy and performance culture, in accordance with the Better Regulation Act
- strategies and supporting systems are in place to adequately mitigate identified risks in the development and management of regulatory instruments administered by the agency
- specific progress has been made on compliance, including initiatives to meet Government priorities in this area, and whether it was 'compliant', 'non-compliant' or 'in transition' during the reporting period.

**Driving best practice and improved capability across government**

Stakeholders generally agreed there was an absence of a visible or coordinated function within the Government focused on improving all aspects of the regulatory lifecycle. NSW regulators and agencies consulted felt that they would value support to achieve best practice.

Regulatory design and execution is not considered a recognised professional discipline in Australian state governments. However, the Commonwealth Government, through the Office of Best Practice Regulation, considers a centralised approach to capability building is a priority to improve the delivery of regulation. New Zealand has recognised this need for central coordination by embarking on the Government Regulatory Practice Initiative (G-Reg) to improve regulatory capability through professionally-recognised Regulatory Compliance Qualifications.

To enable real efficiency in the regulatory environment the Government will need to draw on a wide range of expertise as well as good government regulatory practice. A deeper understanding of private sector or community impacts and new options for responding to disrupting business models will be needed to meet future regulatory challenges. A central body, supported by experts in regulatory practice, will be essential in identifying and disseminating advice on regulatory design and implementation across government.

A number of NSW regulators felt that a central capability building function could play a significant role in driving the necessary cultural change across the NSW Government to implement best practice. Others thought that enhancing the current regulatory capability-building roles of the Public Service Commission and DFSI, coupled with better targeted departmental capability-building initiatives, could be equally effective.

The Panel considers that a cultural shift is essential in driving best practice and accepts the NSW Business Chamber's view that an overly bureaucratic approach, involving rules and mandates, can stifle cultural acceptance.<sup>71</sup>

<sup>71</sup>NSW Business Chamber, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016

Some industry and government stakeholders see capability-building as an essential component of a better quality assurance framework and more efficiently done at the centre by working with agencies by:

- providing access for agencies and regulators to a panel of experts on a wide range of regulatory policy and practice from the private, non-government and academic sectors, to help build capability in regulators
- helping identify gaps and build or share the necessary capabilities required to perform robust assessments of policy options
- providing practical guidance and training to regulators
- providing a feedback loop to agencies and regulators on the assessment of the quality of regulatory proposals.

Several stakeholders suggested combining central and agency-led support to instill best practice within their regulatory culture. That is, key staff in agencies would collaborate with a central body to more effectively disseminate new regulation making practices and influence culture.

The Office of the NSW Small Business Commissioner described the value of combining central and agency-led support to promote regulatory assessment quality:

*“A degree of central oversight from an independent body would be necessary to perform a gatekeeper or quality assurance function. Equally, a degree of more decentralized oversight will encourage regulatory best practice to become embedded and 'business as usual' within departments. It would also ensure best practice is adopted early in policy redevelopment process, rather than as an afterthought or 'tick the box' exercise.”<sup>72</sup>*

### **Moving away from a siloed approach to get better regulatory outcomes**

Several stakeholders considered that a fundamental role of central government is to monitor emerging trends, issues and opportunities across the whole of government, including with respect to regulatory environments. This recognises that agencies may not always be able to look or act further than their specific regulatory responsibilities.

A central point of contact for industry, government and the community will address the expectation of assistance in reducing red tape, brokering better outcomes through regulatory reviews, education or other mechanisms that can consider industry sectors as a whole or cut across agency boundaries.

A whole of government view is necessary to undertake certain functions that are not feasible or efficient with a siloed approach and are essential to drive real statewide benefit, including:

- a point of contact to promote and coordinate cross jurisdictional initiatives, particularly where the benefits for NSW are broader than specific agencies or stakeholder groups views
- driving a culture of continuous improvement and collaboration to reduce red tape, including to monitor and manage the cumulative impact of regulation on an industry or community sector (especially when a number of regulators involved)
- a central view of the efficacy of regulatory stewardship
- leveraging emerging trends and opportunities for NSW, including responding to new business models or technologies and through National Partnership reforms.

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<sup>72</sup>Office of NSW Small Business Commissioner, Submission, Independent Review of the NSW Regulatory Policy Framework Issues Paper, 2016, 3

## Panel view: NSW needs clearly defined central leadership for regulatory best practice



The Panel considers that Ministerial leadership of regulatory policy is critical. It is noted that there is the risk that leadership can be compromised by various factors such as political appetite (or lack of) for leading regulatory policy, machinery of government changes and conflicts of interest with other portfolio responsibilities. To mitigate this, and ensure sustainable and consistent effort, clear governance and structural arrangements need to be in place and established by statute.

The Panel believes that NSW's current lack of clearly defined accountabilities for regulatory quality exposes it to significant risks, such as a higher cost burden and unintended consequences from poorly informed regulatory decisions creating sub-optimal policy outcomes for businesses, consumers and the community.

Allocating a central function to manage and monitor a regulatory policy framework would address these risks, and result in better regulatory outcomes for the community.

### Proposed governance arrangements:

#### Ministerial commitment

- The Panel considers that a senior Minister with sufficient authority should be assigned responsibility for regulatory policy to advocate within Cabinet, to drive high quality regulation and reform by the NSW Government. It is imperative that this Minister is supported by rigorous processes, structures and enduring independent regulatory assurance mechanisms within the Government.

#### Enduring leadership

- The Panel heard that it is critical that high level leadership is established within the public sector to actively lead a new regulatory policy framework and pursue regulatory reform opportunities for NSW. A question on the most appropriate governance arrangements was posed in the Panel's draft report. The discussion with stakeholders mostly centred around striking the right balance between 'additional bureaucracy' and effective and sustainable support for decision-makers, regulators and stakeholders.

The Panel recommends a model that combines a visible proactive presence in the form of a Commissioner, supported by a secretariat with expertise in regulatory development, assessment and practice. Key to success for this role will be working from within Government and the Cabinet process, to provide advice and support to agencies with an independent and impartial viewpoint.

It is considered that this level of leadership, as a clearly identifiable focal point for both the government and private sector, is essential to drive the meaningful change needed for NSW to meet future challenges.

#### Dedicated secretariat and support for the Commissioner and Minister

- A central secretariat, independent of regulatory agencies, is essential to provide independence for the assessment of agency proposals and provide a whole of government perspective. Currently three central agencies have related functions and resources that can be enhanced or refocused to support a more cohesive approach. For example, a dedicated central secretariat function will be able to support the Commissioner with specialist advice on whether regulatory proposals have been developed with sufficient rigour. This advice would complement and enhance the current roles of DPC and Treasury in advising the Premier and Treasurer, respectively, on the policy merits of proposals.

Employees from across government and the private sector should be seconded to the secretariat to support the diversity of views and skills necessary for this function. This can be augmented by an external reference panel to provide agencies and the Commissioner with access to leading regulatory specialists – from the private, non-government and academic sectors – when they need to tap into further expertise on complex areas of regulatory reform.

### 5.3 Preferred option: sustainability through leadership, independence and transparency

The table below provides more detail on the Panel's preferred option on the Regulatory Policy Framework's governance, including roles and reporting responsibilities.

**Table 1. Regulatory Policy Framework governance and reporting**

	Role	Activities
Minister	<ul style="list-style-type: none"> <li>Champion and advocate within Cabinet for high quality regulatory policy and reform</li> </ul>	<ul style="list-style-type: none"> <li>Promotes better practice and outcomes of regulatory policy in Parliament, Cabinet and the community</li> </ul>
Commissioner	<p><b>Independent of regulatory agencies</b></p> <ul style="list-style-type: none"> <li>Works with the public sector, industry and the community to monitor and improve the practice and outcomes of regulatory policy</li> <li>Leads or promotes initiatives across the public sector to reduce unnecessary regulatory burden</li> <li>Provides independent advice to Cabinet, the Premier and Ministers on regulatory policy and practice</li> <li>Leads whole of government policy and strategy, including culture and capability change, in relation to regulatory policy and practice</li> <li>A central driver and point of contact for cross-jurisdictional regulatory initiatives</li> </ul>	<ul style="list-style-type: none"> <li>Identifies and initiates targeted reforms, reviews, or health checks (on industry or scheme) and PIR where required</li> <li>Publishes annual reports on the efficacy of the public sector's regulatory stewardship and the management of the stock and flow of regulation including future opportunities for improvement, challenges and trends in the regulatory environment; a summary of the adequacy of PPE assessments; and reductions in red tape</li> <li>Provides advice to Cabinet on the adequacy of PPEs, and can recommend to the Premier and Ministers a delay on the progress of proposals to ensure adequate analysis in PPEs</li> </ul>
Central function (secretariat) supporting the Commissioner	<p><b>Independent of regulatory agencies</b></p> <ul style="list-style-type: none"> <li>Works with agencies to improve the practice and outcomes of regulatory policy, including the cultural change necessary for new approaches to regulation</li> <li>Provides a central view of regulatory stewardship, and emerging trends/opportunities for government</li> <li>Is a source of expertise for capability building</li> <li>Brings together and refocuses any existing central functions or resources related to regulatory policy from DFSI and Treasury</li> <li>Coordinates access to expertise from across the government and private sectors</li> </ul>	<ul style="list-style-type: none"> <li>Maintains and actively promotes principles and guidance.</li> <li>Provides advice to agencies on obligations under the Framework</li> <li>Provides education and advice for agencies to improve capability and drive new approaches, regulatory trials, co-design, data use and digital services</li> <li>Undertakes assessment of the adequacy of PPE</li> <li>Works with agencies to publish post-implementation reviews of selected reforms</li> </ul>
Secretaries	<ul style="list-style-type: none"> <li>Lead statutory obligations under regulatory stewardship, for the effective delivery and management of the stock and flow of regulation to ensure the regulations they administer remain fit for purpose and in the public interest</li> <li>Establish KPIs for executives and Regulator Performance Framework</li> </ul>	<ul style="list-style-type: none"> <li>Publishes Secretaries' annual attestation on stewardship</li> <li>Annual Cluster stewardship report published, including strategy, status of current stock of regulation and forward plans (self-assessed)</li> <li>PPEs published, after Cabinet decision and/or introduction to Parliament</li> </ul>

	Role	Activities
		<ul style="list-style-type: none"> <li>Programs to improve the experience of regulation e.g. Commerce Regulator program, portals, Construction Assist</li> </ul>
Cluster based support officers/ teams	<ul style="list-style-type: none"> <li>Agency resources identified as key expertise in regulatory practice, to be the point of contact between the Cluster/regulator and Central function (secretariat)</li> <li>Works within the organisation to improve the practice and outcomes of regulatory policy, including the cultural change and capability necessary for new approaches to regulation</li> </ul>	<ul style="list-style-type: none"> <li>Engage with the Central function and regulatory and policy staff within the organisation to support better regulatory development and practice</li> <li>Support the Secretary and the Cluster with obligations under the framework, including reporting</li> </ul>
DPC and Treasury	<ul style="list-style-type: none"> <li>Provide advice to the Premier and Treasurer on Submissions to Cabinet, informed by a number of sources including the Commissioner's assessment of PPEs.</li> </ul>	<ul style="list-style-type: none"> <li>Engage with the Central function (Secretariat) on the adequacy of PPE and with agencies on policy proposals</li> <li>Can recommend a delay on the progress of proposals to ensure adequate analysis in PPEs</li> </ul>

#### Recommendation 24:

Assign responsibility for regulatory policy to a senior Minister to champion and advocate within Cabinet for high quality regulatory policy and reform.

#### Recommendation 25:

Establish a Commissioner role, independent of regulatory agencies, to provide a visible and proactive presence for the public sector and the community to:

- a) work with government agencies, industry and the community to monitor and improve the practice and outcomes of regulatory policy
- b) lead and promote initiatives to reduce red tape. This includes identifying significant regulatory review and reform opportunities, particularly in areas of disproportionate or cumulative regulatory burden, sectors experiencing rapid change or those involving multiple agencies (including designating a lead agency where conflicts arise or where there are multiple jurisdictions)
- c) provide independent advice to the Premier and Ministers on regulatory development process and practice, including an independent assessment of the adequacy of PPEs and recommending delay on the progress of proposals if required to ensure adequate analysis in PPEs
- d) promote culture change and skills across the public sector to ensure better quality regulatory practice and impact, including:
  - developing guidance to support the regulatory stewardship approach
  - coordinating education and providing advice on regulatory best practice
  - engaging with agencies early in the policy development process to support compliance with PPE requirements, including developing practical guidance
- e) be a central driver and point of contact for cross-jurisdictional regulatory initiatives
- f) publish annual reports on the efficacy of the public sector's regulatory stewardship and the management of the stock and flow of regulation. These reports should cover future opportunities for improvement, challenges and trends in the regulatory environment; a summary of the adequacy of PPE assessments;

and progress in red tape reduction

- g) publish post-implementation reviews of selected reforms, including (but not limited to) at the request of the NSW Government
- h) be supported by a secretariat with expertise in regulatory development and practice.

**Recommendation 26:**

Establish a highly-skilled and well-resourced central function (secretariat) to support the Commissioner, that is independent of regulatory agencies, including:

- a) bringing together and refocusing any existing functions or resources related to the administration of a regulatory policy framework, from the Department of Finance, Services and Innovation and Treasury, to support the role of the Commissioner
- b) establishing a staffing mix from across the government sector and private sector to build capability, possibly through the use of short and long-term secondments
- c) the secretariat should be supplemented by establishing a panel of external regulatory experts from the private, non-government and academic sectors, that can be accessed by the Commissioner and agencies when they need to tap into further expertise on complex areas of regulatory reform.



## Appendix A: Terms of reference

### Overview

The NSW Government is committed to ensuring NSW laws are reasonable and responsive to the economic, social and environmental needs of our community and do not impose unnecessary red tape on business, consumers and the community.

This review will examine the current NSW regulatory policy framework to develop recommendations for enhancing the policies, institutions and practices that underpin regulatory quality across the whole of NSW Government. The Review will have regard to the NSW Government's response to the NSW Auditor-General's Performance Audit Report Red tape reduction.

### Matters for consideration

The Review will consider and make recommendations of the following:

- a. Principles and administrative arrangements for the development and periodic review of NSW acts, regulations and other significant quasi-legislative instruments, such as Ministerial Orders and Codes of Conduct, including whether there are sectors of the economy that need or would benefit from targeted regulatory review.
- b. Ex ante and ex post requirements for regulatory impact assessment of proposals, including appropriate level of assessment and evidence for low, medium and high significance proposals, or whether all proposals should receive the same level of analysis.
- c. Governance and institutional arrangements, including roles and responsibilities across government for the administration and oversight of the regulatory policy framework, and mechanisms for the systematic review of regulation.
- d. Arrangements to ensure regulation supports innovation, including ensuring that regulation is fit for purpose in the digital age, and that it remains appropriate as technology, business models and the role of government changes over the coming decades.
- e. Measures to ensure regulatory policy reform includes a business perspective on regulation with the aim of making it easier to start and continue a business and enable efficient supply chains and investment.
- f. Disseminating current regulatory best practices, including greater use of digital and data strategies, to enable regulators to more effectively and efficiently achieve their mandates in the face of rapidly changing technology and community expectations.
- g. Enhancing the capacity of NSW Government agencies and building capability within the public service to effectively apply the regulatory policy framework.
- h. Accountability arrangements, including publication of the outcomes of regulatory reviews and compliance with the regulatory policy framework, consistent with Open Government principles.

### Scope of the Review

The Review includes all current statutory and administrative requirements, including intergovernmental commitments, for the development, assessment, reform and review of NSW legislation and regulations to the extent they impose regulatory costs on business, consumers and the community, including:

- a. *Subordinate Legislation Act 1989* requirement for the staged repeal of regulations, and public consultation and regulatory impact statements for new regulations.
- b. *Legislation Review Act 1987* requirements for the Review of new legislation and regulations by the Legislation Review Committee of NSW Parliament.
- c. Other statutory review processes, including requirements in individual acts for their review after 5 years.
- d. NSW Government *Guide to Better Regulation* and other policy and guidance documents and processes adopted by the NSW Government to support regulatory programs.
- e. COAG agreements on competition policy and regulatory reform
- f. Agencies and institutions that administer regulation as provided for in legislation.

### **Out of scope**

The Review will not consider:

- a. Statutory reviews arising from amendments to Bills in Parliament.
- b. Legislative drafting conventions and policies.

### **Other jurisdictions**

The Review should consider overseas and inter-jurisdictional experience insofar as it may be useful for the Review.

## Appendix B: Stakeholders and consultation

The following organisations and individuals provided feedback to the Panel on the Review:

Government sector	Government sector	Consumer groups, and others
Audit Office of NSW	Legislation Review Committee	CHOICE
Australian Charities and Not-for-profits Commission	Liquor and Gaming NSW	Keep Sydney Open
Australian Competition and Consumer Commission	Local Land Services	NSW Council of Social Service
Australian Taxation Office	New Zealand Department of Prime Minister and Cabinet	Professor Gary Banks
Australian Treasury	New Zealand Treasury	Professor Gary Sturgess
Board of Surveying and Spatial Information	NSW Architect Registration Board	Professor Martin Lodge
Cross Border Commissioner	NSW Dams Safety Committee	Professor Percy Allan
Customer Service Commissioner	NSW Fair Trading	<b>Business and regulated parties</b>
Data Analytics Centre	NSW Ministry of Health	Australian Industry Group
Department of Education NSW Education Standards Authority	NSW Police Force	Centre for International Economics
Department of Finance, Services and Innovation	NSW Resources Regulator	Housing Industry Association
Department of Industry, Innovation and Science	NSW Small Business Commissioner	Infrastructure Partnerships Australia
Department of Industry, Skills and Regional Development	NSW Treasury	Liquor Stores Association NSW
Department of Justice	Office of Local Government	Motor Traders' Association of NSW
Department of Planning and Environment	Office of State Revenue	NSW Business Chamber
Department of Primary Industries	Parliamentary Counsel	NSW Farmers
Department of the Prime Minister and Cabinet	Professional Standards Authority	NSW Minerals Council
Environment Protection Authority	Public Service Commissioner	Professional Standards Authority
Fire and Rescue NSW	Roads and Maritime Services	Property Council of Australia (NSW Division)
Greater Sydney Commission	Safework NSW	Retail Council
Independent Pricing and Regulatory Tribunal	State Insurance Regulatory Authority	Sapere Research Group
Information and Privacy Commission NSW	Transport for NSW Point to Point Transport Commission	Stone and Chalk TechSydney
Infrastructure NSW	Victorian Commissioner for Better Regulation	Uber

## Appendix C: The Commonwealth Government’s evaluation process

Agencies must prepare a Regulatory Impact Statement (RIS) for all Cabinet submissions.

### Preliminary assessment stage

Agencies prepare a Preliminary Assessment to determine whether a RIS is required and, if so, the level of analysis required. Agencies do this by answering seven rudimentary RIS questions:

- What is the problem you are trying to solve?
- Why is government action needed?
- What policy options are you considering?
- What is the likely net benefit of each option?
- Who will you consult about these options and how will you consult them?
- What is the best option from those you have considered?
- How will you implement and evaluate your chosen option?

Agencies provide their Preliminary Assessment to the Office of Best Practice Regulation (OBPR), which advises whether a RIS is required and, if so, the level of analysis required.

The level of analysis required is tiered into three types of RIS:

- short-form RIS
- standard-form RIS
- long-form RIS.

The types of proposals appropriate for each tier of RIS and the level of analysis required is outlined in the table below:

	WHEN IS IT USED?	WHAT MUST IT CONTAIN?
LONG FORM	<ul style="list-style-type: none"> <li>• The policy proposal has substantial or widespread impact on the economy.</li> <li>• The proposed changes affect a large number of businesses, community organisations or individuals.</li> <li>• The administrative and compliance costs are high or onerous.</li> <li>• There may be determined opposition among stakeholders or the public.</li> <li>• The issue is sensitive, contested and may attract media attention.</li> </ul>	<ul style="list-style-type: none"> <li>• Answers to all seven RIS questions.</li> <li>• Analysis of genuine and practical policy options.</li> <li>• Analysis of the likely regulatory impact.</li> <li>• Evidence of appropriate public consultation.</li> <li>• A formal cost–benefit analysis.</li> <li>• A detailed presentation of regulatory costings and offsets.</li> </ul>
STANDARD FORM	<ul style="list-style-type: none"> <li>• The policy proposal has measurable but contained impact on the economy.</li> <li>• The proposed changes affect a relatively small number of businesses, community organisations and individuals.</li> <li>• The administrative and compliance costs are measurable but not onerous.</li> <li>• There is unlikely to be vigorous opposition among stakeholders or the public.</li> <li>• The issue is uncontroversial and unlikely to attract media attention.</li> </ul>	<ul style="list-style-type: none"> <li>• Answers to all seven RIS questions.</li> <li>• Analysis of genuine and practical policy options.</li> <li>• Analysis of the likely regulatory impact.</li> <li>• Evidence of appropriate public consultation.</li> <li>• A detailed presentation of regulatory costings and offsets.</li> </ul>

	WHEN IS IT USED?	WHAT MUST IT CONTAIN?
SHORT FORM	<ul style="list-style-type: none"> <li>The policy issues are simple, clear cut or policy alternatives limited.</li> <li>The policy is a matter of national security, public safety, natural disaster or pressing event.</li> <li>The regulatory impact of the policy is of lower priority than some other factor.</li> <li>A RIS has recently been completed and only minor modifications have been made to the original policy options under consideration.</li> <li>The proposal is non-regulatory, minor or machinery in nature.</li> </ul>	<ul style="list-style-type: none"> <li>A summary of the proposed policy and any options considered.</li> <li>An overview of likely impacts.</li> <li>An outline of regulatory costs and cost offsets.</li> </ul>

In general, Short Form RISs would only be prepared when a proposal is non-regulatory or administrative/machinery in nature, or is expected to have only a minor regulatory impact on individuals, businesses and community organisations. If an agency does prepare a Short Form RIS for a Cabinet proposal that has a more than minor regulatory impact it will be classified as an Interim RIS, that should be converted to a Standard Form or Long Form RIS (as appropriate) prior to a final decision. If the Interim RIS is not converted before a final decision then the Interim RIS will be published by the OBPR following public announcement of the decision and noted as non-compliant.

### Early assessment stage

- If an agency needs to prepare either a standard or long-form RIS, they complete an early assessment RIS – i.e. a partly completed RIS – by answering the first four RIS questions and planning the forthcoming consultation process.
- The early assessment RIS is signed off by the agency’s Secretary, Deputy Secretary or Chief Executive, and submitted to the OBPR for early feedback.
- Agencies are encouraged to work with the OBPR to resolve any issues at this stage and throughout the RIS development process.

### Final assessment stage is a two-pass process:

#### First pass:

- The first pass RIS must be certified by the agency’s Deputy Secretary, Secretary or Chief Executive.
- Agency formally lodges its RIS with the OBPR.
- The OBPR assesses whether the RIS is compliant, e.g.
  - Does the RIS answer all seven RIS questions?
  - Are regulatory costs properly quantified?
  - Does the analysis adequately reflect stakeholder feedback?
  - Are policy options adequately considered?
- The OBPR provides formal written feedback to the agency to enable any necessary improvements to the RIS.
- This first pass written feedback from the OBPR is *not* published.

#### Second pass:

- The second pass RIS, containing any improvements, must be certified by the agency’s Deputy Secretary, Secretary or Chief Executive.

- The agency provides the second pass RIS to the OBPR.
- The OBPR provides a formal written assessment of the RIS.
- A compliant RIS will conform to all applicable processes and have all necessary inclusions, such as an appropriate consultation approach and a minimum of three policy options, one of which must be a non-regulatory option.
- A non-compliant RIS will contain unsatisfactory analysis, inaccurate costings or an inadequate consultation process.

### **Policy decision and publication of RIS**

- After final assessment by the OBPR, the agency provides the RIS to the relevant decision-makers (e.g. with a Cabinet submission).
- A non-compliant RIS may be provided to the relevant decision-makers, however the OBPR's final assessment will be published on the OBPR website, even where it is non-compliant.

### **Special cases**

The following are special cases where a government entity can be exempt from the need to complete a RIS:

- Prime Minister's exemptions
- costing extension
- independent reviews
- election commitments
- carve-outs
- Cabinet Secretary's exemptions
- revenue raising and protection measures.



## Appendix D: Targeted reviews

### Role of an independent Commissioner for better regulation

As identified in this report, a renewed program of regulatory reviews should be identified and overseen by the independent Commissioner as part of its responsibilities. This would support the introduction of productivity-enhancing reforms and meeting other core NSW policy objectives.

The *Intergovernmental Agreement on Competition and Productivity-enhancing Reform (the Agreement)* signed by NSW in December 2016 indicates priority areas for regulatory review and reform drawing on – but not limited to – the *Australian Government Competition Policy Review* recommendations, including the areas outlined below, which states and territories are responsible for (either solely or jointly with the Commonwealth Government). These targeted areas for review are discussed below and the Panel supports further work focusing on the priority sectors that will deliver the greatest public benefit from concerted regulatory reform.

### Priority areas identified by Australian Government Competition Policy Review

- **Commercial planning and zoning, and residential land-use planning regulations**

The *Australian Government Competition Policy Review* recommended that restrictions on commercial planning and zoning should be subject to a public interest test to ensure that any unnecessary impediments to competition are removed. In particular, competition between businesses, restrictions on particular types of stores, the viability of existing businesses and proximity restrictions should not be considered as relevant planning considerations. In addition, the Agreement identifies residential land-use planning regulation as a priority area for review, with a view to removing unnecessary impediments to both residential and major project developments.

The Agreement also requires parties to identify any other regulatory restrictions to competition, such as zoning rules that impede in-fill opportunities for new housing or construction of higher-density residential buildings. This might include, for example, local environment plans that suppress housing construction or reduce the pace of supply where they are complex, inconsistent or create delays.

- **Road infrastructure and pricing**

The *Australian Government Competition Policy Review* highlighted that reform of road pricing and provision should be a priority for the Commonwealth, state and territory governments to promote efficient use and investment in road infrastructure. It would involve developing a regulatory framework to enable cost-reflective road pricing, with pricing subject to independent oversight and revenues reinvested back into road infrastructure. This is a key area for interjurisdictional reform. Road related taxes and charges are imposed at both the Commonwealth and state level and reform would, over time, involve replacing current charges and taxes with direct pricing. The Panel notes that NSW has been working with other jurisdictions, including the Commonwealth, to:

- accelerate heavy vehicle road reform including identifying steps to transition to independent pricing regulation by 2017-18
- investigate the benefits, costs and options for applying direct user charging to all vehicles.

- **Water infrastructure and pricing**

Jurisdictions, through COAG, committed to implement the National Water Initiative in 2004 with a view to applying a nationally consistent approach to best practice pricing to promote efficient use of and investment in water infrastructure. However, progress on the initiative stalled over the years. The *Australian Government Competition Policy Review* recommended that jurisdictions should renew their efforts to implement this national initiative, which should involve stronger economic regulation in urban water and creating incentives for increased private participation in the water sector through improved pricing practices.

- **Regulations affecting retail trading hours**

The NSW Government reduced regulatory restrictions on Boxing Day trading in 2015; although trading restrictions remain in place for Easter Sunday, Good Friday, ANZAC day prior to 1pm and Christmas Day. The Panel notes, however, that the *Australian Government Competition Policy Review* recommended restrictions should be strictly limited to these days (except Easter Sunday) where states wish to retain trading restrictions. Notwithstanding, there is also scope to broaden and/or streamline exemptions for the existing restrictions in NSW as recommended by the Australian Government Competition Policy Review (e.g. there are currently exemptions for 51 specific shops in the CBD, Newcastle and Cabramatta).

- **Regulations affecting taxis and ridesharing**

In December 2015, the NSW Government announced reforms that included enabling ridesharing services to operate legally (for pre-booked services) and repealing more than 50 taxi and hire car regulations. The Panel notes that the Victorian Government has committed to abolishing taxi licence fees and enabling ridesharing services (with appropriate safeguards in place).

- **Pharmacy regulation**

NSW, together with other states and territories, currently places restrictions on pharmacy ownership, which are governed by nationally consistent regulations (*Health Practitioner Regulation National Law (NSW)*). Alongside these restrictions, Commonwealth regulations place restrictions on where pharmacies may be located. The *Australian Government Competition Policy Review* recommended that pharmacy ownership and location rules should be removed in the long-term interests of consumers. Moreover, IPART identified the Pharmacy Registration and Renewal licence in the top 32 licences by regulatory burden.<sup>73</sup>

While NSW could remove restrictions unilaterally, the Panel notes an interjurisdictional approach could be taken to review current state-based ownership restrictions (states and territories impose the same restrictions under the National Law). This national approach might involve agreeing with the Commonwealth to review its current 6th Community Pharmacy Agreement (in place until 2020) at the same time, which restricts pharmacy location rules.

- **Liquor and gambling licensing**

NSW places a range of restrictions with respect to liquor licenses. The *Australian Government Competition Policy Review* recommended that state-based liquor and gambling regulations should be reviewed to ensure that they are meeting their stated objectives at least cost to consumers and are not unduly restricting competition. The Panel notes that following the release of the independent review of the state's liquor laws (the Callinan Review), the NSW

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<sup>73</sup>IPART, *Reforming licensing in NSW: Review of licence rationale and design*, Final Report, 2014

Government announced in December 2016 that it will maintain Sydney’s lockout and last drinks laws (with some amendments).

- **Agricultural marketing arrangements**

Under the *Rice Marketing Act 1983*, the NSW Rice Marketing Board maintains a single-desk export arrangement by issuing an exclusive export licence to SunRice. The Board is one of Australia’s two remaining agricultural marketing boards. Consistent with The *Australian Government Competition Policy Review’s* recommendation, the Productivity Commission issued a draft recommendation for the NSW Government to repeal the *Rice Marketing Act 1983* to create incentives for innovation in rice production and deliver cost savings in rice marketing that could increase premiums for some rice growers.<sup>74</sup> The Panel notes, however, that the NSW Government announced in December 2016 that following a statutory review of the *Rice Marketing Act 1983* it will renew the vesting powers of the NSW Rice Marketing Board, which will continue until June 2022.

- **Occupational and professional licensing**

The *Australian Government Competition Policy Review* Panel was of the view that licensing requirements should be reviewed to remove unnecessary restrictions, particularly barriers to entry and expansion that impede competition. In 2015, IPART listed the ‘top 40’ licences for review and reform by the NSW Government, including several occupational and professional licenses:

- Home Building Licence at #10,
- Certificate of Registration as a Real Estate Salesperson at #17,
- Valuer’s license at #35,
- Architect’s registration licence at #36,
- Individual Private Accredited Certifiers (building surveying and subdivision) at #40.

The Panel notes that in August 2015 the NSW Government announced that it would commit to reviewing the ‘top 40’ priority licences identified by IPART.

Moreover, the Panel notes that NSW could participate in further national harmonisation efforts. In 2013 COAG abandoned the national occupational licensing reform program, which was to include national licensing of the electrical, air conditioning, refrigeration, plumbing, gas-fitting and property industries.

### **Mandatory product standards**

The *Australian Government Competition Policy Review* recommended that mandatory product standards should be a priority area for review by the Commonwealth and states, including where international standards can be adopted in Australia, and recommended coordinated, interjurisdictional work to review existing competition restrictions.

In addition to the coordinated interjurisdictional review recommended by the *Australian Government Competition Policy Review*, there is also an opportunity for further interjurisdictional work on harmonisation of standards both domestically and with international standards. The Panel notes that at its October 2014 meeting, COAG agreed to explore adopting trusted international standards or risk assessment processes. The COAG Industry and Skills Council at its 2015 November meeting also noted that food industry and government standards for food can be reviewed for duplication.

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<sup>74</sup>Productivity Commission, *Regulation of Australian Agriculture*, Draft Report, 2016

### **Governments’ competitive neutrality, procurement and other commercial arrangements**

The *Australian Government Competition Policy Review* recommended that all governments review and apply the public interest test to policies governing commercial arrangements with the private sector and non-government organisations, including procurement policies, commissioning, public private partnerships and privatisation guidelines and processes. As the *Australian Government Competition Policy Review* final report points out, government policies and decisions in these areas can affect the range of goods and services ultimately available to consumers.

The Panel notes that the NSW Government released its commissioning policy in November 2016. In addition, the Commonwealth Government announced in March 2017 that it is reviewing its competitive neutrality policy, including its scope of application, effectiveness and oversight of compliance with competitive neutrality principles. The Panel encourages the NSW Government to consider the findings of that review with a view to their application in NSW where appropriate.

### **Priority areas for targeted regulatory reviews identified by stakeholders**

In addition, stakeholders consulted for this review identified a range of areas of regulation and policy, listed below, where there are significant regulatory barriers or overlap with regulation administered by the Commonwealth and other jurisdictions. The Panel recommends the NSW Government consider the following stakeholder identified areas (and notes that a number of these areas are also identified as priority areas for review in the *Agreement on Competition and Productivity-enhancing Reform*):

- **NSW planning and zoning regulations and the development application process** were raised by stakeholders as a concern. Non-traditional approaches to planning should be considered to allow zoning to keep pace with commercial and planning changes, particularly in industrial employment opportunities e.g. a digital printing facility could sit next to residential use properties, whereas heavy industry technology could not.
- **NSW procurement rules and practices that adversely effects competition**, in relation to commissioning of human services by smaller not-for-profit (NFPs) providers was raised. A review should consider barriers faced by NFPs to participation in commissioning opportunities. The Panel notes the Productivity Commission is undertaking an inquiry into the increased application of competition, contestability and informed user choice to human services. The Commission is due to deliver its final report in October 2017.<sup>75</sup>
- **The Australian Charities and Not-for-Profit Commission (ACNC)** recommended transfer of state and territory regulatory functions to the ACNC enabling NSW NFPs to satisfy NSW reporting requirements through complying with the ACNC’s requirements. This would be a first step towards harmonisation of regulations and transfer of functions to the ACNC.
- **Infrastructure markets** would provide scope to improve the economic regulation of water, including greater consistency in water pricing across NSW local government areas; and to develop a regulatory framework to underpin the efficient use of and investment in road infrastructure, including cost reflective road pricing.
- **Privacy laws** create complexity with intersecting Commonwealth and state legislative regimes and may promote a risk-averse culture within government agencies that discourages data sharing.<sup>76</sup> Government agencies face numerous specific exemptions which differ between the Commonwealth *Privacy Act 1988* and NSW *Privacy and Personal Information Protection Act 1998*. This complexity may be resolved by further work with the Commonwealth on a set of common principles and supporting policies.

<sup>75</sup>Productivity Commission, *Introducing Competition and Informed User Choice into Human Services*, 2016

<sup>76</sup>NSW Government, *Submission to the Productivity Commission Inquiry into Data Availability and Use*, July 2016

## Appendix E: Other jurisdictions’ regulatory oversight models

Key features of regulatory oversight and support arrangements in other jurisdictions

Description of model		Senior Ministerial leadership	Quality assurance of regulatory proposals proceeding to Cabinet	Regulatory policy and reform agenda coordination	Capability building
Independent Commission e.g. Queensland Productivity Commission; former Victorian Competition and Efficiency Commission	Central independent oversight and support	Optional	✓	✓	✓
Independent Commissioner for regulatory policy e.g. Victoria’s Commissioner for Better Regulation, supported by regulatory policy unit in the Victorian Treasury		✓ Victoria’s Commissioner reports to the Treasurer	✓	✓	✓
Independent Committee, supported by central agency oversight and Cluster-based regulation units e.g. UK’s oversight model including an independent Regulatory Policy Committee (RPC) comprising board members with specific areas of expertise and supported by a secretariat in an agency; Netherlands Dutch Advisory Board on Regulatory Burden (ACTAL); Germany’s National Regulatory Control Agency (NKR); Sweden’s Swedish Better Regulation Council	Hybrid independent & agency oversight and support	✓ UK Minister for Small Business, Industry and Enterprise allocated Better Regulation portfolio	✓ Core function of UK’s RPC, which provides ‘Red, Amber, Green’ quality assessments	✓ RPC also reports on Government’s regulatory performance; and HM Treasury oversees the regulatory management system including issuing guidance	✓ UK model also comprises Cluster-based Better Regulation Units
Dedicated unit within a central agency supported by Cluster-based regulatory reform units e.g. Commonwealth’s Office of Best Practice Regulation (OBPR) in the Department of Prime Minister and Cabinet	Central agency oversight and support	✓ However, the Commonwealth model is driven by Department of Prime Minister and Cabinet	✓ The OBPR also publishes reports on agencies’ compliance with requirements	✓	✓ OBPR works with agencies early in the policy development process to advise on the preparation of regulatory impact statements

Description of model		Senior Ministerial leadership	Quality assurance of regulatory proposals proceeding to Cabinet	Regulatory policy and reform agenda coordination	Capability building
Dedicated unit within a central agency e.g. New Zealand Treasury oversight of best practice regulation and regulatory management system, former NSW Better Regulation Office model	Central agency oversight and support	✓ NZ has a Minister for Regulatory Reform; NSW formerly had the Premier responsible for better regulation	✓ Quality assurance by NZ Treasury's regulatory impact assessment team; OR independent quality assessment arranged by the agency	✓ NZ Treasury publishes regulatory impact assessments, and oversees publication of regulatory review forward plans by Clusters	✓ NZ Treasury issues guidance and facilitates agencies in preparing regulatory impact assessments, and implementing their role as 'regulatory stewards' (i.e. managing regulations as 'assets')
Cluster-based regulatory reform units No jurisdictional examples; Commonwealth combines this with central oversight	Devolved oversight and		✓		✓
Oversight devolved to agencies e.g. current NSW model			✓		✓