

Guidance for regulators to implement outcomes and risk-based regulation

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Foreword

Government uses regulation to control risks that affect the economy, consumers, society and the environment. Our regulatory system spans a broad range of industries, activities and behaviours, and therefore impacts almost every aspect of our lives. For example, regulation helps ensure:

- we can have confidence in our food supply's safety
- we live in homes that are structurally sound
- we can travel safely on public roads, and
- we can breathe clean air.

Effective regulation and controls can lead to economic, social and environmental benefits. There are, however, costs associated with implementing and enforcing regulation. Poorly designed, implemented and enforced regulation can both:

- burden business and consumers, for example, by:
 - duplicating requirements at different levels of government, increasing regulatory costs, and
 - targeting regulatory initiatives and enforcement disproportionate to business size, risks to regulatory outcomes, and patterns of non-compliance.
- reduce a regulator's performance by allocating limited resources to initiatives that do not achieve a commensurate reduction in risks.

Minimising costs for business and individuals while maximising outcomes for government is critical. It contributes to improving business competitiveness and productivity which are key priorities in *NSW 2021: A plan to make NSW number one*. Regulators need a process to prioritise resources towards the greatest potential risks to regulatory outcomes.

This guidance material has been designed to assist regulators to take an outcomes and risk-based approach to regulation, in the context of having to deliver more with fewer resources.

Outcomes and risk-based regulation provides regulators with a consistent and transparent framework to proactively respond to that challenge, while also increasing their effectiveness in achieving regulatory outcomes.

With sustained effort and support from government, the move towards outcomes and risk-based regulation will enhance our collective economic and social wellbeing by:

- reducing unnecessary regulatory burden on regulated entities
- increasing the productivity of regulators and regulated entities, and
- driving flow-on economic and social benefits.

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1. Introduction

Increasingly, regulators are expected to deliver more with less including delivering better outcomes and minimising the regulatory burden on regulated entities. Unnecessary regulatory burden can take many forms, including:

- reporting requirements for compliant entities being the same as reporting requirements for non-compliant entities, and
- requiring regulated entities to provide similar information to multiple regulators.

These constraints mean that regulators must operate within a framework that enables them to maximise effectiveness and efficiency. Implementing outcomes and risk-based regulation will help regulators in this regard.

1.1 Purpose

This guidance material provides a clear and practical framework for regulators to implement outcomes and risk-based regulation through:

- a clear focus contributing to regulatory outcomes (ie the impact), and the resources and activities used to achieve these outcomes (ie the impact's efficiency)
- greater flexibility to adapt to changing circumstances
- increased transparency through clear outcomes and accountability
- a more informed basis for effective organisational improvement
- more informed and meaningful interactions with regulated entities, and
- more effective customer engagement, reducing unnecessary regulatory burden.

This document is intended for staff within agencies directly responsible for designing and implementing regulatory initiatives.

1.2 Framework

The concepts in this guidance material align to the framework presented in Chapter 2. The framework outlines a process for regulators to implement outcomes and risk-based regulation. Each stage within the framework matches specific steps to help regulators with implementation.

You will also find worksheets to complete throughout this document. Their purpose is to enable responsible managers to consolidate responses to key steps in developing and implementing outcomes and risk-based regulation.

1.3 Diagnostic tool

To most effectively use this guidance material and make meaningful improvements, regulators should first develop a thorough understanding of their current approach.

The diagnostic tool accompanying this guidance material has been developed to, over time, help regulators at different stages of implementation and maturity to prioritise areas for improvement by:

- providing a tailored, high level assessment of whether and to what extent a regulator's current approach is aligned with the principles of effective outcomes and risk-based regulation
- prioritising areas that will deliver the greatest benefits over the current approach
- identifying targeted actions for regulators to implement improvements, and
- directing regulators to sections within this guidance material most relevant to these actions.

Regulators should use the diagnostic tool to create a baseline measurement of their current approach and revisit the tool periodically (for example, annually) to monitor improvements and target areas for further improvement.

The diagnostic tool is intended to assess the processes and practices associated with implementing outcomes-based reporting and a risk-based approach to compliance and enforcement. It is not intended to assess the regulator's performance effectiveness. The regulator's performance effectiveness is measured by its contribution to regulatory outcomes, and this is a concept addressed within the guidance material.

2. Framework

Increasingly, regulators are expected to deliver better outcomes and minimise any unnecessary burden in complying with regulated entities.

This is one of the drivers of outcomes and risk-based regulation, supporting regulators can prioritise, focus and deploy resources in proportion to the risk to regulatory outcomes being achieved.

It is critical to note that the purpose of this framework is **not** to eliminate risk to regulatory outcomes. Rather, the purpose is to:

- use a **risk-based approach** to prioritise effort in assisting compliance, and identifying and enforcing instances of non-compliance, and
- use an **outcomes-based approach** to assess both the efficiency and effectiveness of regulatory actions and outcomes respectively.

Figure 1 on page 10 summarises the framework at a high level. Further detail is below on each of the key steps.

2.1 Defining regulatory outcomes

Regulatory outcomes that are clearly defined and achievable are critical to effective outcomes and risk-based regulation. It requires regulators to consider:

- their legislative mandate
- their core purpose to regulated entities, regulation beneficiaries, and the broader strategic context, and
- the options available to implement regulatory initiatives.

2.2 Identifying risks

Regulators should actively identify and document historical, current and emerging risks. This is critical to prioritising a regulator's focus, designing tailored initiatives, and allocating limited resources in the most cost effective way, relative to the outcomes achieved.

2.3 Assessing risks

Regulators should prioritise regulated entities and behaviours via formal risk assessments. Prioritise according to risk characteristics that are common to groups or classes of regulated entities and behaviours.

The risk assessment process then informs:

- designing regulatory initiatives
- allocating resources to identify non-compliance in higher and lower priority entities, and
- selecting the most appropriate enforcement tools for non-compliance.

2.4 Linking your work to outcomes: a contribution story

Developing a 'contribution story' involves testing and validating how inputs (for example, resources) generate outputs (for example, regulatory initiatives) and contribute to outcomes.

2.5 Identifying measures

Regulators need to monitor and assess performance over time to understand an initiative's effectiveness and efficiency. To do this, regulators need to:

- identify timely, relevant and objective measures – the best available at the most reasonable cost to regulators and those they regulate, and
- establish baselines or benchmarks to monitor changes in measures over time.

2.6 Allocating resources

Regulators should allocate resources to regulatory initiatives in proportion to the risk and complexity of regulated entities and behaviours.

2.7 Tailoring the enforcement response

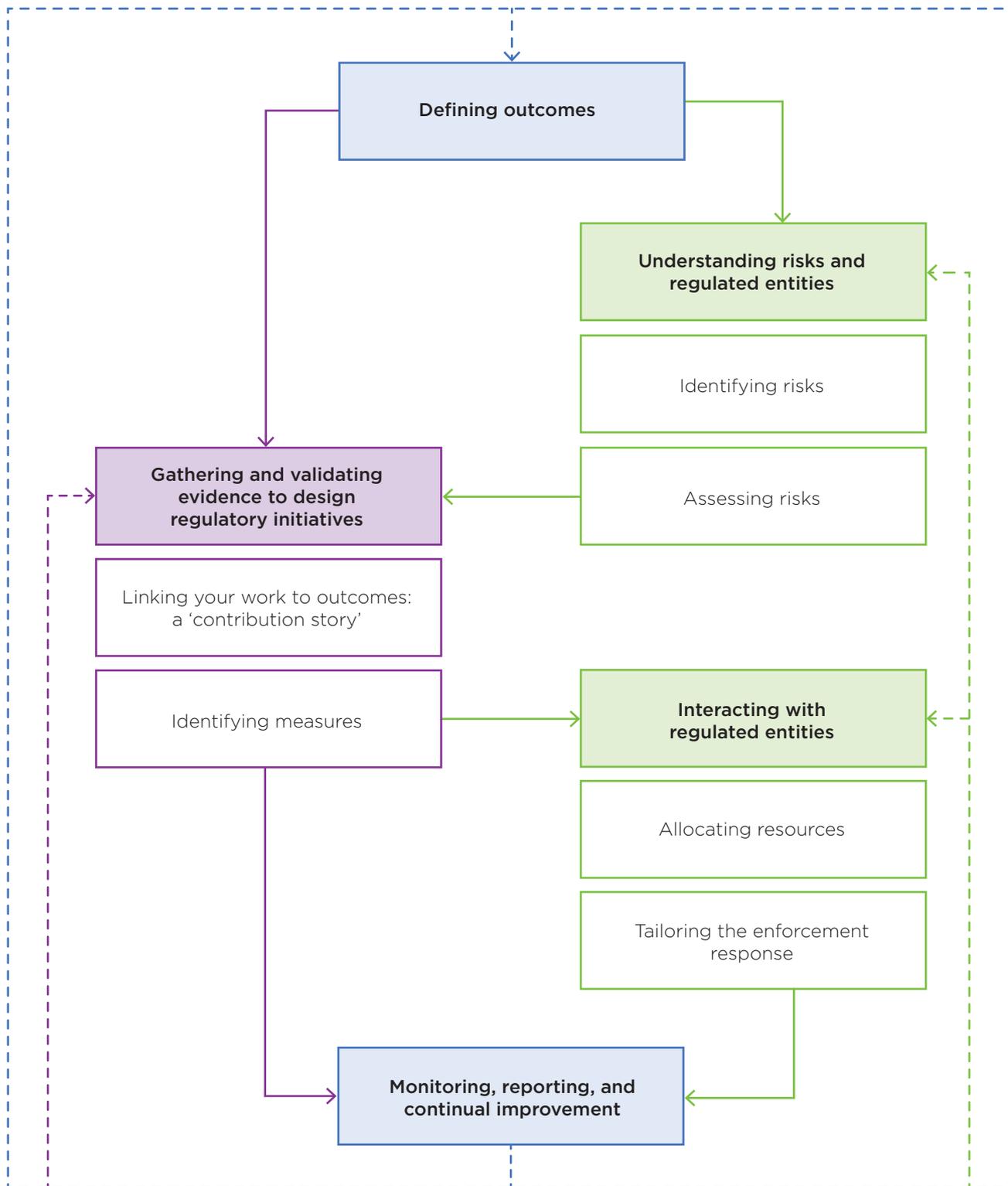
Effective risk-based regulation requires regulators to tailor their use of enforcement and other regulatory tools based on the severity and behavioural drivers of non-compliance. Tailoring responses in a consistent and transparent way helps to underpin the regulator's authority and credibility, and incentivise better compliance.

2.8 Monitoring, reporting and continual improvement

Over time, a structured and consistent focus on monitoring and reporting is critical to:

- inform the regulator's corporate and strategic direction
- identify and reprioritise risks over time, and
- understand, adapt and strengthen evidence underpinning regulatory initiatives.

Figure 1: Outcomes and risk based regulation framework



Key

Strategic, corporate planning, and operational aspects

Outcomes-based reporting

Risk-based compliance and enforcement

2.9 Implementation benefits and enablers

Effective implementation requires commitment and understanding at all levels within regulators – from executives to frontline staff – and is achieved through small, continual improvements.

Regulators should take a long-term view to implementation and consider:

- benefits – in particular increased efficiency, effectiveness and productivity, and
- success enablers relevant to their current situation.

2.9.1 Effective implementation benefits

There are a number of potential benefits associated with implementing this framework.

Benefits to regulated entities include:

- **improved compliance outcomes** – focusing on outcomes means that regulated entities can better tailor their approach to demonstrating compliance, and
- **reduced regulatory cost burden on complying regulated entities** – regulatory initiatives are proportionate to risk.

Benefits to regulators include:

- **better alignment of strategic and operational planning** – aligning the regulator with cluster, department and State priorities contributes to more effective government
- **more effective engagement with internal and external stakeholders** by demonstrating how regulatory initiatives impact outcomes
- **improved internal accountabilities for outcomes** through embedding the framework into strategic planning and performance management
- **greater flexibility** through improved information to respond to changing circumstances, and
- **improved productivity** through better understanding efficiency and effectiveness, enabling more informed financial and human resource allocation.

Flow-on benefits for regulation beneficiaries may also include society, the environment and the economy.

2.9.2 How to effectively implement

We have identified and highlighted ways to ensure effective implementation (see Chapter 11).

These include:

- developing and publishing a compliance and enforcement policy
- ensuring all staff are aware of and understand the internal and external business context and objectives, the strategies to achieve these objectives, and the role they play
- implementing effective internal procedures to ensure a structured approach to planning and gathering information, and measuring progress, and
- maximising the use of technological resources:
 - in the short term, by identifying and improving areas that are within the control of regulators (for example, improving internal processes), and
 - in the longer term, by identifying gaps in capability and implementing solutions to alleviate these gaps.

2.10 Case study: WorkCover NSW

To illustrate the framework, the practical experience of WorkCover NSW (WorkCover) is outlined in Box 1.

Over time, WorkCover has implemented an approach to outcomes and risk-based regulation. The example provided relates to WorkCover's Focus on Industry program that:

- identifies high risk industries (with respect to injuries and illnesses), and
- designs tailored initiatives to address prioritised risks.

Box 1: Case study – WorkCover NSW

WorkCover NSW is the regulator responsible for work health and safety, return to work and injury management including:

- preventing injury and illness in the workplace
- regulating the NSW Workers Compensation System, and
- exercising the powers of the Nominal Insurer for the NSW Workers Compensation Scheme.

WorkCover’s main statutory function is to ensure compliance with the following legislation:

- *Work Health and Safety Act 2011*
- *Workers Compensation Act 1987*
- *Workplace Injury Management and Workers Compensation Act 1998*
- *Workers Compensation (Bush Fire, Emergency & Rescue Services) Act 1987*
- *Explosives Act 2003*
- *Workers Compensation (Dust Diseases) Act 1942*
- *Sporting Injuries Insurance Act 1978*
- *Rural Workers Accommodation Act 1969*
- *Dangerous Goods (Road and Rail Transport) Act 2008*
- *Associated General Contractors Insurance Company Limited Act 1980*
- *Bishopsgate Insurance Australia Limited Act 1983*, and
- associated regulations and other statutory rules.

Through consideration of its legislative obligations, WorkCover determined that its core purpose is to “... *increase the competitiveness of the NSW economy through productive, healthy and safe workplaces.*”

With this purpose established, WorkCover has:

- embedded it in its corporate planning process, with detailed planning to cascade this purpose through outcomes, outputs and actions at all levels of the agency, and
- published and communicated its purpose both internally and externally to regulated entities (ie businesses), regulation beneficiaries (ie employees), and the broader community.

For detailed guidance: see Chapter 3 (Defining Outcomes).

WorkCover uses a risk-based approach to design initiatives and allocate resources, including for:

- proactive initiatives (for example, the Focus on Industry program, audits, inspections and educational activities), and
- reactive initiatives (for example, responses to immediate priorities driven by injuries, fatalities and hazards).

The Focus on Industry program is a key risk-based proactive initiative. The program’s purpose is to develop tailored programs for high priority industries (for example, wood products manufacturing) through:

- identifying and prioritising risks within that industry
- developing actions to minimise these risks in workplaces
- understanding the context in which regulated entities operate to enable effective engagement with industry, and
- collaborating with key industry and government stakeholders to assist in implementation and information dissemination.

These stages broadly mirror the approach required to undertake risk-based regulation. Industries to be targeted are determined by:

- analysing historical workers compensation and return-to-work data, publicly available data, and undertaking stakeholder consultations
- drawing on the analysis, in addition to broader public interest and management input, to prioritise high risk industries and sectors within those industries, and
- obtaining the final cross-divisional sign off required prior to progressing to program design.

For detailed guidance: see Chapter 4 and 5 (Identifying risk and Assessing risk).

With a set of industries and risks within those industries prioritised, WorkCover uses a framework underpinned by a program logic model. This is used to design specific initiatives that target underlying risk drivers.

- WorkCover uses a top-down approach to attribute its overarching outcome to intermediate and shorter-term outcomes, key focus areas (ie prioritised industries), and actions (initiatives). This is based on a hypothesis developed by initially analysing internal data and experience.
- WorkCover then tests and validates the initial hypothesis to ensure its initiatives are most effectively aligned to the underlying risk drivers being addressed. This is achieved by considering broader evidence, in particular, internal and external stakeholder consultations.
- The initial hypothesis and the assumptions underpinning the initiative are revised and strengthened based on the outcome of the testing and validation process. This feedback process continues until internal stakeholders are satisfied with the credibility of the information.
- Once the hypothesis and assumptions are validated, they develop outcomes and actions for each risk identified in the action plan. The initiatives are then supported by measures to monitor progress over time, implementation protocols, and risk management strategies.

For detailed guidance: see Chapter 6 and 7 (Linking your work to outcomes: a 'contribution story' and identifying measures).

An industry action plan's efficiency and effectiveness is monitored over time including:

- during implementation with project management that includes monitoring and reporting, communication protocols, and budget management, and
- following implementation by evaluating the contribution to intended outcomes and learnings to inform future initiatives.

WorkCover uses successes and learnings identified through monitoring and reporting to actively inform future initiatives through:

- refining and strengthening processes to identify and prioritise risks
- improving feedback mechanisms related to testing and validating internal knowledge and program design, and
- strengthening project management and implementation mechanisms.

For detailed guidance: see Chapter 11 (Monitoring, reporting, and continual improvement).

Source: WorkCover NSW

3. Defining outcomes

At a glance

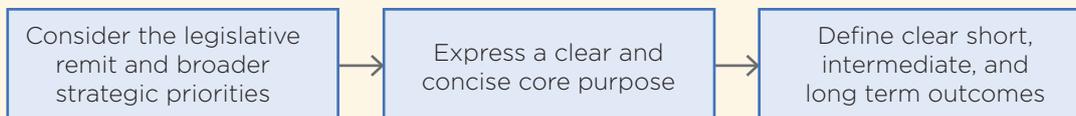
Clearly defined, measurable and achievable outcomes are critical to effective outcomes and risk-based regulation. Establishing what outcomes the regulator wants to achieve helps:

- set a regulator's strategic direction, and
- informs an initiative's design and evaluation, plus ongoing monitoring, reporting and continual improvement.

To define outcomes, regulators need to thoroughly understand:

- their legislative mandate
- their core purpose to regulated entities, regulation beneficiaries, and the broader strategic context.

While establishing outcomes can be difficult, investing time and effort upfront will support effective implementation over time.



3.1 Purpose

To define meaningful regulatory outcomes, regulators must understand and articulate their core purpose. For many regulators, particularly those with broad remits, it can be difficult to express a core purpose and communicate it to regulated entities, government and the broader community.

To express a core purpose, regulators should consider legislative obligations in the context of:

- regulation beneficiaries (for example, the economy, the environment, consumers and the broader community)
- individuals or business obliged to comply with regulation, and
- the internal and external business environment, including broader strategic priorities within:
 - the regulator
 - broader clusters or departments, and
 - the State Priorities or Premier's Priorities.

The following box provides examples of core purpose statements from selected regulators. The regulators identified in the example have expressed clear and concise core purposes despite responsibility for:

- multiple pieces of legislation (for example, WorkCover), or
- a broad scope of industry operations (for example, the NSW Food Authority regulating primary producers through to manufacturers and consumers).

Box 2: Illustration – core purposes, selected regulators (NSW)

- The NSW Food Authority states that it “works to ensure food sold in the State [NSW] is safe and correctly labelled and that consumers are able to make informed choices about the food they eat.” In its Corporate Plan, the NSW Food Authority states a vision of “safer food, clearer choices” and states outcomes in key result areas including “safer food produced and sold in NSW”, “well informed industry and consumers”, and “excellence in client service and delivery”¹
- WorkCover NSW states that its purpose is “to increase the competitiveness of the NSW economy through productive, healthy and safe workplaces. [It is] dedicated to promoting productive, healthy and safe workplaces for workers and employers in NSW.”²
- The NSW Office of Environment and Heritage has identified its “core business ... is ensuring that sustainability is reflected in business and government operations and decisions.”³

3.2 Defining regulatory outcomes

Understanding their purpose and the internal and external business context effectively, regulators should then work to define short, medium, and long-term outcomes. Assessing the business context should also include identifying other agencies (for example, Commonwealth, State and local government) that may be responsible for the same or similar outcomes. Regulators should engage with co-regulators to understand these dynamics.

Well-defined outcomes help enable better regulation through:

- upfront clarity of objectives
- greater ability for regulators to demonstrate how initiatives contribute to outcomes over time (see Section 4), and
- improved transparency and accountability to internal and external stakeholders for:
 - more effective performance management
 - better engagement with community, industry and government stakeholders, and
 - more valuable feedback for regulators to improve over time.

Outcomes can be difficult to express, even when a regulator has developed a thorough understanding of its purpose, remit, and strategic and business context. Difficulties can include:

- overusing aspirational language, which can detract from an outcome’s simplicity and attainability
- lacking clarity over the relationship between short, medium, and long-term outcomes, either through:
 - treating short or medium outcomes as lower priority than long-term outcomes, or
 - lacking clarity over change drivers that determine the pathway to achieve long-term outcomes.
- misclassifying outputs and outcomes (for example, the number of inspections is an output, while reducing unsafe practices is an outcome), and
- lacking clarity over expectations (for example, targets that should be met versus stretch goals intended to motivate staff, encourage innovation and improve performance).

1 NSW Food Authority 2013, *NSW Food Authority: safer food, clearer choices* | NSW Food Authority, <http://www.foodauthority.nsw.gov.au/>.

2 WorkCover 2013, *WorkCover Authority of New South Wales – About us*, <http://workcover.nsw.gov.au/aboutus/Pages/default.aspx>.

3 NSW Office of Environment and Heritage 2013, *Office of Environment and Heritage – striving to be sustainable* | NSW Environment & Heritage, <http://www.environment.nsw.gov.au/performance/>.

When drafting outcomes, it is useful for regulators to structure outcome statements similarly to the following examples:

[Outcome] for [target group] through [actions]

or

[Outcome] through [actions] for [target group]

To complete the outcomes statement (ie identify the outcome, action and target groups), regulators should ask themselves a range of questions, including, but not limited to:

- What is our strategy?
- What does industry expect of us?
- What does the community expect of us?
- What are the potential consequences if we didn't exist?
- Where are regulation benefits realised in the chain of interactions between industry, consumers and us?

Regulators should also distinguish between program and entity-level outcomes.

Box 3: Illustration – potential program-level outcome statements for regulators (NSW)

- The NSW Food Authority will reduce the incidence of food-borne illnesses among vulnerable populations by undertaking risk-based inspections of nursing home facilities.
- The WorkCover Authority of NSW will reduce injuries caused by tractors among agricultural workers by conducting an information campaign through industry associations.
- The NSW Office of Environment and Heritage will respond more quickly to instances of asbestos dumping near vulnerable populations by using social media monitoring.

3.3 Corporate planning

An outcomes and risk-based regulation framework cannot be effectively implemented when considered in isolation from corporate planning. Instead, regulators should work to:

- embed the framework in the corporate planning process, and
- develop and implement accountability to managers and divisions.

The benefits of embedding the framework in corporate planning are realised:

- upfront by:
 - aligning the framework with the agency, department and State's strategic direction
 - ensuring consistent and transparent initiative design and resource allocation, and
 - ensuring clear accountabilities in the performance management process.
- over time by:
 - using it as the basis to justify the regulator's approach, particularly when confronted with expectations that may not be considered effective, and
 - using feedback mechanisms and flexibility to adapt approaches in response to experience and broader change.

Engaging with staff across the regulator while developing the regulator's purpose and outcomes will help develop a consistent understanding of outcomes, and each individual's role in achieving these over time.

3.4 Checklist for regulators

Checklist for implementation

- ✓ The regulator is able to define and communicate its purpose clearly and concisely.
- ✓ The regulator has defined short, medium, and long-term outcomes.
- ✓ Outcomes expressed by regulators are clear, concise and clearly linked to its purpose.
- ✓ The regulator can demonstrate the links between its outcomes and broader strategic priorities.
- ✓ Through the corporate planning process, managers and divisions have been assigned accountabilities to assist in embedding the framework.
- ✓ The regulator checks whether outcome statements reflect outcomes or outputs. An effective way of distinguishing outputs and outcomes is: outputs are *what will be done*, and outcomes are *what will be achieved*.
- ✓ Avoid terms that cannot be clearly defined, for example, 'to benefit the environment'. These can lead to ambiguity regarding both definitions (ie what does 'benefit' mean?) and how to measure the outcome (ie how do you measure benefits to the environment?)
- ✓ Avoid words or phrases with subjective definitions, for example, good, better and higher quality.

3.5 Defining outcomes worksheet

1. What is the regulator's purpose or initiative being undertaken?

2. What are the regulator's short, medium and long-term outcomes or initiatives being undertaken?

3. How are these outcomes related to the regulator's purpose?

4. How are these outcomes related to the regulator's broader strategic priorities?

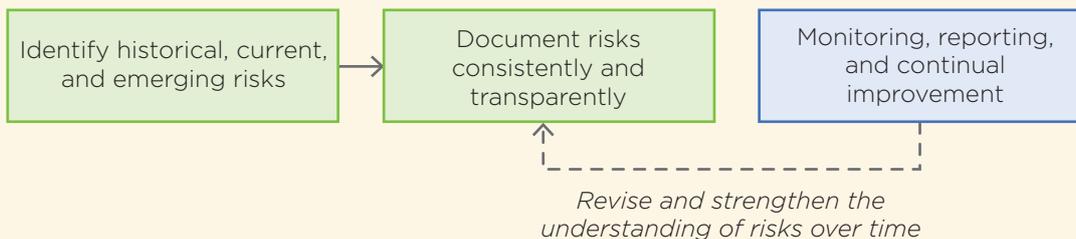
4. Identifying risks

At a glance

For effective risk-based compliance and enforcement, it is essential to identify and document a full range of historical, current and emerging risks that can affect defined regulatory outcomes. With an effective understanding of risks, regulators can more effectively:

- **prioritise** their focus
- **design** targeted initiatives, and
- **allocate** limited resources.

Insights from implementing regulatory initiatives (see Monitoring, reporting, and continual improvement) should be used to revise and strengthen the understanding of risks over time.



4.1 Identifying risks

When they eventuate, unidentified and unmitigated risks can adversely impact the defined regulatory outcomes and damage public confidence in regulators. By consistently identifying risks to the defined regulatory outcomes – particularly emerging risks – regulators can better adapt to changing circumstances and emerging challenges, and achieve better compliance outcomes.

Box 4: Illustration – what is meant by ‘risk’?

Key concepts associated with risk and risk management can be defined as:

- **risk** – the likelihood and consequence of a hazard causing an outcome to deviate from what is expected
- **hazard** – a potential source of harm (ie a risk factor)
- **likelihood** – the chance of a hazard eventuating, and
- **consequence** – the amount of harm, should a hazard occur.

The focus in this guidance is on managing risks to regulatory outcomes. This means regulators should focus on a regulated entity’s actions and behaviours that have the potential to adversely impact on achieving regulatory outcomes.

Managing internal operational risks for regulators is also crucial but not within the scope of this guidance.

Regulators should note that broader risk management for the NSW public sector is governed by the NSW Treasury *Internal Audit and Risk Management Policy for the NSW Public Sector* (TPP 09-05), available at http://www.treasury.nsw.gov.au/Publications/treasury_policy_papers/2012-TPP/tpp_12-03/tpp_12-03_risk_management_toolkit.

4.1.1 Historical and current risk characteristics

Regulators can identify and monitor historical and current risks over time using data and analysis. In contrast to emerging risks (see Section 4.1.2), regulators should have:

- a strong understanding of risk drivers
- greater certainty over risk timing and duration
- greater understanding of the industry's exposure to risks, and
- greater certainty over exposure indicators and onset, which can be monitored over time.

These characteristics mean that the approach to identifying historical and current risks involves:

- focusing strongly on quantitative analysis
- monitoring forward indicator changes to respond to changing circumstances, and
- testing the impact of changes in assumptions with sensitivity analysis.

4.1.2 Emerging risk characteristics

Identifying and responding early to emerging risks should be a critical focus for regulators. Emerging risks may arise due to any number of factors including technical change, new business models for industry participants, and changes in consumer preferences or behaviours.

Emerging risks are an important consideration for regulators given:

- they are often complex, meaning more than one regulator may have jurisdiction to manage the risk
- their drivers are not well understood, relative to historical and current risks
- their timing and duration is relatively uncertain
- industry exposure is unknown, and
- it is difficult to determine effective forward indicators.

Given these differences to historical and current risks, regulators should work to identify emerging risks through:

- continual and coordinated scanning and brainstorming in collaboration with other regulatory agencies, with clear accountability assigned
- qualitative, rather than quantitative, analysis given the lack of data and experience
- technical and subject matter expertise to enable challenging and effective discussions, and
- a mixture of forums to obtain a variety of views for analysis.

4.1.3 Identifying risks

Regulators should, wherever possible, work to identify historical, current and emerging risks, undertaken through a range of forums and lenses of analysis.

Box 5: Illustration – mechanisms to assist in identifying risks

As outlined above, there are multiple forums you can use to identify risks including:

- engaging with those working at the ‘coalface’
- literature reviews to assess practices in other jurisdictions
- a structured cross-agency working group that meets regularly to share knowledge and lessons
- considering statutory objectives, government policy and guidance from the relevant minister – although this may be complex for regulators that manage disparate risks or administer multiple pieces of legislation
- reviewing past adverse events from the regulator’s own inspection, enforcement or community complaints records
- engaging with internal and external stakeholders (for example, regulated entities, industry stakeholders, those at risk from adverse events), and
- social media monitoring as a potential tool to assess trends in emerging issues.

Regulators should seek to identify risks through a range of perspectives:

- What are the risks of regulated entities not complying with the obligations under the relevant legislation?
- What are the risks of licensees breaching licence conditions?
- What are the risks to beneficiaries of relevant legislation being exposed to harm arising from acts or omissions by regulated entities?
- What are the risks to the broader community (who may not necessarily be direct beneficiaries of the legislation) of acts or omissions by regulated entities?

Box 6: Example – regulatory risk types

To design initiatives and prioritise effort within the outcomes and risk-based regulatory framework, regulators should use risk characteristics of specific regulated entities and behaviours.

For example:

- a transport regulator may identify *young male drivers* as a group at risk in road accidents
- a transport regulator may target *speeding* as a high risk behaviour for road accidents
- a maritime safety regulator may identify *wakeboarding* as an emerging risk for river bank erosion, maritime safety and noise pollution
- a food safety regulator may use *perishable food groups* (for example, eggs, seafood) as a risk factor for increased rates of food borne illness
- a food safety regulator may identify that *older persons and very young children* are at increased risk of food borne illness
- a workplace health and safety regulator may identify that *employees operating heavy machinery* are at increased risk of workplace injury or death
- a fisheries regulator may determine that *waters with higher stock of endangered marine species* are at higher risk of unsustainable fishing practices, and
- a liquor regulator may identify *intoxication in venues during late hours* as a risk factor for increased rates of alcohol-attributable injury and death.

4.2 Risk documentation

Once identified, it is important that the regulator documents risks and their characteristics consistently and transparently. Assign accountability for this documentation to assist in structured and consistent revisions and strengthening over time.

4.3 Checklist for regulators

Checklist for implementation

- ✓ The regulator identifies risks through a range of forums (for example, corporate planning, stakeholder consultations, risk workshops, subject matter experts).
- ✓ The regulator documents identified historical, current and emerging risks through a structured and transparent process.
- ✓ The regulator assigns accountability to an appropriate person to maintain the risk documentation's accuracy and completeness.

Tips and tricks

- ✓ There is no hard definition for 'risk' – its meaning changes in different contexts. Regulators should therefore focus on practical risk examples, rather than defining 'risk'.
- ✓ Give practical examples to illustrate that 'risk' refers to a regulated entity's activity or behaviour that may adversely impact on the regulator's outcomes. Reiterate that 'risk' in this context is not focused on risks internal to the regulator.
- ✓ Emerging risks may not be within a single regulator's mandate. Regulators should actively engage with co-regulators to stay abreast of changing circumstances that may create emerging risks.
- ✓ Identify key subject matter and technical experts to be part of cross-agency engagement.
- ✓ Assign responsibility for version control of risk documentation to help ensure consistency and completeness.

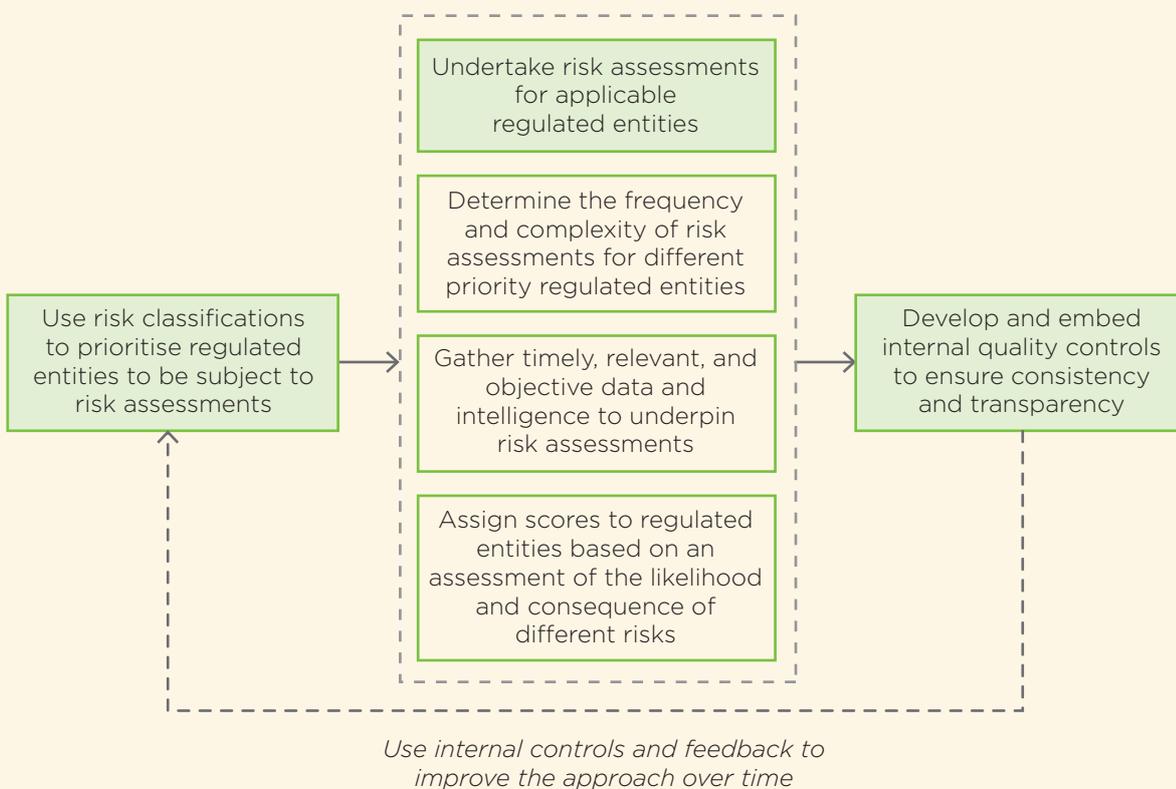
5. Assessing risks

At a glance

Risk assessments inform regulatory initiative development and prioritising efforts to identify non-compliance.

Many regulators are responsible for a large number of regulated entities, meaning it is often impractical to assess each individually. In these circumstances, it is necessary for regulators to group and prioritise regulated entities and behaviours for risk assessment. Within the outcomes and risk-based regulatory framework, regulated entities should be grouped based on common risk characteristics (for example, motorists may be grouped by gender and age).

To enable effective and thorough risk assessments, regulators need to consider a broad range of evidence, and create appropriate internal controls and feedback mechanisms to ensure quality and transparency.



5.1 Prioritising risk assessments

Resources should be allocated to initiatives, regulated entities and behaviours that represent the greatest risk to regulatory outcomes. Prioritising effort also applies to determining how to assess risk for a regulated entity. In some circumstances, it may be necessary to individually assess each regulated entity. In others, it may be more reasonable to assess groups of regulated entities with similar characteristics, particularly where there are large numbers (for example, private motorist licensing).

Regulators can subject regulated entities to risk assessments for:

- specific actions or behaviours (for example, motorists speeding, workplace falls)
- specific regulated parties (for example, the 100 largest nightclubs), and
- specific classes (for example, young drivers, specific product sellers).

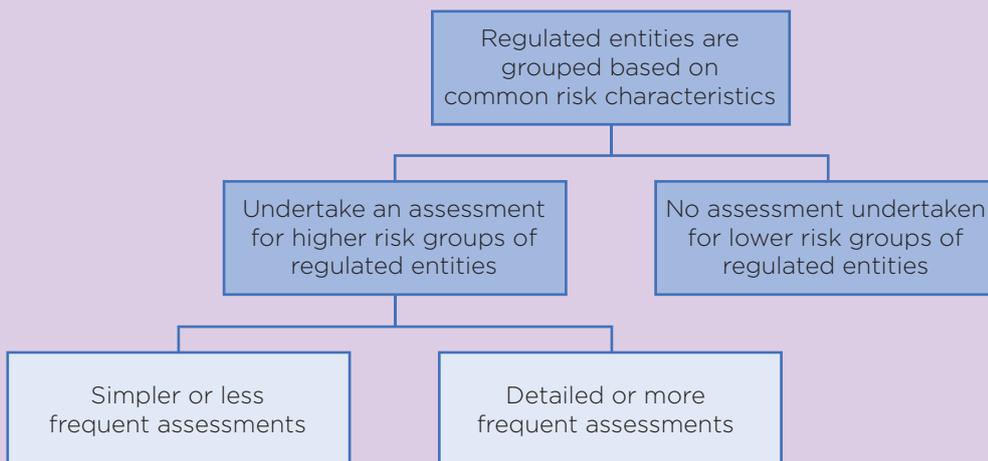
Box 7: Illustration – framework to prioritise risk assessments⁴

Typically, regulated entities are grouped by the regulator based on common risk characteristics. For example, motorists are often grouped according to age and gender, based on the relative risk of road accidents in different age and gender groups.

The regulator should determine the regulated entities to subject to a formal risk assessment and may further prioritise:

- simpler or less frequent assessments, or
- detailed or more frequent assessments.

Regulators should prioritise assessment according to the purpose and characteristics of regulated entities.



Box 8: Example – NSW Food Authority⁵

The NSW Food Authority conducts regular auditing on licensed food businesses with food safety programs. Businesses are categorised as either ‘Priority One’ or ‘Priority Two’ depending on the risks associated with that type of business. Audit frequency is then based on the entity’s rating. In particular:

- ‘Priority One’ businesses are audited biannually, and
- ‘Priority Two’ businesses are audited annually.

Entity ratings are revised after each audit. In particular:

- a rating of ‘A’ or ‘B’ means the business passed
- a rating of ‘C’ is marginal, and
- a rating of ‘D’ or ‘E’ means the business failed.

4 Adapted from Black, J. 2010, *Risk-based Regulation: Choices, Practices and Lessons Being Learnt*, Risk and Regulatory Policy (OECD).

5 NSW Food Authority 2013, *Business standards* | NSW Food Authority, <http://www.foodauthority.nsw.gov.au/industry/>.

The frequency of the next audit is based on the audit performance and the entity's priority category, as set out below.

Audit Rating	Priority One	Priority Two
A or B	6 months	12 months
C	3 months	6 months

A business that fails the audit is subject to a follow up audit and one additional audit, and must pass both before returning to the normal frequency of audits.

Rating	Follow Up Audit	Additional Audit
D or E	1 month	2 months

5.2 Undertaking risk assessments

Once they have prioritised regulated entities to assess, regulators must undertake the risk assessment. A risk assessment's purpose is to understand risk level through estimating:

- the likelihood of the risk occurring, and
- the consequence of the impact, should it occur.

Likelihood and consequence are typically determined with a combination of quantitative and qualitative data, other intelligence, and the regulator's own analysis and judgement.

5.2.1 Data

Both quantitative and qualitative data are fundamental inputs to risk assessments. The data's quantity and quality can vary, and typically depends on:

- the nature of regulated entities and behaviours
- the resources and technical expertise available to regulators, and
- the relative importance placed by the regulator on different data (for example, the regulator may wish to incentivise improving governance structures within regulated entities, so may assign more weight in its risk assessment to governance structure quality).

Regulators should work to prioritise data that is relevant, timely, objective, and the best available at the most reasonable cost.

Box 9: Illustration – potential data sources

Regulators may use a range of data for risk assessment. Regulators should identify limitations with data quality and accessibility, with a view to addressing gaps over time. This will help to improve the quality and consistency of decision making, and therefore support better regulatory outcomes.

Potential quantitative data sources include:

- incident and risk event numbers and frequency as reported to the regulator
- information collected during site visits and inspections
- results from independent field audits
- monitoring data and sample collections
- complaints made to the regulator about regulated entities and behaviours
- regulated entity financial information, and
- requests made to the regulator for information or assistance.

Potential qualitative data sources include:

- information submitted by regulated entities through formal engagement with the regulator (for example, applications, authorisations)
- intelligence about regulated entities and behaviours held by the regulator (for example, reports from previous interactions, staff knowledge)
- information from internal and external stakeholders (for example, industry associations)
- information from regulated entity surveys, and
- data and other information about regulated entities and behaviours held by co-regulators.

5.2.2 Scoring

Data should be aggregated in a consistent and transparent way to determine an overall score. This process is referred to as ‘semi-quantitative analysis’ and involves:

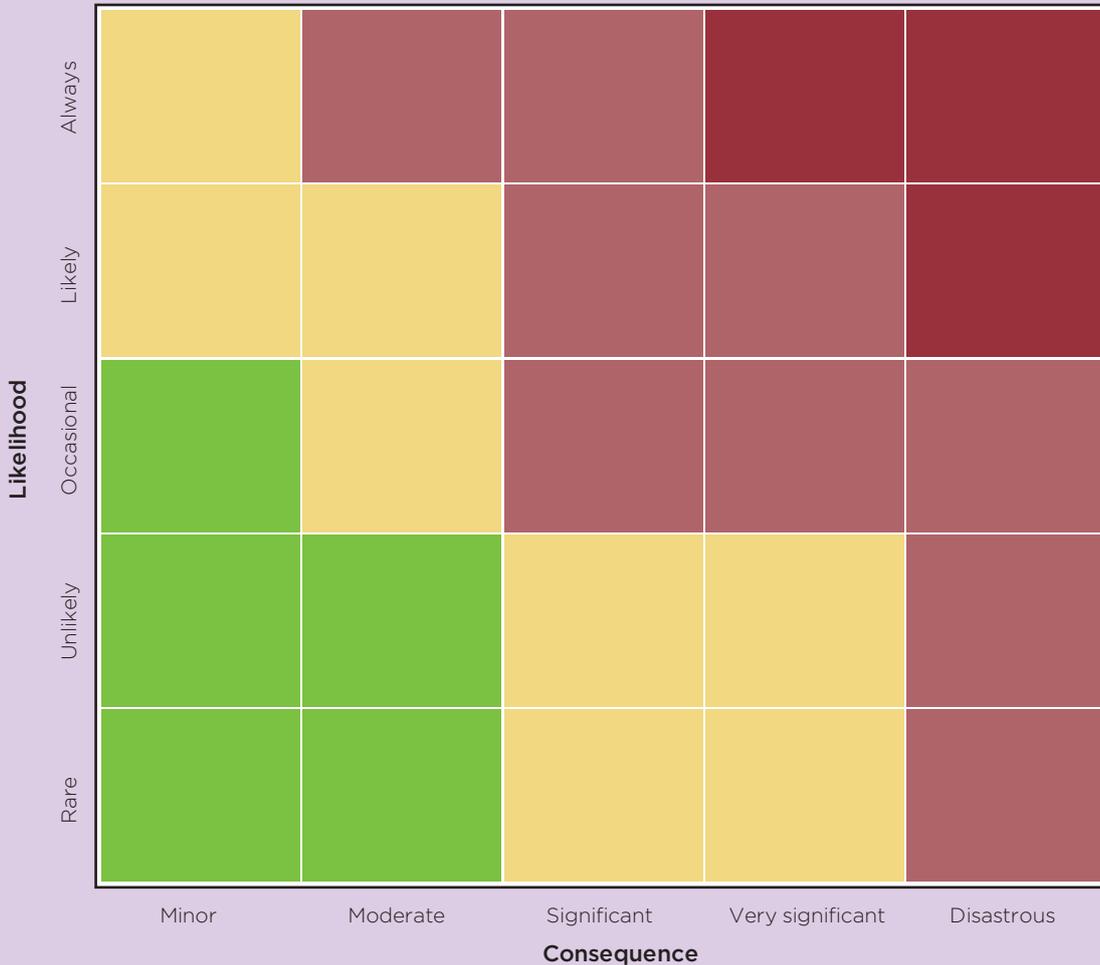
- data analysis independent of the regulator’s judgement (for example, for quantitative data or qualitative data, which can be easily grouped or classified), and
- using discretion or judgement by the regulator (for example, incorporating the regulator’s impression of internal control processes within the regulated entity).

Given that semi-quantitative analysis is subjective, risk assessment outputs are also subjective. Heat maps are a useful way to represent these outputs clearly. Heat maps can be simple or detailed, and contain subjective risk categories as shown in the example below.

Box 10: Illustration – risk heat map

A risk assessment output is typically a subjective measure based on a combination of quantitative and qualitative data, and the regulator’s own judgement. One way of showing results is with a risk heat map, which contains subjective categories to rank the likelihood and consequence of risk.

In the example risk map below, likelihood and consequence each have five subjective categories.



5.3 Consistency and transparency

It is essential that regulators develop and embed mechanisms to underpin risk assessment consistency and transparency. This is important to:

- applying judgement when completing risk assessments
- embedding a consistent understanding of the process throughout the agency, and
- underpinning confidence in the regulator’s processes.

Box 11: Example – Complaints Assessment Committee, and the Environment and Venue Assessment Tool – Office of Liquor Gaming and Racing

Complaints Assessment Committee

The NSW Office of Liquor, Gaming and Racing (OLGR) established the Complaints Assessment Committee (CAC) to ensure that complaints are appropriately categorised and handled. The CAC meets weekly and comprises senior officers from the OLGR's compliance branch.

Complaints determined at CAC as warranting further action are classified as 'minor', 'major' or 'priority', and are allocated for investigation. The classification can be changed at any stage during an investigation, if appropriate.

Environment and Venue Assessment Tool

The Environment and Venue Assessment Tool (EVAT) is a risk assessment tool that OLGR is currently trialling. The EVAT is used to assess new liquor license applications in the City of Sydney and Newcastle, and considers three risk factors including:

- external location risk (for example, assault rate, late night transport availability, police and council assessment)
- market location risk (for example, proportion of late night trading venues, proportion of high risk venues), and
- venue risk (for example, licence type, patron capacity, extended trading, liquor accord membership).

Data on each risk factor is used to produce assessments for each category that are then aggregated to determine the outcome. The assessment outcome informs:

- whether a new licence should be granted to the regulated entity, and
- the conditions to apply to the licence, if it is granted.

Box 12: Example – NSW Office of Water

The NSW Office of Water is responsible for managing surface water and groundwater resources in NSW. When the Office of Water receives reports of alleged non-compliance, they are assessed using questions designed to determine:

- the alleged non-compliance is actually occurring, and
- the consequence severity if the alleged breach were to occur.

The series of questions consider the:

- activity type causing the alleged breach
- water course's health
- alleged extraction volume
- catchment impact, and
- alleged offender's history.

Based on the responses to these questions, the alleged non-compliance is given a risk score that ranges from 'very low' to 'very high'. The Office of Water will then take regulatory action tailored to the risk score.

5.4 Checklist for regulators

Checklist for implementation

- ✓ The regulator examines whether it is suitable to individually assess regulated entities.
- ✓ The regulator identifies appropriate risk categories to classify and prioritise regulated entities and behaviours.
- ✓ The regulator assesses if the expected benefits of prioritising risk assessments exceed the additional costs associated with administration, training and quality control.
- ✓ The regulator determines the range of information available to inform risk assessments. Where additional information is needed, the regulator first determines whether it can be obtained from co-regulators, public sources and – finally – regulated entities.
- ✓ When undertaking risk assessments, the regulator weights the significance of different information according to the information's relative importance.
- ✓ The regulator has developed guidelines to underpin risk assessment quality and consistency.
- ✓ The regulator educates staff in properly applying risk assessments, and tests this understanding to ensure consistency.

Tips and tricks

- ✓ There should be a reason to undertake risk assessments of varying complexities. The additional time and resources required for administrative, training and quality control should not outweigh the benefits to the regulator.
- ✓ Qualitative data can often be categorised simply, and qualitative information can be useful for undertaking risk assessments. For example, the consistency of a regulated entity applying its safety procedures could be categorised as: 'no evidence'=1; 'inconsistent'=2; 'reasonable'=3, or 'consistent'=4.
- ✓ Keep risk assessments as simple as possible without eliminating important detail. Often, simplicity delivers more effective outcomes. Plus, it is simpler to communicate to staff and monitor consistency.

5.5 Understanding risks, and regulated entities worksheet

1. What forums did the regulator use to identify risks to their regulatory outcomes?

2. What are the historical, current and emerging risks to achieving the regulatory outcomes?

3. Is it practical for the regulator to individually assess regulated entities?

4. What are the risk category ranges that entities can be placed in?

5. Will the benefits of prioritising risk assessments likely exceed the costs?

6. What information sources are available to inform risk assessments?

7. How important is different information to risk assessment outcomes?

8. What processes support risk assessment quality and consistency?

9. What methods could be used to educate staff on how to appropriately employ risk assessments?

6. Linking your work to outcomes: a 'contribution story'

At a glance

When designing and evaluating the impacts of regulatory initiatives, it is critical for regulators to recognise that its initiatives will rarely be the single contributor to a regulatory outcome. Often, there are other external factors that also impact outcomes.

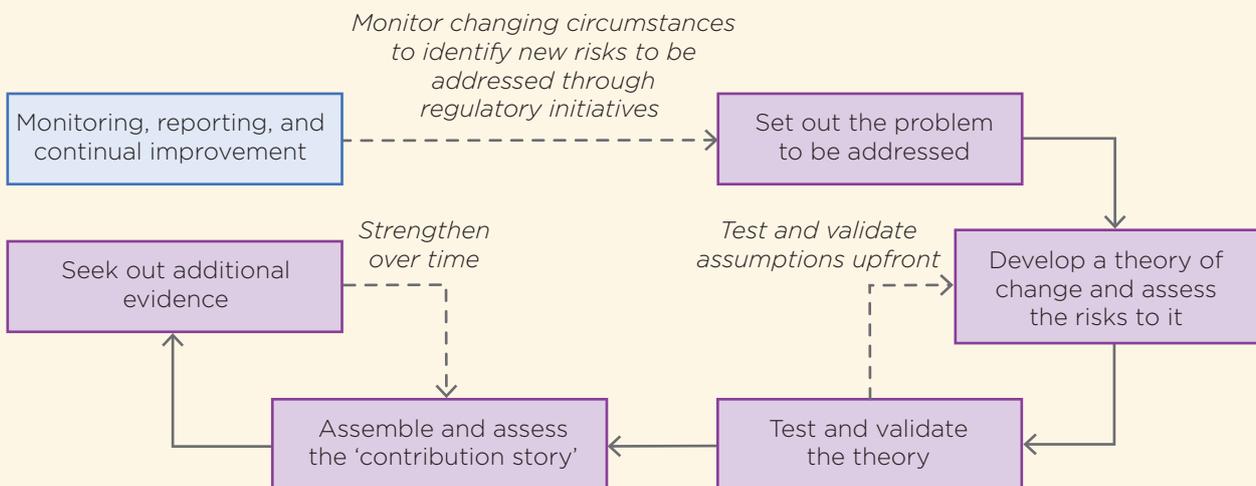
A 'contribution story' is a statement that identifies how a regulator uses inputs to design initiatives, and how these are associated with changes in short, intermediate and long-term outcomes. It recognises the ways that both its initiatives and external factors can impact outcomes.

Developing contribution stories can help to drive greater productivity, flexibility and accountability through:

- better aligning regulatory initiatives to underlying risk drivers
- adapting initiatives and allocating resources according to experience and evidence gathered over time, and
- using a contribution story as the basis for effective and informed engagement with internal and external stakeholders.

Over time, regulators need to ensure that contribution stories are underpinned by:

- rationalising how regulatory initiatives will contribute to an outcome
- considering assumptions and key risks associated with the rationale
- supporting and dissenting evidence associated with the rationale
- identifying external factors and their relative impact on outcomes, and
- incorporating a regulator's own experience developed over time.



6.1 Designing initiatives

Once risks to regulatory outcomes are identified and assessments are complete, regulators can design and implement regulatory initiatives. To do this effectively, regulators must:

- understand risk drivers to develop the most effective regulatory initiatives (this chapter), and
- identify the most appropriate measures to monitor progress over time (Chapter 7).

Designing and implementing regulatory initiatives should draw on this process and be:

- tailored to different entity characteristics to ensure a broad and impactful regulatory reach (see Box 13)
- supported throughout implementation by project management, risk identification and management, and budget management, and
- monitored:
 - during implementation to assist in adapting the approach in the short term, and
 - through a post-implementation evaluation, to identify key successes and lessons that can inform future initiative design and implementation.

When designing an initiative, regulators will have a range of measures available to them. The extent of these measures will be subject to the regulator's legislative remit, and can include but may not be limited to:

- media campaigns
- industry education and workshops
- financial incentives, and
- themed inspections or audits.

The mix of measures used should be informed by analysing the risks that the initiative is seeking to manage.

Box 13: Example – Tailoring engagement to entity characteristics – Health and Safety Executive UK⁶

The Health and Safety Executive (HSE) faces significant resource constraints, and does not have the personnel to regularly inspect many of its regulated entities. Historically, the inspection rate for regulated entities across the economy was, on average, about once every 14.5 years.

To address this challenge, the HSE has adapted its approach to engaging with small and medium sized regulated entities by segmenting the regulated population by industry categorisation and tailoring its engagement approach.

Agriculture

Typically, agricultural entities were a difficult sector to influence with regulatory initiatives. To address this difficulty, the HSE increased its visibility to the sector through a range of tailored mechanisms, including:

- participating in agricultural industry shows and farmers' markets
- disseminating information to farmers' wives, and
- airing a story about a tractor fatality on a BBC radio programme.

Construction

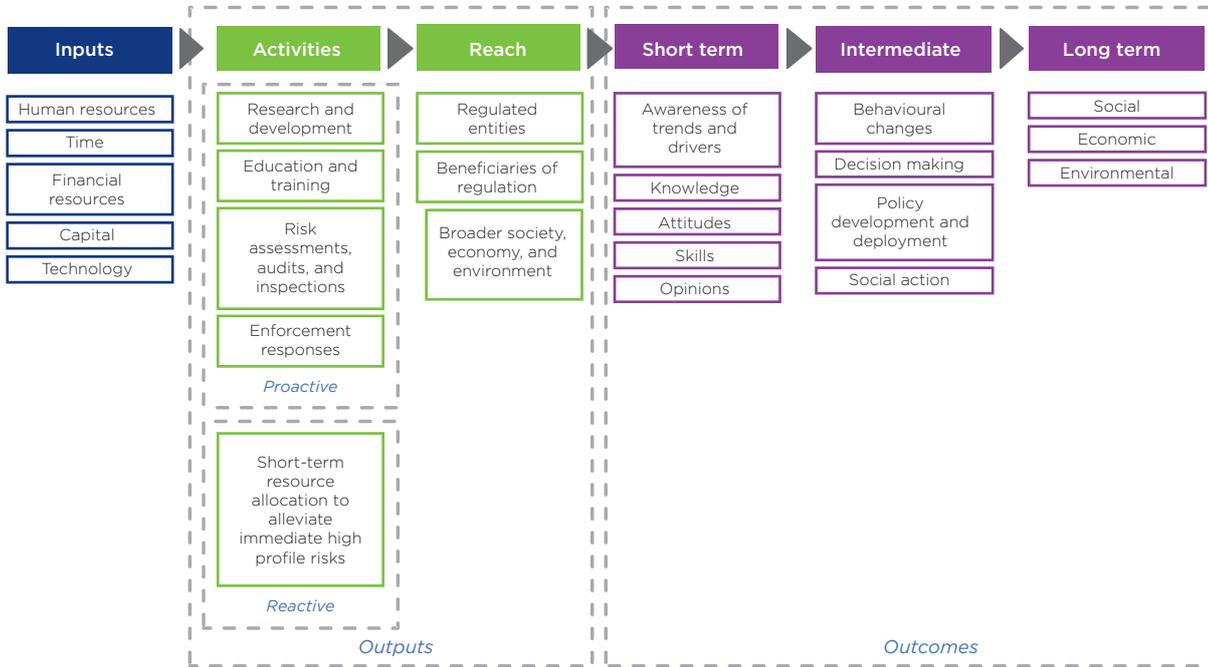
To target construction workers, the HSE is using radio and television campaigns, celebrity endorsement and shock campaigns. It has cooperated with hire shops and builders' merchants who have run schemes for builders to hand in old equipment and replace with new equipment at substantially reduced prices.

⁶ Adapted from Black, J. 2010, 'Risk-based Regulation: Choices, Practice and Lessons Being Learnt', in OECD, *Risk and Regulatory Policy: Improving the Governance of Risk*, OECD Publishing, 184-224.

6.2 Developing the contribution story

The contribution story is a key concept within the outcomes and risk-based regulatory framework. While the concept of a story may seem subjective, as Malcolm Sparrow notes, it enables regulators to substantiate the pathways through which its actions and initiatives impact stated outcomes (ie the outcomes hierarchy) at the micro level.⁷ This is illustrated in Figure 2.

Figure 2: The role of the ‘contribution story’ in the outcomes hierarchy



The ‘contribution story’ identifies how a regulator uses inputs to design initiatives, and how these are associated with changes in short, intermediate, and long term outcomes.

Each contribution story should include:

- why the regulator focused on the particular outcome
- the measures used to assess the initiative’s success
- a description of the intervention(s)
- a description of the intervention’s impact on the outcomes, as recorded by the designated measures, and
- steps going forward, such as any longer term monitoring or maintenance plan.

6.2.1 Logic model

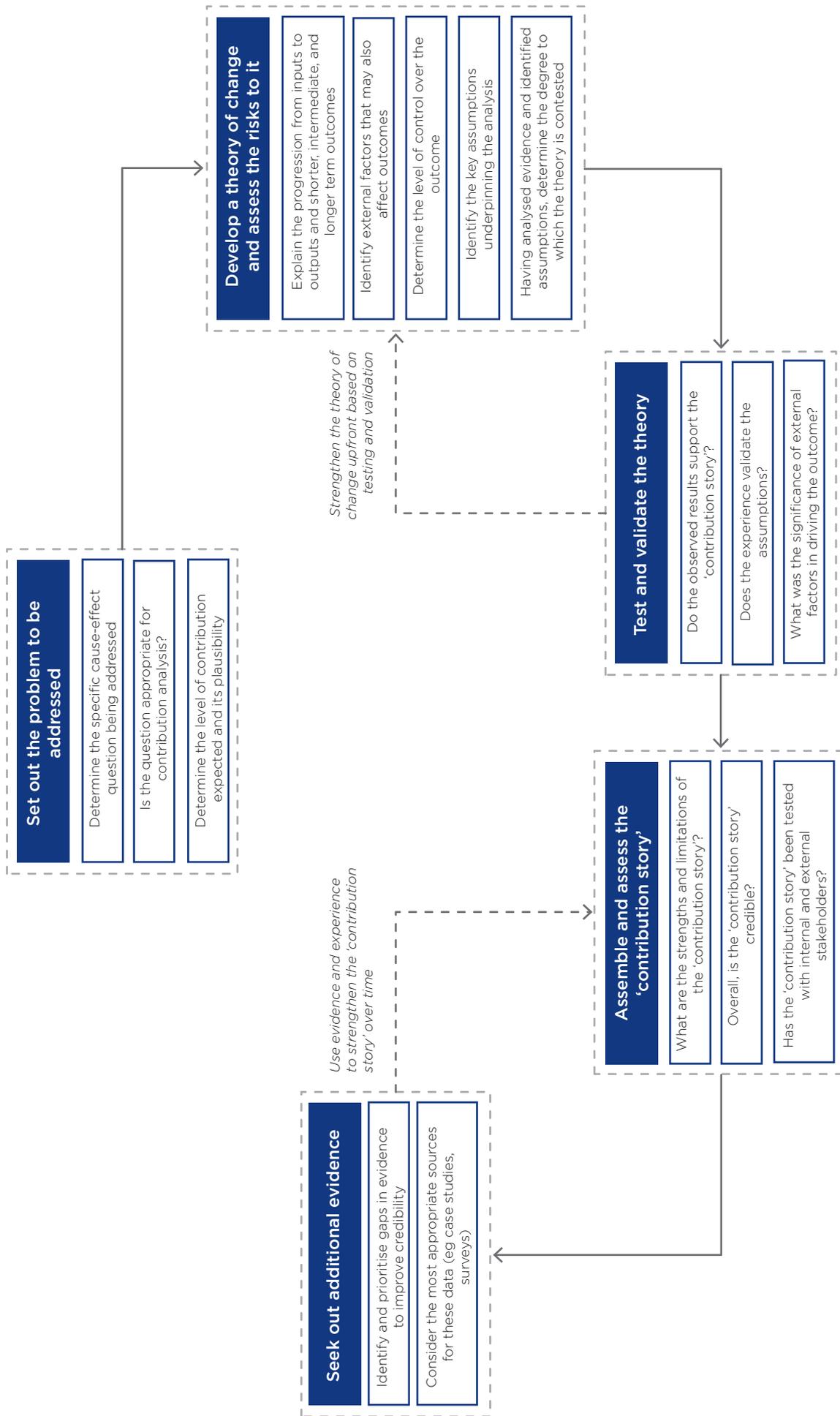
Credible contribution stories can be developed using a logic model similar to Figure 3. Regulators should note the feedback mechanisms that allow strengthening of the logic, both:

- upfront, through testing and validating key assumptions, and
- over time, through experience from implementing and collecting additional evidence.

These feedback mechanisms are represented by dotted lines.

⁷ Sparrow, M. 2008, ‘The character of harms: operational challenges in control’, Cambridge University Press, Cambridge.

Figure 3: The logic model



Source: Adapted from Mayne (2008), *Contribution analysis: An approach to exploring cause and effect*.

6.2.2 Testing assumptions

Regulators often take a top-down view of logic models and consider:

- long-term outcomes, and
- short-term outcomes, actions and inputs that may be associated with long-term outcomes.

Regulators need to test whether inputs and actions will interact as expected – including with external factors – to contribute to outcomes. By testing and validating assumptions upfront, regulators can better target initiatives to the underlying risk drivers and therefore achieve more effective outcomes.

Often, assumptions made by regulators through this process are not tested. This means that regulatory initiatives and, consequently, progress against outcomes, can be ineffective over time. A practical example is provided in Box 14.

Box 14: Illustration – Testing assumptions

Background

It is critical that regulators test assumptions made in logic models to ensure initiatives are best targeted at key risk drivers.

To effectively test assumptions, regulators should consider a range of evidence including but not necessarily limited to:

- internal and external data
- benchmarking experiences in domestic and international jurisdictions
- consultations with industry, government and community stakeholders, and
- the regulator’s own experience, if available.

Regulators should use the testing process to strengthen its assumptions, in addition to considering if an action has any unintended consequences.

Example

Intoxication in venues during late hours may be associated with increased rates of alcohol-attributable injury and death. The Office of Liquor, Gaming and Racing (OLGR) has a long-term outcome of promoting responsible alcohol consumption. This may involve identifying reductions in alcohol-attributable injury and death as a short-term outcome to monitor progress against its long-term outcome. To achieve this short-term outcome, the regulator may design an initiative to target intoxication in venues during late hours.

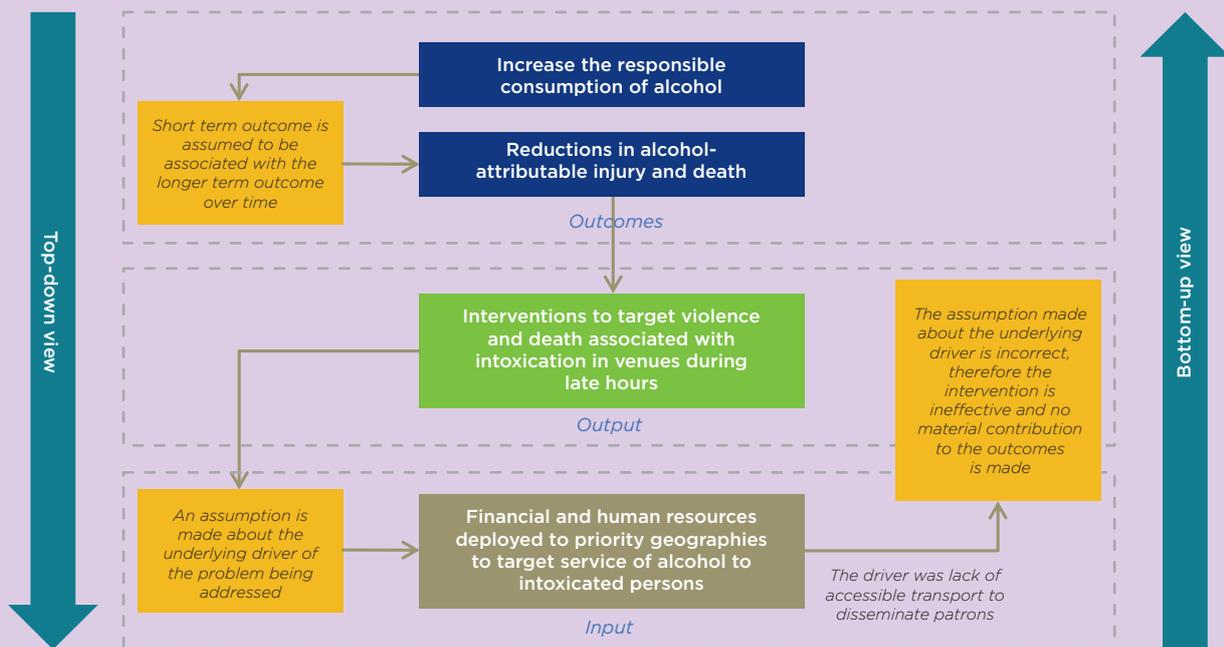
In attributing the short-term outcome to its initiative, the regulator may assume that the underlying cause of intoxication in venues during late hours is venues serving alcohol to intoxicated persons. In making this assumption, the regulator should identify other contributors to intoxication in venues during late hours, including:

- venues serving alcohol to intoxicated persons
- a lack of accessible transport for patrons to leave venues, and
- the combined effect of consuming alcohol and illicit drugs.

For the purposes of this example, the most significant contributor to intoxication in venues during late hours may be the lack of options to transport patrons from venues. The regulator needs to test, validate and strengthen its assumption prior to deploying resources to ensure that its initiative contributes to its short-term outcome.

This concept is illustrated in the following diagram.

Figure 4: Testing assumptions



To improve the approach over time, the regulator in question could:

- identify a broader range of potential drivers behind the risks that are being targeted by the initiative through data analysis, stakeholder consultations and expert insight
- draw on this broader upfront analysis and insight to develop more informed initial assumptions
- test these assumptions against broader data sources, industry stakeholders (including people at the 'coalface'), and expert insight
- use the testing process to refine assumptions and adapt the initiative upfront, and
- actively monitor the initiative's implementation and use insights from monitoring to adapt the approach as early as reasonably possible.

6.2.3 Degrees of contribution

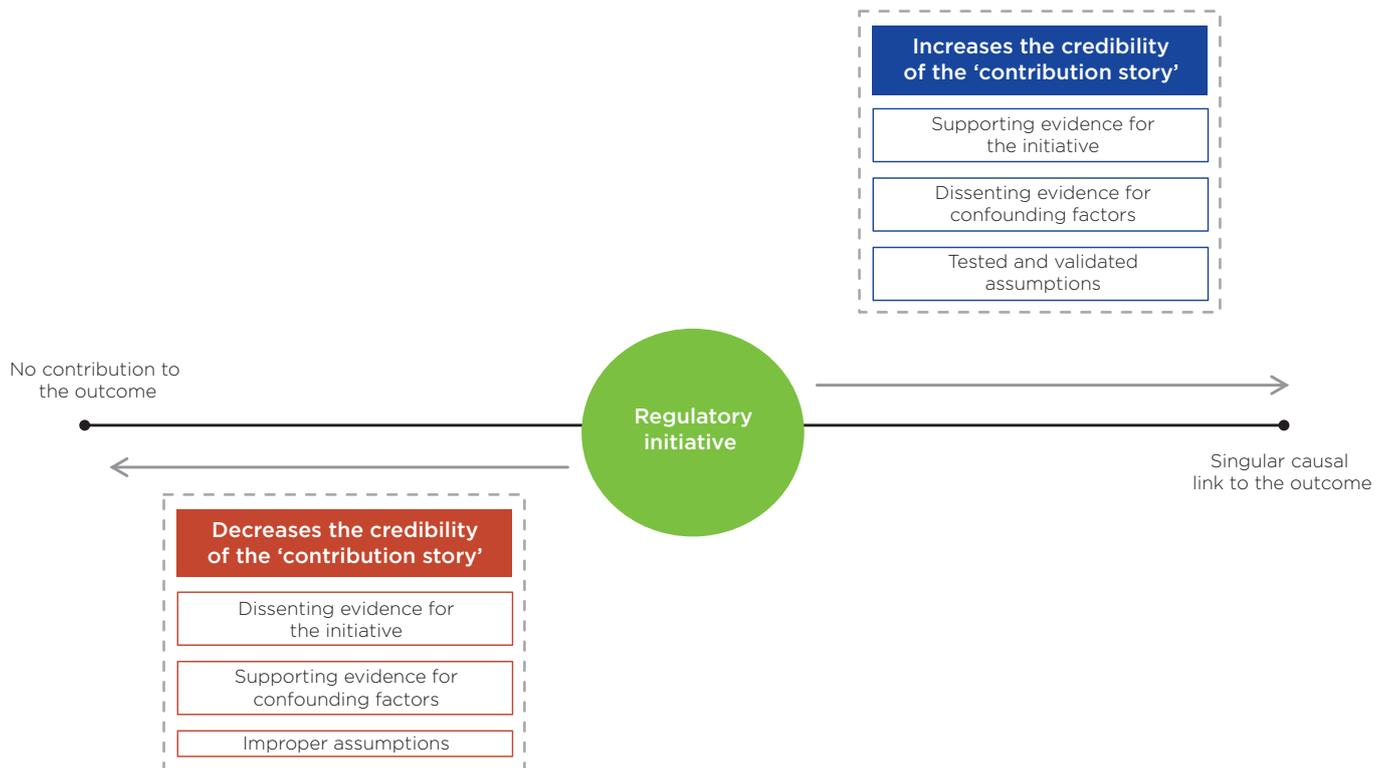
It is important for regulators to consider that other factors, often beyond their control, may also impact on outcomes. The contribution story's focus is therefore not to demonstrate a singular causal link between initiatives and outcomes. Rather, the focus should be to holistically consider evidence to determine the initiative's degree of contribution to the outcome.

Box 15: Example - NSW Food Authority

The NSW Food Authority identified salmonella poisoning as a key risk to target through an initiative. When evaluating the initiative's effectiveness (for example, with reference to reported salmonella poisoning rates), they identified and considered a number of other factors that may have impacted the outcome. For example, they noted that cooler than expected summer weather may have contributed to lower salmonella poisoning rates.

Figure 5 illustrates how different factors may affect how much a regulatory initiative contributes to the intended outcome.

Figure 5: Degrees of contribution



6.3 Strengthening the contribution story

It is critical to recognise that contribution stories and the underlying logic will change over time as:

- changes in outcomes are monitored, and
- circumstantial factors change that require regulators to adapt their approaches.

Similar to upfront assumption testing, regulators should:

- strengthen the contribution story over time by:
 - identifying and explaining successes (ie where an improvement in a regulatory outcome is attributable to the regulatory initiative's impact)
 - identifying gaps in evidence that decrease the contribution story's credibility
 - considering appropriate sources for additional evidence (for example, data, stakeholder consultations, research and development), and
 - incorporating evidence gaps and adapting regulatory initiatives as appropriate.
- undertake post-implementation evaluations of regulatory initiatives, with a view to:
 - validating an initiative's contribution to outcomes, and
 - identifying strengths and limitations in designing and implementing initiatives.
- incorporate lessons from post-implementation evaluations to inform:
 - developing and implementing future initiatives, and
 - developing internal processes, quality controls and other operational procedures.

Box 16: Example – WorkCover NSW

WorkCover NSW develops action plans to target key drivers of workplace injury and illness in high priority industries. The publicly available action plans provide detailed information, including:

- substantiating evidence to justify the industry’s priority
- background information on the industry’s trends in workplace safety
- a plan for change that identifies high risk areas to target with regulatory initiatives, the contributing factors to high risk issues, and the outcomes to be addressed through the regulatory initiatives, and
- detailed outcomes and actions for each issue to be addressed through regulatory initiatives.

A program logic framework similar to Figure 2 underpins the detail within these industry action plans. Importantly, the process incorporates deliberate feedback mechanisms to ensure that evidence and assumptions are continuously tested and validated. These mechanisms are embedded:

- upfront, through testing and validating risk drivers until internal stakeholders are satisfied with the evidence’s credibility, and
- over time, through structured project management and formal post-implementation effectiveness evaluations.

An example action plan, *Wood products manufacturing industry action plan 2012–2013*, is available at <http://www.workcover.nsw.gov.au/formspublications/publications/pages/wood-manufacturing-IAP-2012-2013.aspx>.

6.4 Checklist for regulators

Checklist for implementation

- ✓ The regulator determines an initial rationale for how its regulatory initiatives will contribute to its short, intermediate and long-term outcomes.
- ✓ The regulator explains the rationale by considering how its inputs will contribute to outputs and short, intermediate and long term-outcomes.
- ✓ The regulator tests assumptions underpinning the rationale by examining broader data and engaging with internal and external stakeholders.
- ✓ The regulator uses insights from the testing process to strengthen assumptions and the rationale.
- ✓ The rationale is used as the basis for regulatory initiatives that are targeted at the underlying risk drivers.
- ✓ The regulator continually seeks out additional evidence to strengthen the rationale over time.

Tips and tricks

- ✓ Data – and inferences made from data – need to avoid the danger of garbage in, garbage out. Do not make decisions based on data without challenging it. Engage with stakeholders and look to broader sources to test whether data is telling the right story.
- ✓ Identifying dissenting evidence or other external factors in an appropriate way does not indicate weakness. It demonstrates that the regulator has considered a broad range of information to inform – and therefore strengthen – its position.
- ✓ The work to identify risk drivers is never complete. Risks and their drivers continually change, and benefits can be maximised if regulators identify and respond to these changes early.

7. Identifying measures

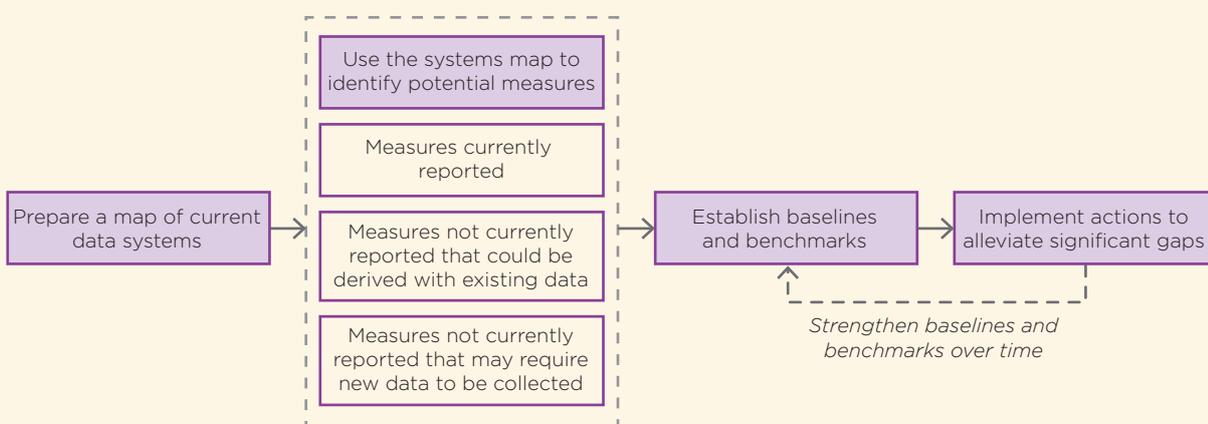
At a glance

Regulators need to identify measures to monitor and report on performance over time.

Regulators may face legislative, operational or technical constraints that can impact the capacity to use ideal measures. Within the context of these constraints, regulators need to understand their data and systems capability. This will assist in identifying:

- well-defined measures with clear links to regulatory outcomes that are timely and the best available at the most reasonable cost, and
- clear baselines to monitor change over time.⁸

Using relevant, objective and timely measures improves accountability and provides a strong basis for change and improvement.



7.1 Identifying measures

Within the outcomes and risk-based regulatory framework, regulators require measures to understand:

- the size and significance of the contribution to regulatory outcomes (ie the effectiveness)
- the attributes of outputs and administered items (ie the quality, quantity and cost), and
- how well outcomes have been delivered (ie efficiency and stakeholder responses).

Often, regulators will need some new or better measures to complement existing measures. The approach to identifying measures not currently reported should involve:

- mapping current systems, including:
 - data reported
 - links and interdependencies with other data systems, and
 - restrictions that may apply to data or its use.
- using the systems map to identify measures not currently reported, but within the regulator's capability, and
- identifying gaps that cannot be alleviated within existing capability, and appropriate measures that can be captured at a reasonable cost.

⁸ Barrett, P. 2004, *Results Based Management and Performance Reporting – an Australian Perspective*, Australian National Audit Office.

7.1.1 Developing a systems map

To identify new measures over time, it is important that regulators understand their data capability and control over data collection and reporting. Regulators may access data from multiple databases and use these to report a range of measures. Databases may be:

- internally controlled by the regulator, with:
 - no or few legislative or operational restrictions on the use of data, or
 - legislative or operational restrictions on data use (for example, only certain personnel authorised to collect and control the database, data use may be restricted).
- controlled externally, meaning the regulator has little control of the data's form, quality and timeliness.

Regulators should develop a map of current data and systems capability that shows:

- data reported
- links and interdependencies with other data systems, and
- restrictions that may apply to data or its use.

7.1.2 The suite of potential measures

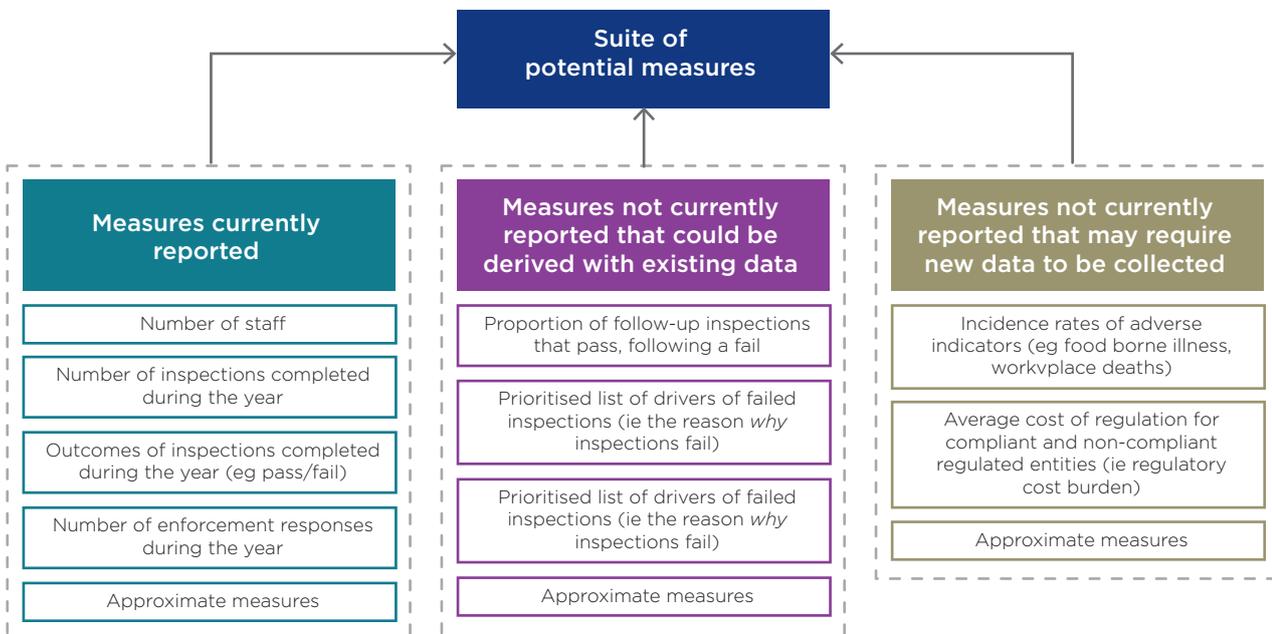
There is no single measure that captures all information required by regulators. A complete understanding of performance can only be obtained with a broader and balanced suite of measures.⁹

When looking to identify better or new measures, regulators should recognise that there is a range of potential measures that a regulator can use, as illustrated in Figure 6, including:

- measures currently collected and reported by regulators on their current approach
- measures that are not currently reported, however could be derived by combining existing data in new ways, and
- measures that are not currently reported and may require additional data to be collected over time.

There may be a trade-off between the timeliness and quality of measures, and regulators should look to balance these tensions in a manner appropriate to the context.

Figure 6: Identifying a suite of potential measures



⁹ Department of Finance and Deregulation, Performance Information and Indicators, from <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/docs/KPI-guidance.pdf>, p. 4

Box 17: Example – Potential measures for the NSW Food Authority

The NSW Food Authority is responsible for ensuring that consumers can make clear choices about and purchase safe food. Within its remit, the NSW Food Authority is responsible for regulating retail food businesses, and can inspect these premises to monitor and enforce compliance.

Potential measures the NSW Food Authority can use to assess their effectiveness in contributing to their outcomes include:

- *current compliance levels*, the percentage of premises that pass inspections
- *improvements in compliance*, measured by the percentage of premises that pass, given they previously failed, and
- *impacts associated with compliance*, measured by the number of food-borne illness outbreaks.

7.1.3 Approximate measures

Often, it will be difficult to identify measures that fully reflect the outcome or quality being monitored. In the absence of complete measures, regulators should identify approximate measures.

Box 18: Illustration – approximate measures

Approximate measures approximate a quantity when it cannot be measured exactly. When using approximate measures, it is critical to consider:

- reliability – definitions, assumptions and how these relate to the quantity being measured, and
- the correlation between the approximate measure's value and the quantity being measured (ie whether changes in the approximate measure reflect changes in the quantity being measured).

When reporting approximate measures, it is useful to note limitations and the impacts these have on the results. This provides context and can better inform decision making.

Where appropriate, regulators should seek advice from relevant specialists about appropriate measures.¹⁰

7.2 Baselines and benchmarks

To effectively monitor changes in measures over time, regulators should establish baseline measurements or benchmarks. Baselines are a base level against which future data is measured, and can be useful for performance reporting, given that they:

- inform target and stretch target setting, and
- provide reference points for monitoring and reporting changes in measures over time.

Similar to other aspects of the framework, the aim should be to achieve progress over time. For example, there will be some measures (for example, measures not currently reported that require new data to be collected) for which regulators do not immediately have a baseline or benchmark. In these situations, regulators should:

- consider interim measures (for example, qualitative comparators) while more complete baselines or benchmarks are established, and
- establish baselines or benchmarks over time that are the best available at the most reasonable cost.

¹⁰ Department of Finance and Deregulation (Commonwealth), *Performance Information and Indicators*, from <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/docs/KPI-guidance.pdf>, p. 4

7.3 Checklist for regulators

Checklist for implementation

- ✓ The regulator has worked to understand its data systems by developing a map that shows information captured, links to other systems, and key operational or legislative limitations on data use.
- ✓ The regulator uses the systems map to identify measures currently reported.
- ✓ The regulator uses the systems map to identify measures not currently reported, but that could be reported with existing data (for example, by combining data in new ways).
- ✓ The regulator uses the systems map to identify measures not currently reported and may require additional data to be collected over time.
- ✓ The regulator examines the balance between timeliness, cost and quality for different identified measures.
- ✓ The regulator has established baselines and/or benchmarks to monitor changes in measures over time.
- ✓ Where baselines are not available, the regulator has identified appropriate interim measures (for example, qualitative comparators).

Tips and tricks

- ✓ Free text fields often contain valuable information, however it is very difficult for regulators to systematically access and use it. Drop down lists with set responses can be very useful in capturing additional information. For example, if a regulated entity fails an inspection's component, the form could then have a drop down list of reasons why the entity failed. These should be informed by the regulator's own understanding of the key drivers.

7.4 Gathering and validating evidence to design regulatory initiatives worksheet

1. How is the regulatory initiative expected to contribute to the short, medium and long-term outcomes?

2. What are the assumptions underpinning this rationale? Have these been tested and validated? If so, what was the range of methods used to test and validate the assumptions?

3. What data information systems does the regulator currently use?

4. What measures are currently reported?

5. What measures does the regulator currently have the capacity to report but does not? Would the benefits of using these measures likely outweigh the cost?

6. What measures are currently not reported that may need additional data and systems capability? Would the benefits of these measures likely outweigh the costs?

7. What are the baselines against which future performance will be measured?

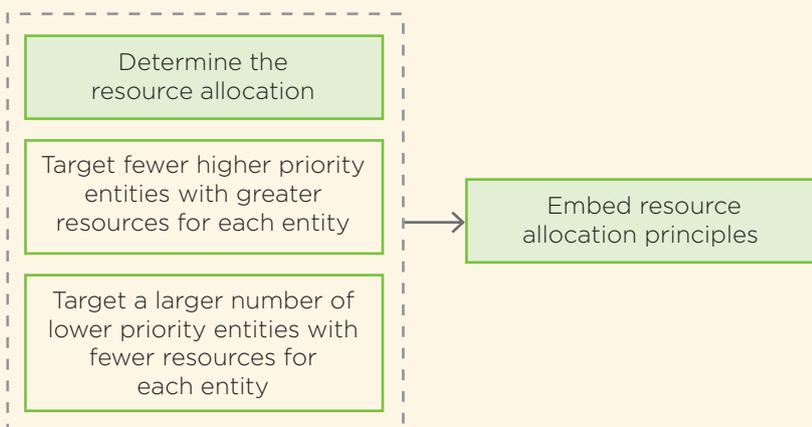
8. Allocating resources

At a glance

Once regulatory initiatives are designed, regulators need to appropriately allocate resources to initiatives. Resource allocation should be tailored according to the regulator's assessment of the priority and behaviour of a regulated entity.

Although non-compliance in higher priority entities is more likely to contribute to greater harm, there must also be a focus on lower priority entities. Regulators therefore need to consider how best to interact with entities with different priorities.

The regulator should establish resource allocation principles for higher and lower priority entities and embed in corporate planning.



8.1 Proactive and reactive initiatives

Regulators undertake a range of proactive and reactive work to promote and enforce compliance. For example:

- proactive work can include planned audits and inspections, education campaigns, financial incentives to change behaviours, and
- reactive work can include notifications, emergency incidents, responses to complaints received through call centres, and can include measures to alleviate community pressure from high profile incidents.

Some regulators, by their nature, will undertake a substantial share of reactive work. For these regulators, it is important to begin to apply a risk-based approach. This allows the regulator to achieve the best outcomes from that activity, and to minimise the burden on regulated entities that are found to be complying or have only minor or technical non-compliance issues. For example, a regulator could begin to triage complaints at the point of receipt based on information obtained from the complainant, with:

- low priority complaints being noted but not actioned unless further complaints are received
- mid priority complaints being followed up with an inspection or audit, and
- high priority complaints being followed up with an inspection or audit, an enforcement response (if necessary), and follow up interactions over time to promote better compliance.

An effective prioritisation scheme needs a process for assessing each case against a number of clearly specified criteria, with an explicit rating of that case against the criteria. This generates a priority score for each case (for example, low, mid and high as above). This system and associated procedures should be documented and approved by the regulator's management.

Front line officers need to document each case's rating, and there should be the capacity to review it if new information comes to light (for example, a second complaint about the same regulated entity, or there is a need to revise the rating system).

A system to check ratings consistency also needs to be put in place, with appropriate governance to review the ratings and the progress of high priority cases. The proportions in each category, and the scoring system, should be reviewed regularly to ensure that disproportionate numbers are not falling in any one rating category.

Applying such a prioritisation system means that, while some cases will get a more timely and targeted response, after the initial assessment, some cases will not be investigated at all. Procedures may need to be developed to advise potential offenders that concerns have been raised, suggest that complainants make contact again if the problem persists, and suggest information they might provide (for example, recording when and where subsequent problems occurred).

As importantly, better targeting reactive activities can free up capacity for proactive activity, the main focus of the following sub sections. When designing prioritisation systems for a more focussed approach to reactive cases, some regulators may seek to establish high level targets for the level of proactive activities that are able to undertaken.

The concepts within this guidance material principally relate to proactive regulatory work. However it is critical that regulators have the right tools to manage pressures from reactive work. The framework to manage reactive work is discussed and illustrated further in Chapter 11.

8.2 Allocating resources

The underlying principle of the risk-based approach to compliance and enforcement is that regulators should focus the most significant proportion of their resources to initiatives that target the highest priority entities and behaviours. Equally, it is critical that regulators have a structured approach to assisting and enforcing compliance in lower priority entities and behaviours.

By their nature, higher and lower priority entities and behaviours have different characteristics so regulators should consider these when developing their approach to allocating resources.

8.2.1 Higher priority regulated entities and behaviours

The approach to engaging with higher priority entities and behaviours should be based on:

- the regulated entity's size and sophistication, and
- the risk assessment's outcome.

Higher priority entities and behaviours are more likely to have:

- a higher likelihood of a risk event, more serious consequences, or both, and
- higher degrees of interdependency with industry or other risk factors.

Regulators should target a smaller number of higher priority entities, devoting more time and human resources to each.

8.2.2 Lower priority regulated entities and behaviours

The framework involves more resources being allocated to entities or behaviours that pose the highest risk to outcomes. Many regulated entities and behaviours will be lower priority for regulators and may not be subject to risk assessments. Despite being lower priority, regulators must still supervise these regulated entities and behaviours.

Lower priority entities and behaviours are typically associated with:

- a lower likelihood of a risk event and less serious consequences, and
- lower interdependency with industry and other risk factors.

Regulators should consider the most appropriate activities to assist compliance for low priority entities and behaviours that are not subject to risk assessments. For example, the regulator may choose to carry out random inspections, distribute information, conduct campaigns, provide advice on request, or a combination of these activities.

An active and consistently executed enforcement policy is just as important for low priority entities and behaviours as it is for higher priority entities and behaviours. Accompany educational and preventative activities with consistent enforcement action as an effective deterrent for non-compliance and to underpin the regulator's authority.

8.3 Embedding resource allocation principles

It is important for regulators to ensure that principles for resource allocation are explicit and embedded within the agency. This helps to ensure that:

- principles are effectively embedded into corporate planning
- resource allocation is consistent and transparent, and
- internal and external stakeholders understand the rationale for prioritising effort.

Regulators should publish the principles that guide their resource allocation as part of their compliance and enforcement policies (see Chapter 11). Some regulators choose to go further and publish specific priorities for their proactive enforcement and compliance activities, and regulators should consider the benefits of this approach given their circumstances.¹¹

Box 19: Example – Resource allocation principles – Office of Fair Trading (UK)

The Office of Fair Trading is the consumer and competition regulator in the UK. It has developed and published *OFT Prioritisation Principles*, which explains that resource allocation decisions associated with its regulatory initiatives are made based on:

- the *impact* on consumer welfare in the respective market or sector (direct and indirect), and on productivity and economic efficiency
- the work's *strategic significance* with respect to corporate strategic priorities, the suitability of the Office of Fair Trading to act, and the balance of other work undertaken by the Office of Fair Trading
- the *likelihood* of a successful outcome associated with the regulatory initiative, and
- the *resource* implications associated with the regulatory initiative, including whether benefits are proportionate to required resources, the timeframe for the initiative, and potential savings over time for the Office of Fair Trading may increase efficiency.

For further information, the *OFT Prioritisation Principles* are publicly available at http://www.offt.gov.uk/shared_offt/about_offt/offt953.pdf.

¹¹ For example, the Australian Tax Office and the Victorian Environmental Protection Authority.

8.4 Checklist for regulators

Checklist for implementation

- ✓ The regulator has implemented a process for prioritising reactive work that is documented and approved by the regulator's management.
- ✓ The prioritisation framework ensures that the rating and basis for that assessment is documented for each case, and can be updated if new information comes to light about that case.
- ✓ The regulator regularly reviews the prioritisation process consistency, whether it is achieving an appropriate balance across priority categories, and is allowing adequate capacity for proactive activities.
- ✓ The regulator has a resource allocation strategy that accounts for higher and lower priority regulated entities.
- ✓ For higher priority entities, the regulator allocates greater resources to fewer entities, with greater time spent per entity.
- ✓ For lower priority entities, the regulator allocates fewer resources to a greater number of entities, with less time spent per entity.
- ✓ The regulator tailors its approach to assisting compliance in lower priority entities based on the entity's characteristics.
- ✓ The resource allocation strategy includes guidelines on how to respond to urgent requests that may arise due to high media or political profile.

Tips and tricks

- ✓ Different industries and different size entities interact with government in different ways. By understanding how different regulated entities operate and interact with government, regulators can better tailor, target and distribute information that underpins more effective outcomes.

9. Tailoring the enforcement response

At a glance

As a result of initiative design and resource allocation to those initiatives, regulators will identify instances of non-compliance in some regulated entities or behaviours. Non-compliance will typically be identified through audits or inspections.

It is important to tailor responses to non-compliance according to the non-compliance's severity and behavioural drivers. Regulators with a wide range of potential enforcement responses are better placed to achieve superior regulatory outcomes given the flexibility to deploy responses that are appropriate to the context.

Regulators should determine the appropriate enforcement response by considering:

- the entity's priority
- the risk assessment outcome
- tools proportionate to the non-compliance's severity and behavioural drivers
- the cost and time impacts on business to determine and deliver the most appropriate enforcement response and other regulatory activities, and
- the potential for incentives for regulated entities with consistent good compliance to balance targeted enforcement responses for entities with consistent non-compliance.

Determine thresholds for the regulator to consider more serious responses



Tailor the enforcement response for identified non-compliance

9.1 Non-compliance thresholds

The purpose of risk-based compliance and enforcement is not to eliminate risk. Rather, the purpose is to use risk to prioritise effort in assisting compliance, and identifying and enforcing non-compliance.

In determining regulatory responses to identified non-compliance, it is understood that regulators have a degree of tolerance to risk. In other words, there is a certain level of risk that:

- below which, regulators may not consider certain enforcement responses, and
- above which, regulators will start to consider more serious enforcement responses.

Regulators should establish thresholds at which an instance of non-compliance will move from requiring one type of enforcement response to another. Typically, thresholds can be defined using the risk heat map used for risk assessments.

Over time, regulators should work to understand these thresholds, express them in the compliance and enforcement policy, and educate staff for consistency in application. In the long-term, consistency and transparency in applying enforcement responses will assist to underpin confidence in the regulator.

9.2 Determining the enforcement response

When non-compliance is identified, regulators should determine the most appropriate set of tools to use to respond. In determining the response, the regulator should consider:

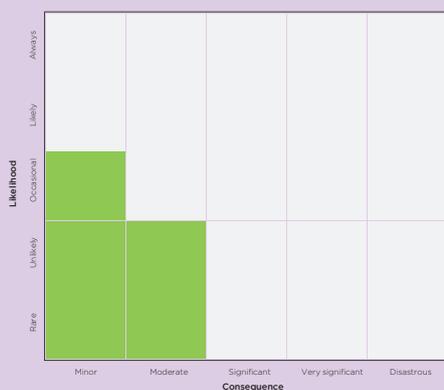
- the regulated entity or behaviour's priority
- the risk assessment output, which gives an indication of the entity's overall risk to regulatory outcomes, and
- the non-compliance behavioural drivers (for example, unintentional non-compliance should be enforced using educational measures, such as advice or guidance material, whereas unwillingness to comply should be enforced with stricter measures, such as infringement notices or prosecutions).

The tools available to regulators can depend on the relevant legislation's scope. Accordingly, the following examples may reflect:

- tools that are not available to some regulators, or
- an incomplete range of tools to other regulators.

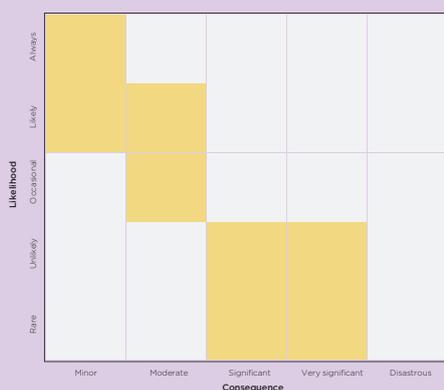
Box 20: Illustration – Potential mapping of regulatory tools to the characteristics of identified non-compliance¹²

Characteristics of non-compliance



Potential responses

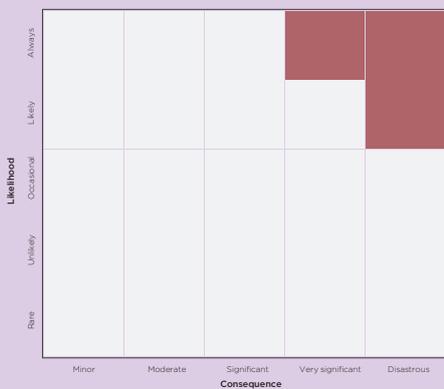
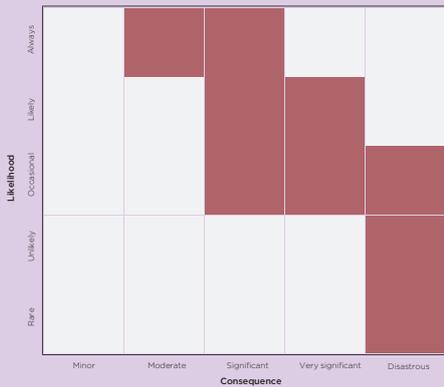
- Regulators can provide advice to regulated entities about their approach to compliance and how it can be made more effective.
- Educational campaigns could be the main regulatory effort for the majority of low priority regulated entities and behaviours.
- Inspections could be conducted only for specific reasons (for example, in response to complaints or for random sampling purposes). It presents an opportunity to engage with and educate the entity in an informal context.
- Notices to remedy contraventions can be used to formally advise of one or more legal requirement breaches, provide a further opportunity to comply without sanction, require remedial action to be undertaken, and provide guidance on how to comply.
- Infringement notices can be used to deal with breaches not serious enough to warrant prosecution.
- Regulators can publish the names of offenders (ie 'name and shame').



¹² Adapted from Better Regulation Office 2008, *Risk-Based Compliance*, http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0019/30862/01a_Risk-Based_Compliance.pdf.

Box 20: Illustration – Potential mapping of regulatory tools to the characteristics of identified non-compliance¹²

Characteristics of non-compliance



Potential responses

- Warnings can be given in writing and recorded by the regulator. They can be used to signal that further non-compliance will result in an escalating response.
- Improvement notices, while also requiring remedial action, are used to inform regulated entities that ongoing or repeated failure to rectify non-compliance will result in financial or other penalties.
- Infringement notices can be used to deal with breaches not serious enough to warrant prosecution.
- Regulators can publish the names of offenders (ie ‘name and shame’).
- Regulators can publish the names of offenders (ie ‘name and shame’).
- Notices to remedy contraventions can be used to formally advise of one or more legal requirement breaches, provide a further opportunity to comply without sanction, require remedial action to be undertaken, and provide guidance on how to comply.
- Enforceable undertakings can be used as a constructive alternative to prosecution. The entity enters into a binding agreement to alleviate contraventions of the law.
- A licence or permit suspension can be used to temporarily remove the ability for the holder to operate. It can be used when the operator has failed to pay annual fees, has a history of repeatedly breaching licence conditions, or obstructs or fails to respond to an inspector.
- Prosecutions seek to provide an appropriate sanction to the offender and act as a deterrent. Prosecutions can be considered when other responses are inadequate or unlikely to ensure ongoing compliance. The decision to prosecute should be based on guidelines from the Director of Public Prosecutions.
- Revoking a licence or permit permanently removes the ability for an entity to operate. This can be considered when the holder has a history of seriously breaching the conditions, the holder has been successfully prosecuted, and is considered to no longer be ‘fit and proper’ to operate the entity.

Box 21: Example – NSW Office of Liquor, Gaming and Racing

The NSW Office of Liquor, Gaming and Racing (OLGR) uses a risk-based framework – known as the Matrix of Breaches – that recommends an enforcement response for non-compliance.

OLGR regulates at least 17 pieces of legislation, each with a number of subordinate sections and clauses. The Matrix of Breaches identifies the breach’s type and scale, and links these to subordinate sections within the appropriate legislation.

A risk rating is assigned based on this information, along with a recommended enforcement response. For example:

- the recommendation for minor non-compliance is typically to issue a warning, and
- the recommendation for serious non-compliance may include prosecution.

Using the matrix helps to underpin the consistency of OLGR’s enforcement responses over time and between inspectors. It also promotes an enforcement response proportionate to the scale and culpability of non-compliance.

Figure 7: Snapshot from the Matrix of Breaches

Legislation	Section or Clause	Details	Risk	Recommended action
GALAA	s.34(1)	Person refuses or fails to comply with a requirement made by an Inspector	8	Prosecution

Note: GALAA refers to the *Gaming and Liquor Administration Act 2007*

Source: NSW Office of Liquor, Gaming and Racing.

Box 22: Example – NSW Environmental Protection Agency

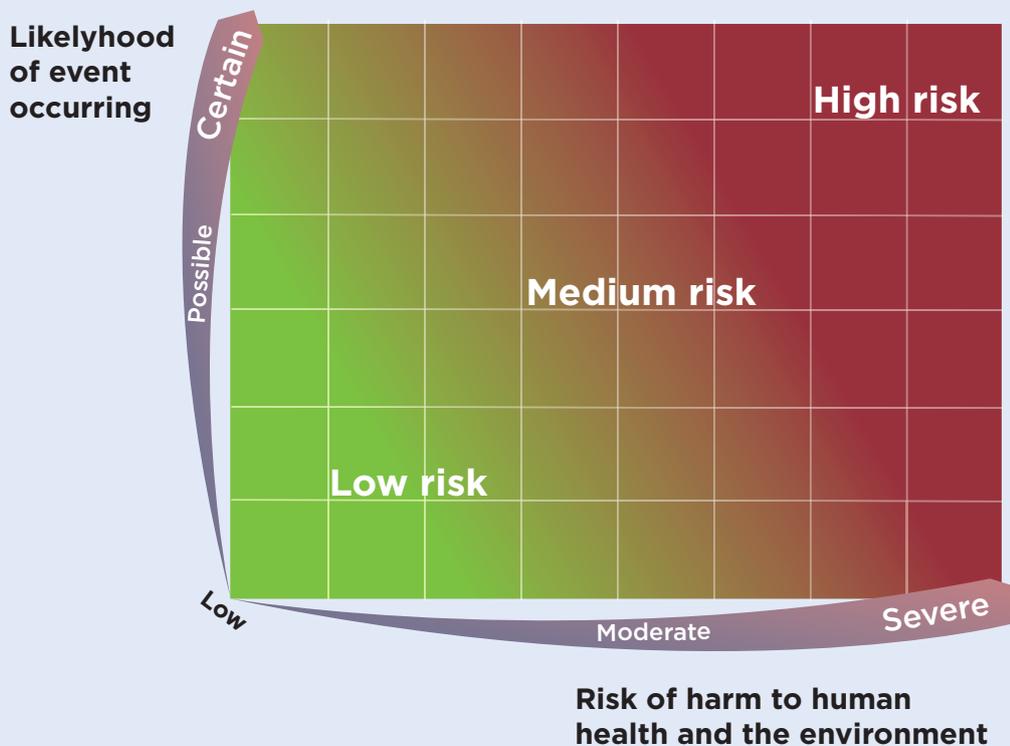
The NSW EPA's Compliance Policy summarises the EPA's general approach to compliance and enforcement. The policy explains how the EPA undertakes activities that achieve compliance and drive improved environmental performance. It guides EPA decision-making to ensure that its compliance activities and actions are consistent, fair and credible.

The following criteria underpin the EPA's assessment of environmental risk:

- Type of environmental media (air, odour, water and noise emissions, chemicals and waste)
- Processes and operations that may result in environmental impacts and controls in place to mitigate them
- Environmental context, for example the proximity to residential premises or to waterways, or impacts on air quality, and the
- Compliance history of the person or activity being regulated.

The enforcement responses matrix published in the Compliance and Enforcement Policy is provided in Figure 8.

Figure 8: The NSW EPA's environmental risk matrix



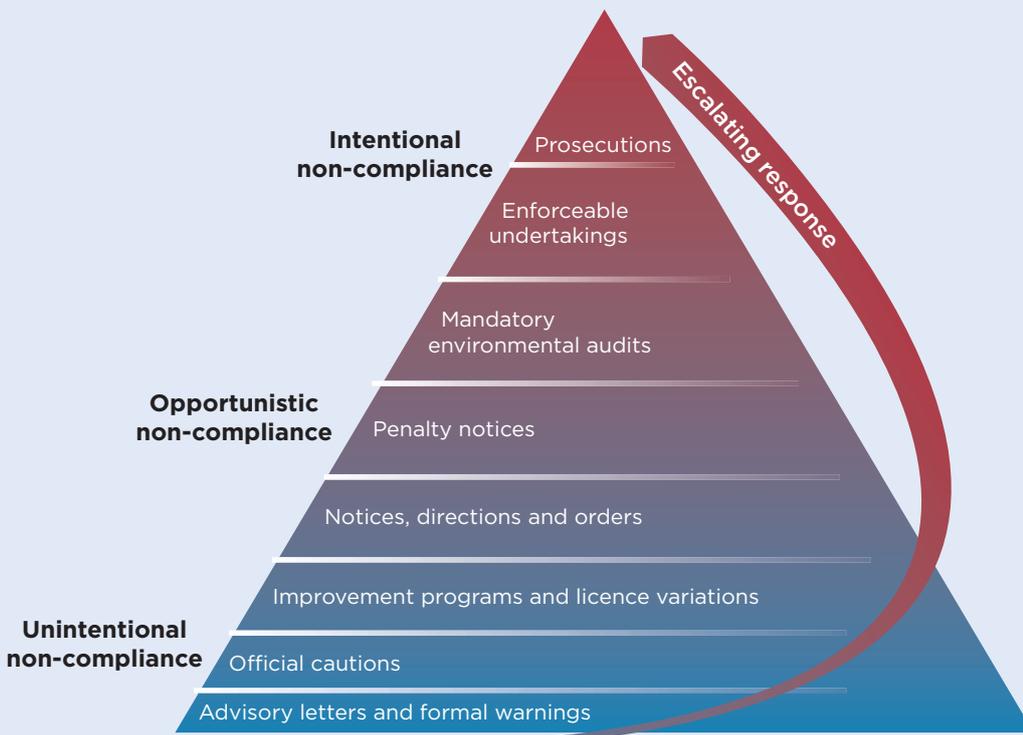
Matching regulatory responses on attitudes on compliance

Compliance and enforcement actions are most effective when they raise environmental awareness and encourage behavioural change. These changes in attitudes and behaviour both improve compliance rates and secure long-term environmental improvements.

A key consideration in changing behaviour is to identify what motivates business and individuals to comply with the law, as well as the factors that lead to non-compliant behaviour. This puts the focus on the causes of non-compliance, rather than just the symptoms. It also helps in deciding the right tool to use to reduce incidences of re-offending and repair environmental damage.

Figure 9 provides examples of the types of regulatory tools the EPA may use to influence positive changes to attitudes and behaviours. The EPA escalates its regulatory response according to the risk to the environment and human health, the seriousness of the non-compliance, the apparent attitude to compliance, and the compliance history and frequency of issues arising.

Figure 9: Matching EPA regulatory tools with attitudes and behaviour



Adapted from Ian Ayres @ John Braithwaite (1992), *Responsive Regulation: Transcending the deregulation debate*, Oxford University Press, New York

9.3 Checklist for regulators

Checklist for implementation

- ✓ The regulator has established, with reference to the risk scoring framework, levels at which it will begin to consider enforcement responses of increasing severity.
- ✓ When non-compliance is identified, the regulator determines a response proportionate to the non-compliance's severity and behavioural drivers.
- ✓ The regulator's approach considers the cost and time impacts on business when determining and delivering the most appropriate enforcement response and other regulatory activities.
- ✓ The regulator considers the potential for incentives to reward regulated entities with consistent good compliance to balance targeted enforcement responses for entities with consistent non-compliance.

Tips and tricks

- ✓ The regulator's flexibility and effectiveness will be driven by the range of responses available to it – more responses for different situations means the regulator can tailor to the context.

9.4 Interacting with regulated entities worksheet

1. How does the regulator prioritise its reactive work?

2. How does the regulator deploy its resources to engage with both higher priority and lower priority entities?

3. How does the regulator tailor its engagement according to the regulated entity's characteristics?

4. How does the regulator respond to urgent requests that may arise from media or political profile? What is the strategy to deal with these requests?

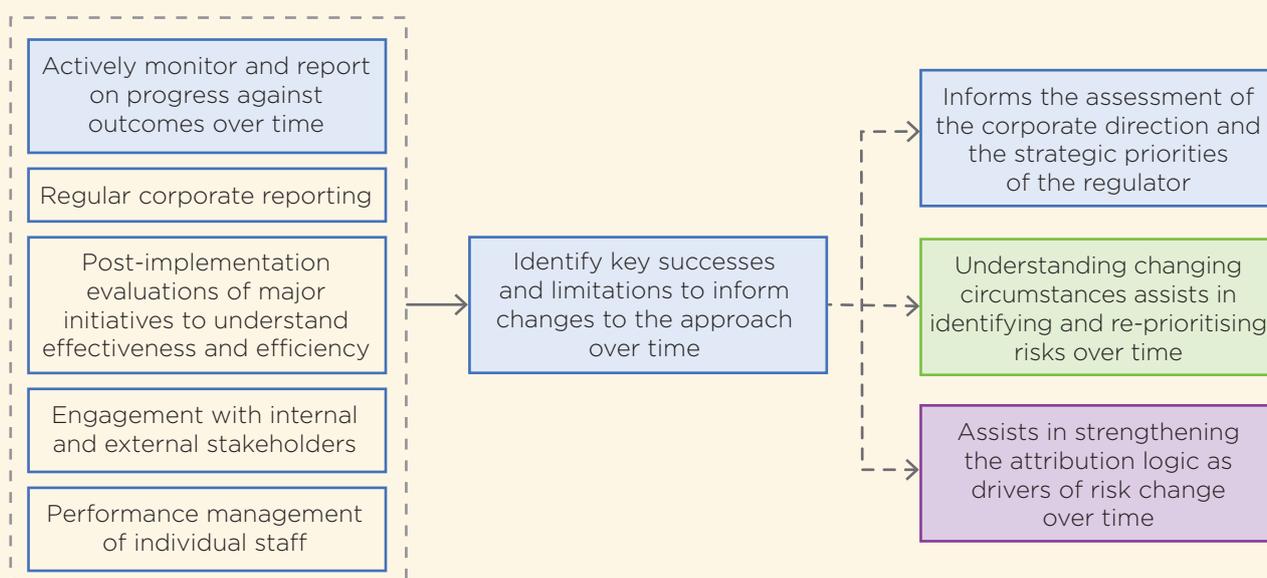
10. Monitoring, reporting and continual improvement

At a glance

Previous stages in the outcomes and risk-based regulatory framework have been associated with the planning and development that underpin regulatory initiatives. Monitoring, reporting and continual improvement are the mechanics through which the benefits of the framework are capitalised and maximised over time.

Through a structured, consistent and transparent approach to reporting, regulators can test an initiative's effectiveness and efficiency in practice. With these insights, regulators are best placed to:

- strengthen regulatory initiatives by more effectively identifying and prioritising risks, and a more informed understanding of risk drivers, and
- inform the regulator's corporate direction and strategic priorities over the longer term.



10.1 The lens for monitoring and reporting

Undertake effective monitoring and reporting through a lens of continual improvement, rather than as a means to periodically and discretely measure (ie a 'box ticking exercise'). With this lens, monitoring and reporting assists regulators to:

- understand performance at a deeper level, enabling more meaningful and informed engagement with internal and external stakeholders
- improve performance management frameworks over time, with clearer accountabilities that are better aligned with regulatory outcomes, and
- use monitoring and reporting, along with broader corporate knowledge and experience, to continually strengthen the approach including by:
 - motivating a continual improvement culture to embed discipline over time
 - improving an initiative's cost effectiveness through informed and targeted initiative design and resource allocation, and
 - reducing burden on complying regulated entities and promoting better compliance outcomes through a more targeted and effective regulatory approach.

The process for collecting and analysing data should be managed so that a quality assurance function is performed. This is particularly important when data is used for strategic purposes, where data contamination can lead to misdirected expenditure and effort.

10.2 Documenting the approach

Implementing decisions arising from the outcomes and risk-based regulatory framework is necessary, but it is not enough for regulators to demonstrate the approach's effectiveness. Regulators must also substantiate its approach to reaching and implementing those decisions.

To substantiate its approach, regulators should actively document the process used to reach and validate its decisions. This includes:

- background information informing the decision, including:
 - the risk identification process, including methodologies and key stakeholders
 - the risk assessment process, including the assessment framework, key inputs and weighting mechanism to aggregate data
 - broader data analysis, stakeholder consultations and expert insight informing decision making
 - the principles underpinning resource allocation decisions, and
 - a description of how – holistically – evidence was assessed to determine the appropriate decision.
- substantiating key decision points and interactions with regulated entities and stakeholders
- showing internal sign off processes that demonstrate adequate management and executive involvement in making key decisions, and
- quality control mechanisms (for example, validating assumptions, peer review of decisions) applied to decisions made by the regulator.

10.3 Checklist for regulators

Checklist for implementation

- ✓ The regulator recognises that monitoring and reporting does not refer to periodic, discrete events, rather that it requires continued, structured attention from all levels within the regulator.
- ✓ The regulator uses monitoring and reporting to identify strengths and limitations in the current approach.
- ✓ The regulator identifies the reasons underpinning the strengths and limitations.
- ✓ Once these reasons are identified, the regulator uses insights to strengthen its approach over time.
- ✓ The regulator can substantiate its actions given that it documents the key analysis, decision-making processes, and quality controls that influence its approach to outcomes and risk-based regulation.

Tips and tricks

- ✓ To drive change over time, people from the 'coalface' through to the board need to be invested. People need to understand their role in contributing to the outcome. Communication at all levels within the regulator will help to drive this knowledge and collaboration over time.
- ✓ Celebrating successes is important, but not enough. Identify what drove the success, and use this along with limitations to continually strengthen the approach.

10.4 Monitoring, reporting and continual improvement worksheet

1. What are the strengths and limitations in the regulator's current approach to monitoring, reporting and continual improvement? What are the key reasons for these strengths and limitations?

2. What practical methods are available to strengthen the approach over time?

3. What internal controls could be implemented to monitor the consistency and quality of regulatory activities?

4. How could data timeliness be improved?

11. Implementation enablers

This chapter discusses a number of key implementation enablers. These were identified by researching Australian and international experience, and consultations with regulators.

To best implement lessons from the research and consultations, regulators should:

- consider barriers and implications in their agency's context
- test their understanding of barriers and implications through internal engagement
- identify short and long-term action achievability to alleviate barriers, and
- embed accountability for actions to underpin continual improvement.

11.1 Links to corporate planning

The outcomes and risk-based regulatory framework cannot be effectively implemented when considered in isolation from corporate planning. Instead, the framework must be embedded within the process. In particular, regulators should work to:

- embed the framework and its underlying principles in the corporate planning process, and
- develop and implement explicit accountability to managers and divisions to drive the implementation.

The benefits of embedding the framework in corporate planning are realised:

- upfront, through:
 - aligning the framework's priorities with the agency's strategic direction and broader department and State priorities
 - ensuring a consistent and transparent basis for initiative design and resource allocation to those initiatives, and
 - ensuring a clear framework for accountability and, therefore, performance management.
- over time, through:
 - a basis to justify its approach, particularly when confronted with expectations that may not be aligned with an effective approach, and
 - structured feedback mechanisms that allow the regulator flexibility to adapt its approach in response to experience and broader drivers of change.

11.2 Publishing compliance and enforcement policies

Once the framework is developed internally, the first step towards effective implementation is for regulators to develop and publish a compliance and enforcement policy. Under the *Quality Regulatory Services Initiative*, all applicable NSW regulators are required to publish compliance and enforcement policies.

The policy should be developed and framed with respect to the regulator's remit and regulatory outcomes, and should clearly define:

- the regulator's approach to applying the framework to regulated entities and behaviours
- how the regulator will use information to tailor its enforcement responses to identified non-compliance, and
- the expectations of regulated entities in engaging with the regulator.

Box 23: Minimum requirements for a published compliance and enforcement policy¹³

A compliance and enforcement policy should, at a minimum, include:

- the policy's purpose and benefits
- the principles underpinning risk-based compliance and enforcement
- the risk assessment framework used by the regulator to evaluate the risk within a given regulated entity
- the range of compliance and enforcement measures used by the regulator
- the decision-making frameworks for enforcement action, including an indication of the regulator's risk tolerance (ie the risk levels at which the regulator will begin to take proactive regulatory action)
- accountability arrangements for enforcement actions (for example, internal decision-making quality control), and
- key relationships with co-regulators or agencies with shared objectives or remits.

11.3 Managing the approach to reactive regulatory work

Regulators undertake a range of proactive and reactive work to promote and enforce compliance. For example:

- proactive work can include planned audits and inspections, education campaigns, financial incentives to change behaviours, and
- reactive work can include responses to complaints received through call centres, and measures to alleviate community pressure from high profile incidents.

A number of key factors increase the pressure to undertake reactive regulatory work, including:

- media and political pressure that can occur when a significant or high profile risk eventuates, and
- complaints received directly by regulators that may not be investigated further, following a risk assessment.

Often, pressures to undertake reactive regulatory work can be sudden or unforeseen. For example, a sudden increase in alcohol-attributable violence that creates high profile media interest.

Although these pressures are important for regulators to address, it is critical for:

- regulators to acknowledge and emphasise to stakeholders that reactive work can be undertaken concurrently to proactive work (ie the approaches are not mutually exclusive), and
- the approach to reactive work to be structured and transparent, so that effectiveness is maximised and the likelihood of an inappropriately designed or resourced 'knee jerk' response is minimised.

When developed, this framework should be supported by a proactive engagement plan to educate stakeholders about the approach and its benefits.

This framework is particularly important when managing pressures that may not be aligned to the principles of outcomes-based reporting or risk-based compliance and enforcement. For example, there may be sudden political or media activity that increases pressure to deploy significant resources to a typically low priority industry or regulated entity. Typically, a risk-based framework would suggest that fewer resources should be targeted to lower priority industries or regulated entities. In these situations, regulators should, *concurrently* to engagement with stakeholders and *prior* to resource allocation:

- identify the key risks to regulatory outcomes that are impacting the situation
- ensure that assumptions underpinning the regulatory response are identified and validated as best as reasonably possible within time constraints, and
- determine (once assumptions have been validated) the most realistic resource allocation that minimises adverse impacts on existing proactive regulatory work.

¹³ Adapted from Black, J. 2010, 'Risk-based Regulation: Choices, Practice and Lessons Being Learnt', in OECD, *Risk and Regulatory Policy: Improving the Governance of Risk*, OECD Publishing, 184-224.

Following resource allocation, regulators should actively monitor progress and adapt the response to maximise effectiveness.

Box 24: Example – Engaging with complainants – NSW Office of Liquor, Gaming and Racing

OLGR uses a risk-based triaging system to determine the complaints that warrant investigation. Where complaints are classified as a low priority, they may not be further investigated unless a further complaint is received, additional evidence is provided, or the breach becomes more serious.

To manage stakeholder communication in line with its approach, OLGR has developed a structured response to complainants to explain both the decision and the process informing it. In particular, OLGR will explain:

- the complaint’s rating, based on its internal triaging framework
- the rating’s implications and anticipated response, and
- the circumstances that may change its response in future (for example, where a complaint is rated as low priority and not further investigated, OLGR may determine that a follow up complaint would increase the priority and warrant further response).

11.4 Internal processes and quality control mechanisms

The framework’s effectiveness in promoting a greater focus on outcomes and a risk-based approach to compliance and enforcement can be impacted by ineffective internal processes or quality control mechanisms through:

- a tendency for systems to dictate, rather than support, the business direction
- inconsistent approaches to activities
- gaps between the capability and expectations of the information’s quality or timeliness
- incomplete understanding of change drivers to be addressed by initiatives
- ineffective regulatory initiatives, and
- misallocating limited resources.

Establishing appropriate internal processes and quality controls, along with accountabilities, can assist in:

- applying the framework consistently and transparently
- maximising productivity by delivering more effective regulatory initiatives, and
- sharing framework responsibility and ownership between staff.

For the logic model in particular, regulators should consider internal processes and quality controls for:

- continual assumptions testing through:
 - data analysis
 - internal and external stakeholder engagement
 - surveys and case studies, and
 - research and development.
- feedback mechanisms to:
 - allow insights from testing to be incorporated upfront to best align initiatives to risk drivers
 - highlight additional evidence that may be required to strengthen the ‘contribution story’, and
 - enable the ‘contribution story’ to be strengthened over time, based on experience and additional data.

Box 25: Example – WorkCover Authority of NSW

The program design framework used by the WorkCover Authority of NSW incorporates a number of feedback mechanisms and internal controls to ensure that evidence, assumptions and insights are tested and validated. This helps to maximise a program's effectiveness in contributing to intended outcomes, and therefore underpins flexibility and productivity over time.

In particular, WorkCover has embedded:

- testing and validation points at each stage in the process, with specific objectives and outcomes to be demonstrated that require sign off before proceeding to the following stage, and
- feedback mechanisms to revise and strengthen the program design that are enabled by the requirement for sign off.

11.5 Awareness of the internal and external business context

Consistent awareness and appreciation of the internal and external business context among staff is significant to enabling effective implementation. Lack of appreciation for this context has the potential to contribute to:

- a 'silo' mentality in teams and divisions that can:
 - restrict effective engagement across and within agencies, and
 - affect morale and devalue each individual's purpose within an agency.
- a lack of understanding measures, in particular:
 - the measures required for effective reporting
 - the most effective ways of collecting those measures, and
 - a reduced ability to make appropriate inferences from changes in measures over time, which can exacerbate cognitive or behavioural biases.
- misallocating resources and decreased efficiency, effectiveness and flexibility.

Regulators should promote a better understanding across their agency of:

- the business objectives
- strategies cascaded through the agency to achieve those objectives
- each individual's role in contributing to these strategies and objectives, and
- the impacts of an individual's role on regulated entities (ie that their decisions can influence the time and costs associated with compliance), and how they can make it easier for regulated entities to comply.

There are a number of potential ways for regulators to work towards achieving these goals, including:

- directing frontline staff engaged in compliance and enforcement to complete the diagnostic tool, which will provide:
 - staff with a summarised version of the guidance material and
 - the organisation with an understanding of the staff's view about the maturity of their risk-based approach.
- embedding outcomes and risk-based regulation within the performance management framework
- circulating and explaining the 'contribution story', logic model and the corporate strategy to staff, and
- using the 'contribution story' as a tool to guide performance management discussions.

11.6 Information timeliness

Throughout consultations with regulators, one of the most important improvement enablers was found to be increasing the timeliness of measures. This was found to be particularly critical for measures informing shorter-term decisions and initiatives.

Often, regulators face a number of limitations that restrict their ability to improve the quality or timeliness of measures, including:

- lack of control over data collection where data systems are controlled externally to regulators
- legislative or operational restrictions on data use, and
- limited financial and human resources to implement significant changes to systems or processes.

These limitations invariably mean that regulators do not have the capacity to implement significant changes to systems or processes in the short-term. To make the most meaningful changes over time, regulators therefore need to identify 'quick wins' that can be accumulated over time.

Box 26 gives a practical example of a 'quick win' for the NSW Office of Liquor, Gaming and Racing in improving the timeliness of its measures to better inform its operations.

Box 26: Example - Memorandum of Understanding - NSW Office of Liquor, Gaming and Racing

The NSW Office of Liquor, Gaming and Racing (OLGR) uses a number of different measures to inform its development and deployment of enforcement responses to non-compliance. Some data is collected internally, while others data is sourced from external government and non-government providers.

One data source to inform these decisions is the Bureau of Crime Statistics and Research (BOCSAR). Measures sourced from BOCSAR are relevant to OLGR in the short-term (ie the most recent data point is the most important). Previously, access to the most recent release was untimely, with some releases only becoming available to OLGR after almost one year.

OLGR approached BOCSAR to discuss the potential for more timely access to its data to underpin better resourcing decisions. Subsequently, the two agencies signed a Memorandum of Understanding that set out specific dates that the most recent release of BOCSAR data would be made available to OLGR. This was undertaken at no cost to OLGR.

Since executing the Memorandum of Understanding, OLGR has reported a noticeable improvement in the effectiveness and flexibility of its resourcing and enforcement decisions.

11.7 Checklist for regulators

Checklist for implementation

Success enablers

- ✓ A structured approach to monitoring, reporting and continual improvement of outcomes and risk-based regulation is embedded within corporate planning.
- ✓ The regulator has published a compliance and enforcement policy in accordance with the minimum standards outlined in this guidance material.
- ✓ The regulator has implemented appropriate internal controls to monitor its regulatory activity's consistency and quality.
- ✓ The regulator's objectives and staff roles in achieving those objectives have been communicated within all levels of the regulator.
- ✓ The regulator implements and documents a process that examines data timeliness and potential strategies to increase timeliness.
- ✓ The regulator has developed and embedded a framework to underpin necessary reactive work, including a proactive engagement strategy to educate stakeholders about the principles underpinning outcomes and risk-based regulation.

Diagnostic tool

- ✓ The regulator uses the diagnostic tool to obtain a baseline view of whether and to what extent the regulator currently uses an outcomes and risk-based regulatory approach.
- ✓ The regulator has used the diagnostic tool to assess differences in understanding and applying the framework across different levels within the agency, and used this to identify areas for improvement.
- ✓ The regulator reassesses its approach at least annually to track progress in implementation and reprioritising areas for further improvement.

Tips and tricks

- ✓ When developing a compliance and enforcement policy review, examine examples of good practice policies, such as the NSW Environmental Protection Agency, and review any examples of policies from regulators with similar remits in other jurisdictions.
- ✓ Improve internal staff quality and consistency by facilitating peer reviews of risk assessments and enforcement actions.
- ✓ Managing media and political pressure is more effective when actions are undertaken proactively and not in response to incidents.

References

The approach to developing this guidance material included reviewing domestic and international literature to inform the theoretical foundation for the framework. Insights from a range of sources were used to:

- design the framework for implementing outcomes and risk-based regulation
- identify good practice approaches to aspects of the framework, for which practical insights were explored through targeted consultation with NSW regulators, and
- identify some of the key considerations for implementation that were subsequently explored and refined through the consultations.

References have been prioritised according to relevance, comprehensiveness and practicality.

Table 1: Literature summary

Authors	Title	Year	Jurisdiction
Risk-based compliance and enforcement			
Sparrow, M.	The regulatory craft: controlling risks, solving problems, and managing compliance	2000	N/A
Peterson, D., Fensling, S.	Risk-based regulation: Good practice and lessons for the Victorian context	2011	Victoria
Baldwin, R., Black, J.	Really responsive regulation	2007	United Kingdom
Gouldson, A., Morton, A., Pollart, S.J.T.	Better environmental regulation – contribution from risk-based decision-making	2009	United Kingdom
Hutter, B.M.	The attractions of risk-based regulation: accounting for the emergence of risk ideas in regulation	2005	N/A
Organisation for Economic Co-operation and Development (OECD)	Regulatory Policy Committee: Indicators of regulatory management systems	2009	N/A
Outcomes-based reporting			
NZ Treasury (Cook, A.)	“Managing for Outcomes” in the New Zealand Public Management System	2004	New Zealand
Mayne, J.	Contribution analysis: An approach to exploring cause and effect	2008	N/A
Mayne, J.	Addressing Attribution Through Contribution Analysis: Using Performance Measures Sensibly	1999	Canada
Australian National Audit Office	Better Practice Guide: Better Practice in Annual Performance Reporting	2004	Australia
Office of the Auditor General of Canada	Reporting on Outcomes: Setting Performance Expectations and Telling Performance Stories	2003	Canada
The Scottish Government	Outcomes Based Approach: Guidance for Scottish Public Bodies	2008	Scotland
Reports, policies, and guidance notes from Australian jurisdictions			
Government of Western Australia Ministerial Advisory Panel	Reforming Environmental Regulation in the WA Resources Industry	2012	Western Australia
Environment Protection Authority Victoria	Compliance and Enforcement Policy	2011	Victoria
Australian Prudential Regulation Authority	The APRA Supervision Blueprint	2010	Australia

Appendix A: Data and systems capability

Data and systems capability is critical to regulators in implementing and strengthening each aspect of the outcomes and risk-based regulatory framework.

Box 27: The role of data and systems

Regulators use data in each aspect of the framework to inform decision-making. Typically, most data used by regulators to inform decision-making will be collected and managed internally.

Within the framework, regulators use internal and external data, along with other intelligence to:

- inform the regulator's strategic direction through monitoring trends and characteristics of regulated entities over time
- inform engagement with internal and external stakeholders
- develop hypotheses about risk drivers when designing regulatory initiatives
- collect and report measures used to monitor performance over time
- monitor changing circumstances over time that may require the regulator to adapt its initiatives and approach to engaging with regulated entities.

Data quality and consistency is a key driver of effective and informed decision-making.

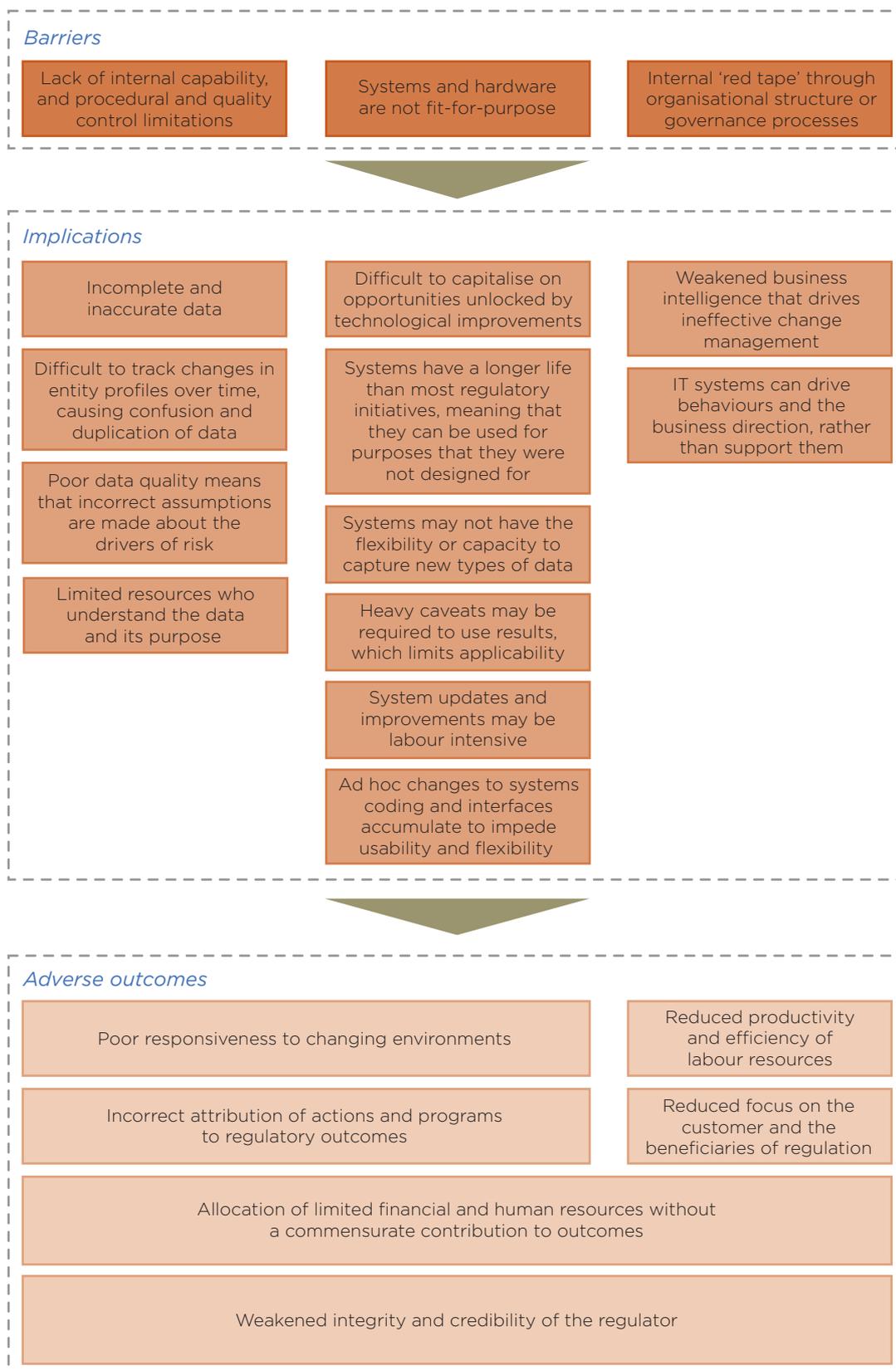
Therefore, regulators have an interest in maximising the effectiveness of their internal data and systems. Over time, continual improvements in data and systems capability will be a key enabler of successful implementation.

Through the consultation process, a number of challenges associated with data systems, and the implications of these challenges, were identified and explored. Potential barriers, implications and adverse outcomes of data and systems capability are summarised in Figure 10.

Barriers and their implications were then considered in the current capability's context to attempt to identify realistic solutions and actions. Many of the solutions and actions identified through the consultations were aligned to the enablers and actions identified throughout the guidance. Importantly, these included:

- embedding an appreciation of the business context among all staff within the regulator, in particular educating staff about their role in contributing to data and systems
- developing a thorough understanding of current systems and limitations (for example, by developing a systems map) to identify achievable improvements, and
- developing effective internal processes and quality control mechanisms that do not unnecessarily impede effectiveness or execution speed.

Figure 10: Potential barriers, implications and outcomes associated with data and systems capability



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