Guidance for determining the significance of a regulatory proposal

1. Purpose

To ensure that regulations are fit-for-purpose and promote community outcomes at the lowest cost, significant regulatory proposals must provide information on the economic, social, and environmental impacts of the proposed regulation.

For any significant new regulatory proposal, a Better Regulation Statement (BRS) applying the Government's better regulation principles must be prepared. Ultimately, Portfolio Ministers are responsible for determining whether a regulatory proposal is significant. This guidance assists agencies to advise their Minister on whether a regulatory proposal is significant. It should be read together with the NSW Government Guide to Better Regulation TPP19-01 (Guide).

New or amending statutory rules, i.e., regulations, are subject to Regulatory Impact Statement (RIS) requirements under the *Subordinate Legislation Act 1989* (SL Act). Agencies should refer to Schedule 3 (6) of the SLA Act to determine whether any exemptions for the preparation of a RIS may apply.

1.1. What is a significant regulatory proposal?

A significant regulatory proposal:

- introduces a major new regulatory initiative
- has a considerable impact on individuals, the community, or a sector of the community
- has a considerable impact on business by imposing high compliance costs
- imposes a major administrative cost to government, or
- imposes a material restriction on competition.

To determine whether a proposal is significant, regulators should consider direct and indirect impacts on NSW residents[1] relative to a base case. The base case is generally "what is the status quo without further government action?" For example, what would happen if a regulation was to continue indefinitely? If a regulation is sunsetting, what would happen when it no longer exists? Impacts to consumers, producers[2], employees and government should be considered.

[1] As defined by the NSW Government Guide to Cost-Benefit Analysis (TPP 17-03)
[2] Producers include businesses currently operating and seeking to operate in New South Wales

Direct impacts occur when regulation imposes costs and benefits on these four groups. For example, occupational licensing imposes administration and compliance cost on businesses and license holders, whereas government receives revenue from licensing fees. Product safety standards may increase compliance costs for businesses (from adopting the standards) and government (from enforcing the standards), whereas consumers benefit from safety protections.

Indirect effects are those that occur as a flow-on from the direct impacts. Indirect impacts affect third parties (i.e., households and firms) not directly involved in an activity the proposed policy seeks to address. For example, occupational licensing may indirectly reduce economic output by increasing the barriers to entry for an occupation.

Where there is uncertainty over the extent of the impact, the starting point should be that the proposal is significant and a BRS is to be prepared.

2. How is significance of a regulatory proposal determined?

The following section provides a non-exhaustive list of significance indicators for businesses, the community, and government to help determine the significance of a regulatory proposal.

2.1. Impacts to individuals, the community, or a sector of the community

A significant impact on individuals may occur where the proposal, if implemented, would:

?	materially alter the prices of goods or services *e.g., imposing taxes on products that contain high levels of sugar*
?	alter the choices available to consumers, including restricting access to or use of a product *e.g., prohibiting sale of electric cigarettes*
?	affect the quality of consumer products or services *e.g., requiring all plastic bottles to be made from a proportion of recycled material*
?	impose non-trivial costs (financial or time) on an individual *e.g., requiring households to record and report their monthly organic food waste*
?	require or restrict information dissemination to consumers *e.g., introducing mandatory labelling requirements for food products*
?	restrict individuals' ability to work, earn income, or engage in recreational activities *e.g., restricting businesses from operating out of a residential address*

A significant impact on the community may occur where the proposal, if implemented, would:

?	raise novel legal or policy issues *e.g., regulating a new technology that is disrupting existing markets, for example, ridesharing*
?	materially affect public health and safety, housing, or social services *e.g., introducing rules for mandatory termination of a tenancy and eviction*

?	infringe the fundamental rights and freedoms of individuals protected under common law *e.g., laws that encroach on existing protections against slavery*
?	impact important infrastructure, or access to land or water *e.g., laws that may diminish access to clean water services in regional areas*
?	have substantial impacts on natural or cultural heritage, the environment, or other species[3] *e.g., weakening requirements for the disposal of hazardous chemicals*

The distribution of impacts should also be considered. There may be a significant impact on a sector of the community if the proposal would:

?	have disproportional economic consequences for households on a low income or vulnerable groups, including people with a disability or elderly people *e.g., a new tax policy that disproportionately impacts low-income households*
?	disproportionately impact Aboriginal, ethnic minority, or single-parent families *e.g., changes to a housing service that impacts access to the service within a community*
?	have a concentrated adverse effect on households or employment within a particular region *e.g., reducing labour mobility between borders, impacting workers in border communities*

[3] Environmental Impact Statements (EISs) are required for State significant projects, such as development and land use proposals. The requirements for EISs are set out in *The Environmental Planning and Assessment Act 1979* and the Environmental Planning Assessment Regulation 2000.

2.2. Impacts on businesses

When evaluating whether a regulatory proposal could have a significant impact on businesses, consider:

- the scope and distribution of impact,
- the effect on investment, business expansion, innovation, and efficiency,
- the impact on small businesses, and
- the effect on access to markets and competition (refer to Section 2.4).

2.2.1. The scope and distribution of impact

The time and financial costs to become aware of the regulations, abide by the regulations and demonstrate compliance form part of compliance costs for business. Figure 1 details the three stages of compliance costs businesses typically experience.

Figure 1: Three stages of compliance costs for businesses

Becoming aware of regulations	Abiding by regulations	Demonstrating compliance
• time and effort to understand what is required to be compliant • understanding the costs of non-compliance	• purchase of equipment • hiring expertise • undertaking training • notifying the government of activities • applying for approvals	• record-keeping • engaging with audits or inspections

A significant impact on businesses may occur where the proposal, if implemented, would:

- have a large, aggregated impact on the NSW economy
  e.g., banning the use of single-use plastic containers
- affect a significant number of businesses overall
  e.g., increasing the minimum amount of paid sick leave days businesses must provide
- impact a large proportion of businesses within a particular industry
  e.g., requiring supermarkets to donate unsold food products instead of wasting it
- impose significant compliance, and/or administrative costs on businesses
  e.g., imposing substantial annual reporting requirements for businesses
- have a concentrated effect on a particular group, region, or industry
  e.g., removing mutual recognition of occupational licences from border regions

To help estimate the scope and distribution of impact, agencies can draw upon the following data sources to help determine the number of businesses likely to be affected by a regulatory proposal:

1. ABS Catalogues
    - 8165.0 “Counts of Australian Businesses, including Entries and Exits’,
    - 8175.0 ‘Counts of Australian Business Operators’,
    - 6306.0 ‘Employee Earnings and Hours’.
2. ATO Taxation Statistics, which provides an annual overview of statistics from tax returns of Australian companies.

Box 1: Examples of significant and non-significant regulatory proposals

1. Proposal: Introducing a new licensing scheme for all chefs in New South Wales

This proposal would be considered significant as it would impose new administrative and compliance costs for many individuals within the hospitality industry.

Alternatively, a proposal that seeks to remove an existing licensing scheme for a certain occupation may also be considered significant, even if the impacts of the proposal are positive. Such a proposal may also require a Better Regulation Statement or supporting evidence to demonstrate the benefits of removing the licensing scheme outweigh the costs.

2. Proposal: Introducing new emission reduction standards for existing power plants and activities

This proposal would be considered significant as it would likely require existing plants to change their practices and potentially adopt new technology to reduce emissions. The new practices and equipment purchases could impose significant costs on affected businesses, which would likely be passed onto consumers.

3. Proposal: Changes to laws for owners’ corporations to allow strata meetings to be held online

Regulations surrounding strata management impacts large numbers of residents and investors across NSW. Decisions made at strata meetings can materially impact what for many people is their largest asset, and the ability to participate fairly and transparently in decision-making is important. As such, the proposal would be considered significant.

4. Proposal: Imposing a conduct rule for real estate agents to prohibit the request or receipt of any gift or benefit from another person valued at $50 or more if it could be considered to give rise to a conflict of interest.

This proposal would be considered non-significant. While it has a concentrated effect on a specific occupation, the policy does not target the primary role of the occupation and may impose a relatively small administrative cost.

Some further examples of impacts with low significance for business might be:

- a change in the format of reporting requirements or minor changes to the provision of information for reporting purposes (*e.g., a requirement for businesses to indicate the number of full-time staff they employ in addition to existing reporting obligations);*
- changes to regulation that are machinery in nature involving technical changes that will not have an appreciable impact on business and are consistent with existing policy (e.g., *annual indexation of regulatory fees*); and
- changes involving very small initial one-off costs to business and no ongoing costs (e.g., *requiring shop owners to display a printed sign on their storefront for compliance purposes*)

Note: proposals that seek to impose new charges, regulatory fines, or penalties and fees beyond standard rates of increase warrant attention as they can impose significant costs on businesses.

2.2.2. The effect on investment, business expansion, innovation, and efficiency

A significant impact on businesses may occur where the proposal, if implemented, would:

?	have implications for the capacity and willingness of business to undertake new activities or expand existing activities *e.g., restrictions that make it harder for small or medium businesses to hire workers*
?	affect the ability of businesses to innovate, adopt new technology, or respond to the changing demands of consumers *e.g., restricting the use of micromobility devices that prevents service providers from operating*
?	affect the ability of business to access debt or equity finance *e.g., increasing the complexity and timeliness for businesses seeking to access equity finance*
?	affect the efficiency of resource use and productivity levels *e.g., requiring businesses to change storage and inventory management processes*

2.2.3. The impact on small businesses

Small business impacts warrant special attention. Small businesses typically rely on the owner/operator to manage compliance with regulations. As such, the opportunity cost of time spent on regulatory activities instead of productive activities is far more significant than for large entities. For example, if compliance costs are the same irrespective of firm size, then a proposal that affects many smaller firms is more likely to be 'significant' than one affecting a small number of larger firms.

Small businesses can be disproportionately affected by proposals as they generally have a narrower revenue base over which to spread the fixed costs of compliance; may not have in-house regulatory expertise to assist with compliance; and may find it challenging to keep abreast of regulatory developments. Small businesses are also more likely to be discouraged by the complexity of regulation and the threat of penalties for inadvertent non-compliance.

It should be assessed whether the measure would disproportionately impact small businesses. In determining this, consider if the proposed measure would:

?	involve substantial time or effort for small business to become aware of their obligations

?	require some small businesses to engage a contractor or external advisor
?	impose variable costs for which it may be difficult to plan or prepare
?	materially increase the time spent on and frequency of compliance activities

Further information on small business impacts can be found on the NSW Small Business Commission's (SBC) website at https://www.smallbusiness.nsw.gov.au/. Agencies who would like further support on understanding small business impacts or to engage with small businesses on proposals can directly contact the SBC at commission@smallbusiness.nsw.gov.au or 1300 795 534.

2.3. Impacts on government administrative costs

A significant impact on the government may occur where the proposal would, if implemented:

?	require a significant amount of capital and/or recurrent expenditure or non-monetary resources (e.g., time) to implement *e.g., requiring additional staff or a new ICT system to manage enforcement & compliance*
?	impose a material impact on local government *e.g., introducing enforcement obligations for local government*

Agencies seeking funding may need to prepare a Business Case[4] and a Cost Benefit Analysis.[5] Agencies are advised to consider any funding proposals in consultation with Treasury.

2.4. A material restriction on competition

Competition promotes innovation and productivity as businesses have greater incentives to lower prices and improve the quality of their products and services, which ultimately benefits consumers. Conversely, policies that restrict competition can have significant economic consequences.

Examples of restrictions on competition include:

- legislatively created monopolies (for example, to provide or operate infrastructure or mandatory marketing schemes)
- licensing schemes which restrict entry to particular businesses
- regulations which restrict market entry to particular professions or impose minimum training requirements
- quota restrictions to preserve natural resources
- regulations which specify strict technical standards for products or services, or
- administratively determined pricing arrangements for nominated goods and services.

[4] See TPP18-06 NSW Government Business Case Guidelines
[5] See TPP17-03 NSW Government Guide to Cost-Benefit Analysis

Table 1 outlines three questions that agencies should answer to determine potential restrictions on competition. A range of factors are outlined for each question that may suggest a material restriction on competition is likely to occur if implemented.

Table 1: Factors that may suggest a material restriction on competition is likely to occur

Guidance questions	Factors that may impose a material restriction on competion
Would the proposal limit the number or range of suppliers in the market?	• establishing a license, permit or authorisation process as a requirement of operation • limiting the ability of some types of suppliers to provide a good or service • restricting who can own or operate a business • significantly raising the cost of entry to or exit from the market by a supplier • creating a geographical barrier to the ability of businesses to supply goods or services, invest capital or supply labour • granting exclusive rights to supply or purchase goods or services
Would the proposal limit suppliers' ability to compete?	• controlling or substantially influencing the price for a good or service • limiting the freedom of suppliers to advertise or market their goods or services • setting standards for product quality or constrain the products that a firm can produce or trade • restricting the type of inputs used, methods of production, operating hours, or location of a firm • limiting access to important infrastructure • requiring specific terms of employment that differ from national standards • significantly raising costs of supply for some suppliers relative to others[6]
Would the proposal reduce incentives for vigorous competition?	• creating a self-regulatory or co-regulatory regime • requiring or encouraging information on supplier outputs, prices, sales, or costs to be published • exempting the activity of a particular industry or group of suppliers from competitive pressures or the operation of general competition law • reducing mobility of customers between suppliers of goods or services by increasing the costs of changing suppliers • advantaging government over the private sector or one firm over another • restricting consumer access or benefiting one group of consumers over another

[6] Including by treating incumbents differently from new entrants or imposing specific levies or imposts that are not levied on all other industries.

If the answer to one or more of the factors identified above is yes, the impacts on competition should be assessed in greater detail. This should include consideration of the extent of any negative market effects with respect to prices, output, product quality, product variety or innovation.

For additional information, please refer to guidance on [Assessment Against the Competition Test.]