South Australian Productivity Commission

Final report

Inquiry into reform of South Australia's regulatory framework

29 October 2021

Government of South Australia

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An appropriate citation for this publication is:

South Australian Productivity Commission, *Inquiry into reform of South Australia's regulatory framework*, Final report, October (2021).

About the South Australian Productivity Commission

The Commission provides the South Australian Government with independent advice on facilitating productivity growth, unlocking new economic opportunities, supporting job creation and removing regulatory barriers.

Premier and Cabinet Circular, *The South Australian Productivity Commission* (PC046) sets out the objectives and functions of the Commission; how inquiries are referred to the Commission, undertaken and reported on; and how the Commission and public sector agencies work together.

The Commission is supported by the Office of the South Australian Productivity Commission (OSAPC) which is an attached office of the Department of the Premier and Cabinet.

Commission's approach

The Commission is required to take a broad perspective in developing advice for the South Australian Government. It must consider the interests of industry, business, consumers and the community, regional South Australia, social-economic implications and ecological sustainability.

The Commission conducts its own independent quantitative and qualitative analysis. It also draws on the experience, evidence and views of all inquiry stakeholders.

Confidentiality

Transparency is an important part of the Commission's independent process for gathering evidence and other elements of the inquiry process. The Commission will publish the submissions that it receives on its website unless the author clearly indicates that the submission is confidential or the Commission considers the material to be offensive, potentially defamatory, beyond the scope of the inquiry's terms of reference, or an abuse of process.

Disclosure

The Commissioners have declared to the South Australian Government all personal interests that could have a bearing on current and future work. The Commissioners confirm their belief that they have no personal conflicts in regard to this inquiry.

More information

For more information on the Commission, including circular PC046, how to communicate with the Commission and details on the Commission's approach to handling confidential material visit our website at www.sapc.sa.gov.au, email to sapc@sa.gov.au or call 08 8226 7828.

Transmittal letter

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DX56201
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Document Ref: SAPC21D00061
File number: SAPC21/0008

The Hon Steven Marshall MP
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Dear Premier

Inquiry into reform of South Australia's regulatory framework

In accordance with the terms of reference received by the Commission on 29 January 2021, we are pleased to submit the South Australian Productivity Commission's final report on the inquiry into reform of South Australia's regulatory framework.

This final report has been prepared after consultation with SA regulators, state government departments, industry associations and businesses as well as careful deliberation on the submissions they made.

We acknowledge and thank them for their support, together with the Office of the South Australian Productivity Commission staff for their contributions in preparing this final report.

We note that in accordance with the *Premier and Cabinet Circular PC046* "The Commission must ensure that the report is available on its website within ninety days of delivering the report…", unless you specify a shorter period.

Yours sincerely

Dr Matthew Butlin
PRESIDING COMMISSIONER

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28 / 10 / 2021

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Key messages

The South Australian Productivity Commission's (Commission) was tasked to identify regulatory reforms to better support investment, reverse negative productivity trends and foster economic growth while protecting public interests. SA's business regulatory framework was examined against leading international and national practice. The Commission concludes that while there are some shortfalls from OECD best practice, the overall regulatory framework serves the state well.

Areas identified as in greatest need of reform, are ex ante assessment of regulatory proposals and ex post evaluation of regulation which are central to effective and efficient regulation. Other areas in need of improvement include the coherence, transparency and speed of regulator decision-making, as well as overlap and duplication between regulators, and business access to clear information on regulatory requirements.

The Commission recommends that these shortcomings (relative to best practice) be addressed by strengthening governance, policy guidance and policy capabilities, building on existing governance arrangements where possible. To increase transparency and accountability and drive improvements in regulator performance the Commission proposes the SA Government establish a statewide framework for monitoring and reporting on performance. This would be complemented by statements of expectations (SOE) for business regulators and initiatives to improve their capability, such as training and regulator communities of practice.

Management of the state's stock of regulation could be improved towards leading practice by the development of an improved searchable online SA regulation resource, building capability in the evaluation of existing regulation and the establishment of an across-government ex post evaluation policy to lift the overall quality of regulation.

The level of digital and technology uptake by SA regulators was observed to be lower than expected. Regulatory compliance could be made faster, easier and more cost effective for both regulators and regulated entities through greater digitisation. The Commission recommends a strategic and co-ordinated approach to promoting the uptake of regulatory technology (RegTech) and investing in technology solutions that would benefit more than one regulator.

A central oversight, advice and coordination function, like that in other jurisdictions, is critical to driving modernisation of the state's regulatory framework. The Commission recommends establishment of a small central unit, reporting to a minister for regulatory reform, to lead and drive system-wide reforms to transition the state toward best practice and support continuous improvement. The Commission's recommendations exemplify a stewardship approach which involves a whole-of-system and life cycle view of regulation at both the regulator and system levels.

The Commission acknowledges the need for reforms to be proportionate and cost effective and notes that the additional resource requirements of its recommendations are small compared to the potential to reduce the economy-wide regulatory burden on SA business estimated at $1.7 billion annually.

Overall, the package of recommended reforms will make it easier for businesses to operate in the state's regulatory environment without compromising regulator public interest mandates.

Executive summary

Why modernising regulation is important

The Commission has been tasked with identifying reforms that will better position the state's regulatory framework to support business for the next decade and beyond. This report provides the South Australian Productivity Commission's (Commission) findings and recommendations aimed at modernising regulation in South Australia (SA).

Regulation is an important tool used by governments to deliver on social, economic and environmental objectives. SA's regulatory framework comprises the legislation, regulations, governance arrangements, institutions, processes, tools and systems in place throughout the state to manage the life cycle of developing, administering, reviewing and amending regulation.

Some of the benefits of regulation to the economy, when developed and applied efficiently and effectively, include: maintenance of consumer and business confidence; greater competition in markets; facilitation of investment, employment and innovation; and capturing of environmental benefits. Maintenance of a sound regulatory framework can provide businesses with the confidence and capacity to establish, invest in and grow their business. Countries with leading practice regulatory frameworks have been found to have greater economic resilience, reducing the likelihood and impact of economic contractions over time. Efficient and effective regulatory frameworks can also help an economy to respond quickly and effectively to unexpected external shocks.

Safely growing jobs, lifting economic growth and raising productivity are urgent priorities for SA. As SA emerges from the COVID-19 pandemic, modernising the state's regulatory framework is essential for lifting business and consumer confidence and improving the state's business climate and competitiveness for investment. It is an important mechanism by which the SA Government can seek to reverse negative trends in productivity growth following nearly two decades of zero productivity growth, a performance far below other states.

Other Australian jurisdictions are pursuing regulatory reform agendas to lift productivity and support a post-pandemic economic recovery. The Commission considers that regulation is an area of direct influence for the state government and one where early action can reduce unnecessary barriers to economic activity and foster economic growth necessary to sustain improvements to living standards in the longer term.

Previous SA reform initiatives have delivered improvements in the rigour of regulation development and reductions in the red tape imposed on business. That said, the SA Government does not currently have a full suite of state-wide policies in place to guide and promote improvements in regulatory performance. Unlike some other Australian jurisdictions, there is currently no agency or minister charged with leading modernisation of the state's regulatory system.

The Commission's approach

To consider how to improve the efficiency and effectiveness of SA's regulatory framework, the Commission has examined the stages of the regulation life cycle: the development of new regulation, administration of regulation and post-implementation review and expiry. The

Commission has also examined how the stock of regulations can be managed to ensure it is relevant and fit for purpose.

The Commission has approached its task by comparing SA against leading practice regulatory systems, drawing on the work of the OECD and other jurisdictions. OECD work on best or better practice principles for design and review of regulations and management of jurisdictional regulatory systems provided a benchmark against which the Commission assessed SA's regulatory framework. The Commission developed its own framework to assess practices of business regulators, based on those developed by the OECD and other Australian and overseas jurisdictions.

The inquiry focus was on SA Government regulations that are principally directed at, or principally affect businesses, with a focus on start-up, expansion, and entry into interstate or overseas markets.

The impacts of regulation on SA businesses

The Commission found that there is no comprehensive list of SA's business regulators or a readily accessible and complete register of all the state's regulations.

Initial consultations identified that those areas of the state's public sector predominantly engaged in regulating business accounted for employment of about 1500 full-time equivalent (FTE) staff and expenditure of around $260 million, suggesting that regulatory activity is lower in SA than Victoria. A comparison of the licensing requirements across the three levels of government for SA's Growth State industries, using the Australian Business Licensing Information Service (ABLIS), showed that there are fewer licensing requirements in these industries in SA than all other jurisdictions except Queensland.

That said, the Commission found little information or analysis on the business impacts of SA regulation. This led the Commission to seek information and views from SA-based industry associations regarding interactions with regulators and regulatory impacts on business.

Associations appeared to find consultation processes on regulatory design and access to regulators to communicate concerns were generally satisfactory, although some expressed a desire for additional time to respond and provide submissions.

In relation to regulator performance comments were mixed. Concerns included: lack of coordination between regulators and consistency within agencies; resistance to change; variations between local councils; and striking a balance between environmental protection and business development without onerous regulation. Similar themes have emerged in the Commission's concurrent regulatory reviews into tourism and referrals in the project development approval process.

The Commission conducted a survey to gather the views of SA businesses on their interactions with SA regulators, receiving 376 responses. Two thirds of these businesses rated their satisfaction with regulators at 6/10 or higher. That said, the commonly cited challenges included time-consuming processes—particularly in seeking advice, filling out forms and waiting for approvals—and costs associated with gaining approvals and ongoing compliance. Other issues identified included repeated information requests, inconsistencies in information provided by the same regulator and regulatory requirements not matching business risk. Some of these issues were also identified through the Commission's survey of regulators discussed below.

Developing regulation

The effects of different regulatory approaches on businesses can be partly a consequence of the types of instruments that are used. That said. the Commission considers that the way that regulatory obligations are enacted is less significant than the quality of the policy development, legislation or regulation drafting and ex ante impact assessment and ex post evaluation processes that support the creation or amendment of regulation. The efficiency and effectiveness of the current institutional arrangements for developing regulation, including Parliament's role to scrutinise executive law-making, is strongly linked to the quality of the policy development process that results in regulatory proposals put to Cabinet and the Parliament.

Based upon consultation with stakeholders, the Commission concludes that the area in greatest need of reform in developing regulation is the quality of the regulatory policy development process. This is central to the development of effective, efficient and high-quality regulation. Anecdotally, the Commission has heard that there has been a long-term decline in regulatory policy development and assessment skills across the public sector. Improvements at the policy development phase of the regulation life cycle are likely to reduce the likelihood of poorly conceived regulation being made, regardless of whether these obligations are enacted through primary or subordinate legislation.

Agencies are required to undertake a regulatory impact assessment (RIA) process whenever the government contemplates the introduction of new or amended regulations. Any proposal that introduces or amends a significant regulatory burden on the broader community, including businesses, must be accompanied by a regulatory impact statement (RIS). The *Better Regulation Handbook* guides this process with Cabinet Office acting as the 'gatekeeper'. While the handbook has not been reviewed since its initial publication in 2011, its principles are broadly consistent with the better practice principles implemented in other Australian jurisdictions and the ex-ante principles developed by the OECD.

The Commission was advised by Cabinet Office that agencies regularly use alternative assessment processes to those required by the *Better Regulation Handbook*. The Commission notes that completed regulatory impact assessments (whether full RIS assessments or alternative approaches) have not been published, as required under the current RIA framework.

The Commission also notes Cabinet Office's view that the RIA framework promotes a high level of compliance with the requirements in the *Better Regulation Handbook*, and that the current approach to managing ex-ante assessments of regulatory impact supports effective Cabinet decision-making. The Commission has also been advised that the use of, and expertise in, regulatory impact assessment and cost-benefit assessment varies widely among agencies and that while some agencies use alternative, equivalent processes to RIS, other agencies apparently do not.

The Commission concludes that the state's RIA framework is broadly consistent with other Australian jurisdictions, but that, in practice, it falls somewhat short of the better practice principles developed by the OECD. This appears to be a longstanding matter.

In particular, agencies do not routinely undertake ex-ante assessments that meet the requirements laid out in the *Better Regulation Handbook* and RIA requirements are not consistently enforced by Cabinet Office. South Australia also currently lacks a functional equivalent of the Australian Government's Office for Best Practice Regulation, which works to enhance agencies' assessment capabilities and acts as a framework gatekeeper. The

Commission has also not been able to determine whether agencies, as required by the *Better Regulation Handbook*, routinely engage with other jurisdictions and local government, to identify opportunities for harmonisation and reduce unnecessary duplication especially in border communities.

It recommends that the SA Government strengthen the governance, policy guidance and policy capabilities for regulation development to improve the efficiency and effectiveness of processes and the quality of regulations so developed.

Improving regulator practice

To inform its consideration of SA regulator practice, the Commission examined the literature on best practice principles developed by the OECD and leading jurisdictions globally. Other jurisdictions in Australia and internationally have developed policies and frameworks to assess regulator performance and foster continuous improvement. In many cases, there is substantial flexibility to tailor regulator assessment strategies to the regulator's specific characteristics and responsibilities. This reduces administrative requirements on regulators while increasing accountability and transparency and promoting improvement in performance.

SA's policy framework for regulator improvement appears under-developed in comparison. Currently, there is no statewide policy in place for performance monitoring and practice improvement across SA regulators. Regulators are individually responsible for identifying priorities and strategies for review and continuous improvement, with governance arrangements varying across regulators depending on how they are structured. There is also no specific requirement for regulatory agencies to report publicly on their performance, aside from their own statutory reporting requirements, or as part of sector-wide annual reporting processes. The result is that the Commission has found it very difficult, relying on public information, to assess the efficiency and effectiveness of SA regulators as a group. Additionally, the quality and effort focused on performance reporting and practice improvement is highly variable across SA regulators.

The only across-government frameworks in SA for organisation performance monitoring and reporting that the Commission is aware of are those contained in the Premier and Cabinet Circular for annual reporting (PC013), and the Premier and Cabinet Circular for chief executive performance appraisals (PC029). While agency annual reports are made public, reports on CE performance appraisals are not. Neither of these across-government requirements are complete in their coverage of SA public sector regulatory functions. Both mechanisms would require significant changes to provide an adequate basis for performance monitoring and improvement of SA's regulators. The Commission notes recent actions to increase accountability and purpose in the SA public sector through revised PC029 requirements.

Consultations with regulators indicated that only some regulatory entities have mature systems of performance monitoring and improvement. These are usually the larger agencies that are better resourced, but there are also significant regulatory entities where the 'score card' of good performance is blank. To increase the transparency and accountability of SA regulators, the Commission recommends the establishment of an across-government policy framework to guide measurement, monitoring and assessment of performance by regulators, in line with good practice principles.

The Commission examined the issue of 'rejection risk', that is the risk of projects offering net benefits to the state being rejected by regulators. This risk is considered to be an important

indicator of the maturity and development focus of the state's regulatory system. The Commission has recommended that approval (and rejection) rates be measured, monitored and reported publicly by all business regulators together with reasons for rejection where that occurs, as part of a new across-government regulator performance reporting framework.

The Commission developed its own model for assessing SA regulator practice drawing on the best practice guidance and frameworks used in other Australian jurisdictions and internationally. This model provided the basis for a survey of 27 SA Government regulatory areas, covering eight areas of practice indicative of regulator efficiency and effectiveness: (1) legal structure and regulatory powers; (2) approvals and decision-making; (3) regulatory impact assessment/ex-ante assessment; (4) ex-post evaluation; (5) stakeholder engagement; (6) monitoring and enforcement (risk-based and proportionate actions); (7) regulatory impact assessment (RIA)/ex-ante assessment; and (8) regulator performance review and continuous improvement. The Commission also collected case studies of good regulatory practice or recent improvements in practice to identify lessons that could be applied more broadly across SA's regulatory agencies.

Evidence gathered through the regulator survey, case studies and stakeholder consultations demonstrated good practice against the Commission's model among a number of SA regulators, including in the areas of stakeholder engagement and monitoring and enforcement. Overall, regulators generally aspire toward good practice principles, and work to integrate these into their policies, processes and improvement initiatives. Nevertheless, the results of the survey suggest there is variability in effort and maturity in some regulatory practice areas, particularly in ex-post evaluation and regulatory impact assessment. Additionally, the state can do more to deal with regulatory overlap with other state government entities which would strengthen SA's regulatory framework. Significantly, regulators indicated that the largest gains in their efficiency and effectiveness can be made by enhancing their digital systems.

Finally, while most regulatory areas advised that they have strategies in place for continuous improvement, SA's framework for regulator improvement is underdeveloped compared to other jurisdictions. There appears to be no clear across-government policy mechanism by which lower performing regulatory agencies might be identified and encouraged to improve. The Commission recommends that the SA Government establish an across-government strategy to promote and support the improvement of practice across SA business regulators. A key element of this strategy is the issuance by ministers of statements of expectations (SOE) to individual regulators to drive progress toward best practice. This action builds on current actions to increase accountability across the public sector.

Better managing the stock of regulation

Managing the stock of regulation refers to a deliberate process aimed at ensuring that regulation remains fit for purpose, relevant, and efficiently achieves its stated objectives over time. The Commission identified leading practices and made comparisons with existing SA practices to identify reform opportunities.

The Commission noted the lack of historical information on the level and type of regulation review activity across-government, and limited publication of review reports. There is no central register or database that lists previous, current, or planned reviews of regulation. Evidence gathered from the regulator survey and stakeholder consultations suggests that ex post evaluation of regulation is not common in SA and nor is the publication of results where it does occur.

Apart from the *Better Regulation Handbook*, there is no across-government statement or policy that provides guidance on if, when, and how to review existing regulation. Other Australian jurisdictions publish guidance on ex post evaluation, consistent with best practice principles.

The Commission examined SA's Regulation Expiry Program (REP), which requires regular review of regulations, and amendment where necessary to ensure they remain appropriate. Unlike SA, many other Australian jurisdictions with a REP publish guidance documents on the program and agency requirements, including how to review regulation and assess whether it is still fit for purpose. The Commission was not able to find guidance material for the REP or material evidence upon which to base a finding on the effectiveness of the REP.

The Commission considers that those responsible for regulation require some form of across-government policy that can assist them to prioritise, sequence, resource and coordinate ex post evaluations of regulations, including those expected under the REP.

The Commission considers that appropriately applying the central principles of regulatory stewardship to managing the stock of regulation can enhance the quality and efficiency of the state's regulatory framework. Regulatory stewardship requires that agencies take responsibility for the active monitoring and care of the regulatory systems for which they are accountable, throughout the regulation life cycle, to ensure regulatory systems remain fit for purpose.

The Commission does not consider that there is one single method that can be applied to manage the stock of regulation efficiently and effectively given the impacts arising from regulation are multi-dimensional. The Commission considers that an effective and efficient approach to manage the stock of regulation requires a range of evaluation methods and approaches across the regulatory life cycle.

The Commission recommends that the SA Government develop an across-government policy to guide the prioritisation of regulation reviews and selection of review methodology so that the state's regulations remain relevant, achieve their policy objectives and deliver net benefits to SA. The policy's principles and criteria would support a holistic, coordinated and proportionate approach to ex post evaluation that considers associated regulatory interactions when appropriate.

To improve knowledge of the stock and inter-relationships between regulations by agencies for regulatory policy development purposes, the Commission recommends that the SA Government build on the existing online regulation register to create one that can be readily navigated and searched, with information able to be exported to support reviews.

To enable agencies to adopt ex post evaluation practices that more closely align with best practice the Commission recommends the development of guidance material, tools and training to build public sector expertise in this area.

Reforms to improve the management of the stock of SA regulation and therefore the overall quality of regulation will ensure that it remains fit for purpose over time and reflects modern practices.

Optimising the use of regulatory technology and digital systems

The Commission has been tasked with providing advice on how to 'future-proof' South Australia's regulatory framework. It heard that regulatory technology (RegTech) can be used to enhance all aspects of regulatory activity. Recent work points to four five key areas where technology solutions are enhancing regulatory practice: compliance; monitoring, reporting and information exchange; risk management; and identity management and control.

The Commission found some good examples of digital and technological innovations being implemented among certain SA regulators. That said, stakeholder consultations and the regulator survey suggest that the level of digital and technology uptake among regulators is currently lower than what might be expected. Some typical issues that have been raised include: a lack of shared data and information management systems between relevant regulators; a lack of interoperability between SA regulators' data management systems; and continued reliance on manual and paper-based systems when dealing with regulators or other levels of government. Sometimes the latter is because of legacy effects of existing legislation, which could otherwise be replaced by electronic solutions. Consultations with regulators identified constraints in current budget processes to investment in modern technologies.

The Commission has identified compelling examples of technology solutions being developed and implemented by SA regulators in response to challenges in the marketplace. The SA Government's investment in the development of a government services portal, providing agencies with a set of integrated digital platforms with which to engage with businesses and the community in the delivery of government services is central to the government's strategy for digitisation and represents a major step forward. This could provide a basis not only for reducing compliance costs for businesses but also facilitating more efficient interactions between regulators.

Nonetheless, the Commission concludes that there are significant opportunities for further investment in digital solutions with only two SA regulators identified as conducting all interactions with regulated entities via online digital systems. At the same time, most regulators identified that better use of on-line and digital systems would deliver the greatest increase in the efficiency and timeliness of approval and decision-making processes, critical factors for the businesses they regulate. Businesses surveyed on behalf of the Commission identified filling in forms (paper-based) and waiting for approvals as the most time-consuming activities in complying with regulations.

The Commission sees a compelling case for the SA Government to make a sustained commitment to all business regulators migrating to digital business-to-government data transfer and the greater use of RegTech to make compliance activities faster, easier and more cost effective for both regulators and regulators.

In a small jurisdiction like SA, substantial economies of scale may be achieved by investing in and implementing RegTech solutions that would benefit more than one regulator. Such an approach would also facilitate coordination and information exchange between regulators to address any interdependencies. The Commission recommends that the SA Government facilitate innovation in regulatory design and practice through a coordinated across-government approach to identifying, assessing, prioritising and funding investments in digital and technology solutions that enable more efficient data collection and sharing between regulators, including regulators in other jurisdictions where appropriate, and improved coordination between regulators.

This requires the necessary precursors to be put in place, including an appropriate methodology for assessing options for government investments within RegTech and other digital solutions, and the provision of funding for investment in priority projects that are supported by rigorous business cases. The Commission's recommendations are framed around achieving these objectives.

Strengthening statewide regulatory architecture

South Australia's regulatory framework generally supports effective practice throughout the different stages of the regulatory life cycle. Overall, the current regulatory architecture does not deviate substantially from the standards of better practice implemented in other Australian jurisdictions.

Nonetheless, the Commission considers that the overall efficiency and effectiveness of the framework could be strengthened by pursuing an even closer alignment with the better practice principles developed by the OECD. The Commission's analysis of the different stages of the regulatory life cycle shows that some both ex ante and ex post evaluation could be improved.

Significant benefits could be achieved by improving the coherence and timeliness of regulators' decision-making through enhanced coordination, increased digitisation and by embedding continuous improvement more effectively within the state's regulatory architecture.

The Commission recommends use of existing governance arrangements, including the Economic Growth Council and lead agencies for Growth State industries, to enhance business regulator performance and to increase public sector focus on identifying and addressing any regulatory barriers to economic growth.

The Commission also recommends that the SA Government establish an across-government accountability framework and strategy to promote continuous improvement and support capability building across the regulatory life cycle.

The Commission notes that performance across all stages of the regulatory life cycle can be positively or negatively affected by the statewide governance structure that is in place. Some other Australian jurisdictions, including the Commonwealth, Queensland and Victoria, have a central unit or authority that is responsible for overseeing regulatory review and reform. Most of these centralised units are tasked with advisory roles to enhance the quality of regulation rather than having authority to block regulatory proposals or intervene in the work of any regulator. Such units are generally located in a central government agency or portfolio and are usually accountable to a minister with specific responsibility for regulatory reform.

The Commission is of the view that centralised oversight, advice and coordination is a key mechanism to ensure that regulatory agencies have access to consistent, high quality, across-government policy direction that is based on international best practice and clearly reflects government priorities.

The Commission recommends the establishment of a small unit, reporting to a minister for regulatory reform, to lead and drive system-wide reform to narrow the gap to OECD best practice and promote continuous improvement, while not encroaching upon individual agency and ministerial responsibilities for the administration of regulations and performance of regulators.

The package of interrelated draft recommendations presented in this report is aimed at increasing transparency, accountability, analytical rigour and customer-centric practices of SA's business regulators across all stages of the regulation life cycle. These reforms are also aimed at improving consistency, coherence and collaboration between regulators, based upon a common understanding of government priorities, and a holistic across-government approach to regulation development and review.

Importantly, the Commission regards the establishment of a central unit to lead and drive system-wide reform, build regulator capability and foster a culture of continuous improvement as critical to the overall success of the proposed reforms. This overall package of reforms is designed to move SA closer to international best practice.

The inquiry task was to identify action to improve SA's regulatory framework so that it reflects modern practices, identifies and removes regulatory barriers and unnecessary red tape, and encourages innovation and investment without compromising public interests.

The Commission concludes there are some significant gaps, compared to best practice, in a regulatory system that overall is effective and serves the state well. The Commission acknowledges stakeholder views on the importance of reforms being proportionate and cost effective and notes that the additional resource requirements are small compared to the potential to reduce the economy-wide regulatory burden on SA business estimated at $1.7 billion annually.

The recommendations are shaped to suit SA's circumstances, build on existing capabilities and integrate into existing governance and accountability arrangements. Overall, the package of recommended reforms will make it easier for businesses to operate in the state's regulatory environment without compromising regulator public interest mandates.

Summary of recommendations

Recommendation 2.1: Developing regulatory proposals for Cabinet

To improve the efficiency and effectiveness of regulation development processes and the quality of regulatory proposals to Cabinet, the Commission recommends that the SA Government strengthen governance, policy guidance and policy capabilities by:

- committing to an across government policy to support regulatory quality, drawing on the OECD's better practice principles, to ensure that the economic, social and environmental benefits of business regulation justify the costs and that distributional effects are considered in order to maximise the net benefits of regulation;
- strengthening the Cabinet Office's gatekeeper role in respect of its responsibilities under the Regulation Impact Assessment (RIA) framework;
- increasing agency adherence to the RIA framework through provision of improved guidance material and coordination of training by Cabinet Office;
- establishing a central agency support and advisory function to enhance agencies' capacity to undertake effective regulatory policy development and impact assessment (see recommendation 6.3);
- developing and implementing a strategy to build public sector expertise in regulatory policy development and review, including through establishment of communities of practice for policy makers (see recommendation 6.1);
- enhancing transparency as well as capability to undertake RIAs through publication of regulatory impact statements;
- subjecting the RIA process to monitoring, regular evaluation and continuous improvement; and
- improving policy guidelines to assist agencies to consider and evaluate the potential for national harmonisation or regulatory equivalence in the development of regulatory proposals.

Recommendation 3.1: Performance measurement and reporting

To increase the transparency and accountability of SA business regulators, the Commission recommends that the SA Government establish an across government policy framework to guide measurement, monitoring, and reporting of performance by regulators, based on the Commission's regulator practice framework. This policy framework would:

- be sufficiently flexible to recognise that regulators are a heterogeneous group with different legislative obligations, roles, structures and functions;
- be integrated into each regulator's annual planning and reporting cycle;
- include reporting on approval and rejection rates, and where applications are rejected, provide the reasons and consequences of the rejection; and
- include reporting on other KPIs and stakeholder feedback on performance.

Recommendation 3.2: Statement of expectations

To provide context of relevant government priorities and to promote a culture of continuous improvement, the Commission recommends that the SA Government introduce a Statements of Expectation (SOE) framework. The framework would apply to all state business regulators. Each SOE would be developed in consultation with the regulator and be issued by the responsible minister to the regulator every two years. These SOEs would include references to:

- the contribution to the governments' economic, social and environmental objectives, recognising the regulator's mandate;
- regulatory activities that are timely, outcome focused, and proportionate with regard to managing risks;
- ensuring open, transparent and efficient dealings with regulated entities;
- the pursuit of continuous improvement and innovation; and
- public reporting on the progress of improvement strategies and their outcomes.

Recommendation 4.1: Enhance SA regulation online resource

To support a system-wide approach to developing and evaluating regulations relevant to business, the Commission recommends that the SA Government leverage existing information and tools, including artificial intelligence (AI) and RegTech, to develop an online regulation information resource that is.

- based on the existing Legislation SA website;
- informed by reforms implemented in other jurisdictions to improve functionality and usability; and
- designed according to assessments of the costs and benefits of alternative approaches.

Recommendation 4.2: Build evaluation capability

To improve the quality and consistency of ex post evaluation of business regulation, the Commission recommends that the SA Government build public sector knowledge regarding the purpose of ex post evaluations and build capability in evaluation methods by:

- developing guidance material and tools, supported by training for agencies on the purpose, requirements, processes and different approaches to undertake proportionate and effective ex post evaluations; and
- incorporating specific guidance information on the Regulatory Expiry Program (REP) to ensure the program is targeted, proportionate, timely and effective.

Recommendation 4.3: Across-government ex post evaluation policy

To proactively manage and improve the quality of SA regulation, consistent with the notion of regulatory stewardship, the Commission recommends that the SA Government develop an across government policy on ex post evaluation. The policy will provide information and guidance on:

- the importance and benefits of ex post evaluation;
- triggers or prompts to help determine whether an evaluation is necessary;
- planning and coordination of evaluation;

- criteria to guide how an evaluation should be undertaken including the type of evaluation with reference to proportionality and risk;
- a holistic approach to regulation review that considers associated regulatory interactions (including those with other governments); and
- sharing of plans for and reports on evaluations with regulated entities and other regulators to promote collaboration and transparency.

Recommendation 5.1: Business-to-government digital systems enhancement

To make regulatory compliance activities faster, easier and more cost effective for both regulators and regulated entities, the Commission recommends that the SA Government:

- commit to all business regulators migrating to digital business-to-government data transfers and the greater use of regulatory technology (RegTech); and

- facilitate investment in regulatory technology design and practice by:
  - ensuring the methodology for assessing government investments in RegTech and digital solutions includes consideration of the broad, ongoing benefits (including avoided costs) to regulators and regulated entities and the state economy from reduced compliance costs; and
  - conducting a study lead by the Department of the Premier and Cabinet, working with regulators, to identify where digital and technology solutions could enhance the state's regulatory system giving particular regard to the Growth State sectors (including nature-based tourism and agritourism as identified in the Tourism Regulation Review).

Recommendation 5.2: Funding across-government RegTech solutions

Based on the study in recommendation 5.1, the Commission recommends that the SA Government identify and fund specific priorities for investment in RegTech and digital solutions informed by rigorous business cases that enable:

- more efficient data collection from regulated entities;
- more efficient data sharing between regulators, including regulators in other jurisdictions where appropriate;
- multiple agency use of existing digital, data and technology assets;
- improved coordination between regulators; and
- improved speed of decision making.

Recommendation 5.3: Promoting regulatory sandboxing

To enable the testing of innovative concepts and responses to new challenges facing the state, the Commission recommends that the SA Government develop a legislative framework for trialling regulatory sandboxes.

Recommendation 6.1: Continuous improvement of practice

To promote and support the ongoing improvement of regulatory practice across the regulatory life cycle, the Commission recommends that the SA Government establish an across government accountability framework and strategy that:

- includes a policy, drawing on OECD better practice principles, to guide regulatory consistency and quality to ensure that the economic, social and environmental effects

of regulation maximise net benefits to the state, consistent with individual regulators' enabling legislation;

- requires regulators to develop, implement and report publicly on improvement strategies with a focus on outcomes;

- establishes a community of practice among SA regulators and policy agencies to build capability and to share data, management systems, and best practice in such areas as technological and digital innovation and regulatory stewardship;

- includes other initiatives to improve capability, such as a dedicated training that could be rolled out across regulatory agencies;

- includes incentives and assistance for regulators to adopt new technologies that will enhance their efficiency and effectiveness; and

- is complemented by a program of external performance audits or peer reviews of selected priority regulatory agencies to examine the extent to which individual regulators deliver on their objectives and implement good practice.

Recommendation 6.2: Enhanced consistency, coordination and timeliness

To enhance the timeliness, efficiency and consistency of business regulator decision-making, the Commission recommends that the SA Government:

- task the Economic Growth Council with identifying options for improving the consistency and timeliness of business regulators' practice, and improving the way that SA regulators coordinate decision-making and compliance monitoring in industries where multiple regulators have jurisdiction;

- task the Growth State sector lead agencies, in consultation with industry, with identifying regulatory barriers to economic growth and escalating these issues, where appropriate, to the Economic Growth Council.

Recommendation 6.3: Central leadership and oversight

To improve the performance of the state's regulatory framework throughout the regulatory life cycle, consistent with the concept of regulatory stewardship, the Commission recommends the creation of a dedicated small unit, located in a central agency and responsible to a minister for regulatory reform, The unit would undertake transformational projects as well as a range of ongoing advisory, oversight and continuous improvement functions. Operation of the unit would be guided by the OECD's 2012 recommendation on regulatory policy governance. Key areas of responsibility would include:

- leading, in collaboration with regulators, the development of across government policies recommended by the Commission, drawing on OECD better practice principles, to guide transition towards best practice (see recommendations 3.1, 3.2, 4.3, 5.3, and 6.1);
- developing across government regulatory strategy, performance and priorities;
- building capability in regulatory policy and practice;
- providing expert advice and assistance to agencies on cost-benefit analysis, regulatory impact assessment and ex post evaluation;

- providing expert advice to Cabinet Office on the need for, and adequacy of, regulatory impact assessment as part of the Cabinet Office commenting process on regulatory proposals to Cabinet; and
- monitoring and reporting on overall regulatory system performance, including KPIs on timelines for decision making, approval rates and reasons for rejections and other key indicators.

The unit would have no authority to intervene in the work of any regulator.

Recommendation 6.4: Cross-border harmonisation

To ensure that cross-border issues are effectively identified and addressed at all stages of the regulatory life cycle, the Commission recommends that the SA Government extends PIRSA's regional role, through its Regional Development Steering Committee, to gather intelligence on these issues, refer them to the responsible agency and monitor progress on agencies' responses.

Definitions

For the purposes of this inquiry, the following definitions will apply.

Better or best practice regulation	The concept refers to an approach, technique or method of developing, managing or implementing regulation that is generally considered to be a preferable or superior way of achieving a particular regulatory outcome**.**
Ex post evaluation	Systematic assessment of regulation against clearly defined policy goals, including consideration of being up-to-date, cost-justified, cost effective and delivering the intended policy objectives.
Quasi-legislation	Sometimes referred to as 'grey letter law'. Instruments imposed by either government or industry (sometimes together) to influence behaviour, but which do not constitute black letter law. Quasi-legislation does not determine the law or alter its content. Examples include voluntary codes of practice and/or standards.
RegTech	'Regulatory technology ("RegTech") refers to technology that enables regulatory requirements to be met more effectively and/or efficiently'[1].
Regulation	Refers to any primary legislation (Act of Parliament), or statutory instruments made under an Act (subordinate legislation or delegated legislation). Regulation may also include 'quasi-legislation' (refer definition above). The term 'regulation' will generally be used in preference to 'legislation'. The term 'regulation' is distinct from 'regulations' (plural) which are a form of subordinate legislation.
Regulator	A South Australian state or local government body that holds mandates to regulate activities or externalities arising from certain activities in a market. A regulator is responsible for implementing, monitoring compliance, and enforcing government regulations within their mandate. Regulators may also have a role in creating or reviewing regulations. Regulators may be structed as statutory corporations, government departments or business units within departments.
Regulatory Framework	The legislation, governance arrangements, institutions, processes and systems in place throughout the state to develop, administer, enforce and review regulation. This includes across-government governance and oversight, training and education, management of applicable regulatory tools (including regulatory impact analysis tools), and responsibility for regulatory reform initiatives.
Regulatory Impact Assessment (RIA)	The process by which the economic and other impacts on proposed new regulations or amendments to existing regulations are identified and assessed to determine their impacts, costs and benefits to society. This includes an assessment of alternative policy options to assist decision-making.

[1] Productivity Commission, *Regulatory Technology – Information Paper* (October 2020), 5.

Acronyms

ABLIS	Australian Business Licence and Information Service
AEMC	Australian Energy Market Commission
AGD	Attorney-General's Department
AI	Artificial intelligence
AMR	automatic mutual recognition
APC	Australian Productivity Commission
BRV	Better Regulation Victoria
CBS	Consumer and Business Services
CSO	Crown Solicitor's Office
ERD	Environment, Resources and Development (ERD) Court
ESCOSA	Essential Services Commission of South Australia
LRC	Legislative Review Committee
MOU	Memorandum of understanding
OBPR	Office of Best Practice Regulation (Cwth)
OCBR	Office for the Commissioner for Better Regulation (Vic)
OCPSE	Office of the Commissioner for Public Sector Employment
OECD	Organisation for Economic Co-operation and Development
OPC	Office of Parliamentary Counsel
QPC	Queensland Productivity Commission
REP	Regulation Expiry Program
RIA	Regulatory impact assessment
RIS	Regulatory impact statement
SACAT	South Australian Civil and Administrative Tribunal
SOE	Statements of Expectations

1. Introduction

1.1 Regulatory reform, productivity and economic growth

The South Australian Productivity Commission (the Commission) was tasked with identifying reforms that will better position the state's regulatory framework to support business for the next decade and beyond. The inquiry has focused on regulation established by the South Australian (SA) Government and impacting on businesses—particularly when they are starting up, expanding into new markets or seeking to invest.

A regulatory framework refers to the regulation, governance arrangements, institutions, processes, systems, tools and culture that work together to design, approve, administer, enforce and review regulation. A well-functioning, efficient regulatory framework supports the design, management, implementation and review of regulation towards the achievement of policy outcomes whilst minimising the resulting regulatory costs that are imposed on businesses and individuals. It can also boost market confidence in the economy, signifying that it is a safe, consistent and reliable location for investment.

Well designed and effectively applied regulation can help safeguard and promote the wellbeing, health and safety of the community, environment and economy. Benefits accompanying regulation must be considered against the burdens. Regulation will, by its very nature, impose costs on businesses and individuals in order to influence and change behaviours. Poorly designed and/or ineffective and inefficiently applied regulation can impose excessive or unintended costs or burdens on businesses and individuals that go above and beyond what would be considered proportionate and appropriate given the risk and significance of the policy objective, or harm to be mitigated. This can, in turn, lead to unforeseen negative impacts and can risk the achievement of the policy objective.

For nearly two decades labour productivity growth in SA has been positive but falling, capital productivity growth has been negative and there has been zero overall productivity growth. This is far below the performance of other Australian states.[2] Lifting productivity is an essential foundation for post-pandemic economic growth and a sustained improvement in living standards over the long-term.

Countries with leading practice regulatory frameworks have been found to have greater economic resilience, reducing the likelihood and impact of economic contractions over time.[3] Efficient and effective regulatory frameworks can help an economy to respond quickly and effectively to unexpected external shocks. As SA emerges from the COVID-19 pandemic, modernising the state's regulatory framework is essential for lifting business and consumer confidence and improving the states' business climate and competitiveness for investment. Other Australian jurisdictions are pursuing regulatory reform agendas to lift productivity and support a post-pandemic economic recovery. The Commission considers that regulation is an area of direct influence for the South Australian Government and one where early and ongoing action can reduce unnecessary barriers to economic activity, raise productivity and foster economic growth.

[2] SAPC, Dean Parham, *A data-driven investigation of South Australia's productivity performance*, Research Discussion Paper no.1 (September 2020), 60.
[3] Queensland Productivity Commission, *Improving* regulation Research Paper (March 2021) 22.

1.2 Best practice regulation

The Organisation for Economic Co-operation and Development (OECD) work on best or better practice principles, for design of regulations, regulator practices and management of jurisdictional regulatory systems, provides a benchmark against which jurisdictions can assess their capacity to develop and implement quality regulation. These principles are explored in more detail in chapter 3. In its 2012 policy statement the OECD called for an across-government approach to regulatory reform to restore confidence and growth in the wake of the global financial crisis.[4] The recommended reforms are presented in Box 1.1 and provide a checklist for action by governments.

Box 1.1: OECD Regulatory Policy Committee recommendations on regulatory policy.

1	Commit at the highest political level to an explicit whole-of-government policy for regulatory quality. The policy should have clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, the distributional effects are considered, and the **net benefits are maximised**.
2	Adhere to principles of open government, including **transparency and participation** in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation. This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis. Governments should ensure that regulations are comprehensible and clear and that parties can easily understand their rights and obligations.
3	Establish mechanisms and institutions to actively provide **oversight** of regulatory policy procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality.
4	Integrate **regulatory impact assessment** (RIA) into the early stages of the policy process for the formulation of new regulatory proposals. Clearly identify policy goals and evaluate if regulation is necessary and how it can be most effective and efficient in achieving those goals. Consider means other than regulation and identify the trade-offs of the different approaches analysed to identify the best approach.
5	Conduct **systematic program reviews** of the stock of significant regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and deliver the intended policy objectives.
6	Regularly **publish reports on the performance** of regulatory policy and reform programmes and the public authorities applying the regulations. Such reports should also include information on how regulatory tools such as regulatory impact assessment (RIA), public consultation practices and reviews of existing regulations are functioning in practice.
7	Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence.
8	Ensure the effectiveness of systems for the review of the legality and procedural fairness of regulations and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that citizens and businesses have access to these systems of review at reasonable cost and receive decisions in a timely manner.
9	As appropriate apply risk assessment, **risk management**, and risk communication strategies to the design and implementation of regulations to ensure that regulation is targeted and effective. Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies.
10	Where appropriate promote **regulatory coherence** through co-ordination mechanisms between the supranational, the national and sub-national levels of government. Identify cross-cutting regulatory issues at all levels of government, to promote coherence between regulatory approaches and avoid duplication or conflict of regulations.
11	Foster the development of **regulatory management capacity** and performance at sub-national levels of government.
12	In developing regulatory measures, consider all relevant **international standards** and frameworks for co-operation in the same field and, where appropriate, their likely effects on parties outside the jurisdiction.

[4] OECD, *Recommendations and Guidelines on Regulatory Policy*, (Web page, 13 July 2021) < https://www.oecd.org/regreform/regulatory-policy/recommendations-guidelines.htm>.

Two significant contributors to the literature on better practice regulation are Sparrow, who advocates a risk-based approach to regulation that focuses on identifying and reducing risks and harm,[5] and Hodges, who argues for the importance of ethical and fair behaviour by both regulators and businesses, and a learning and collaborative culture for the design and operation of an effective regulatory system.[6]

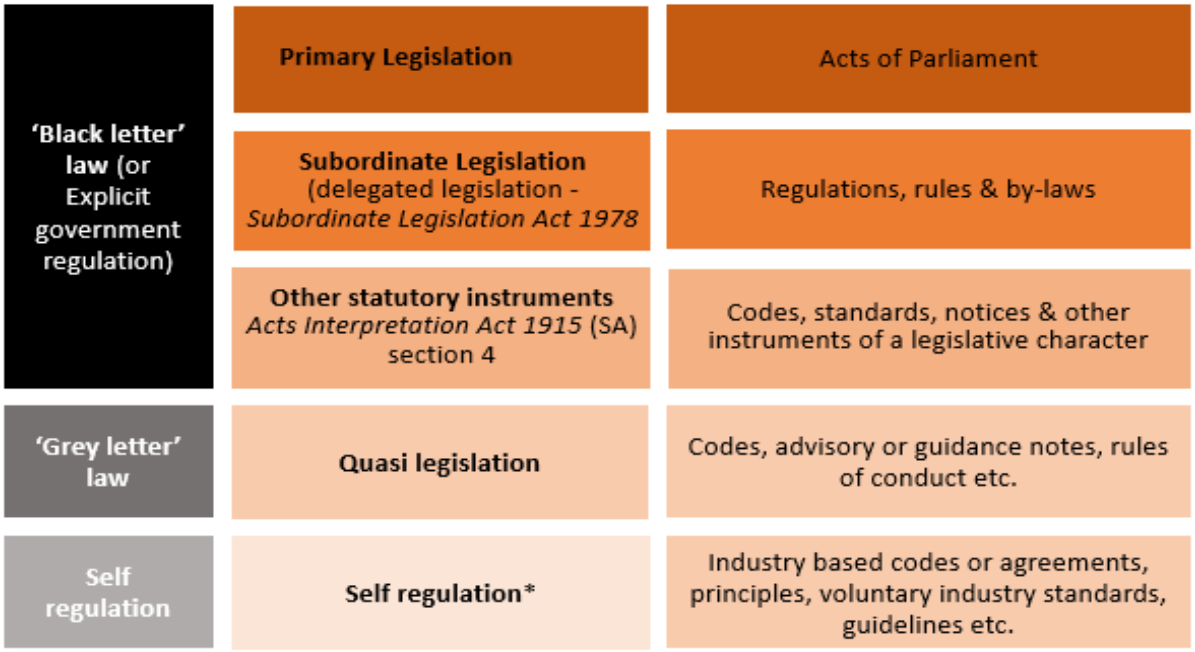
In mid-2021 the Australian Government released its new regulatory impact analysis guide [7] and new regulator performance guide[8] as part of its renewed deregulation agenda. The Australian Government has signaled an intention through these guides to lift regulator performance, capability and culture through a stewardship approach to regulatory reform, to help drive economic and jobs growth. The new guide focuses on three principles of best practice: continuous improvement and building trust; risk based and data driven action; and collaboration and engagement.

1.3 South Australia's regulatory framework

Forms of regulation in SA

The different forms of regulation in SA are illustrated in Figure 1.1.

Figure 1.1: Forms of regulation in South Australia



*Source: Office of the South Australian Productivity Commission (OSAPC), March 2021 * Self-regulation refers to any regulatory regime which has generally been developed and funded by industry, and is enforced exclusively by industry.*[9]

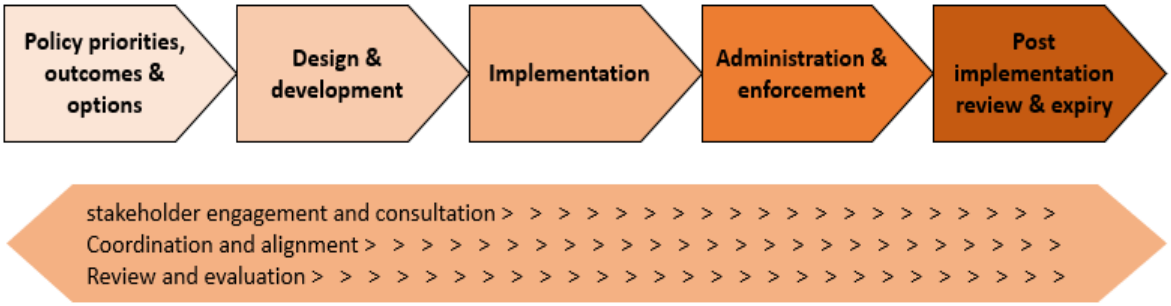
[5] Malcolm K. Sparrow, Professor of the Practice of Public Management, John F. Kennedy School of Government Harvard University.
[6] Christopher Hodges, *Ethics in Business Practice and Regulation,* (Web page, 13 July 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/550542/Prof_Christopher_Hodges_-_Ethics_for_regulators.pdf .
[7] Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Regulatory Impact Analysis Guide for Ministers' Meetings and National Standard Setting Bodies*, (May 2021).
[8] Commonwealth of Australia, Department of the Prime Minister and Cabinet**,** *Regulator Performance Guide*, (July 2021).
[9] Commonwealth Interdepartmental Committee on Quasi-regulation, *Report on grey-letter law*, (December 1997), 6.

In SA, legislative provisions are contained in either primary legislation (Acts of Parliament) or subordinate legislation. Subordinate legislation is created by the government (including local government in the case of by-laws) based on power delegated by Parliament. Regulations, rules and by-laws are subject to provisions in the *Subordinate Legislation Act 1978* (Subordinate Legislation Act). Administrative instruments in the form of 'quasi-legislation' may also be employed by government to influence behaviours.

The regulatory life cycle

The regulatory life cycle (Figure 1.2) refers to the various stages followed in the 'life' of a regulation.

Figure 1.2: Regulatory life cycle



Source: OSAPC

Throughout the regulatory life cycle, policy departments and regulatory agencies design, develop, administer and review regulations, and undertake stakeholder engagement, cooperating with other regulatory authorities within and across levels of government. This approach aims to ensure regulation remains relevant, fit for purpose and aligned with policy objectives, and mitigates against adverse or unintended impacts on the community, business and the economy.

Performance of the state's body of regulations depends on how each stage of the life cycle is managed. The effectiveness and efficiency of regulatory activity depends on: whether regulation is the best policy instrument; what is being regulated; the design and management of regulations; the way they are administered and enforced by regulators; and how they are reviewed.

The appropriateness of the regulation and the way it is designed and developed can affect the ability of regulators to effectively implement and enforce it. Appropriateness may relate to provisions within primary or sub-ordinate legislation and the enforcement powers available to the regulator.

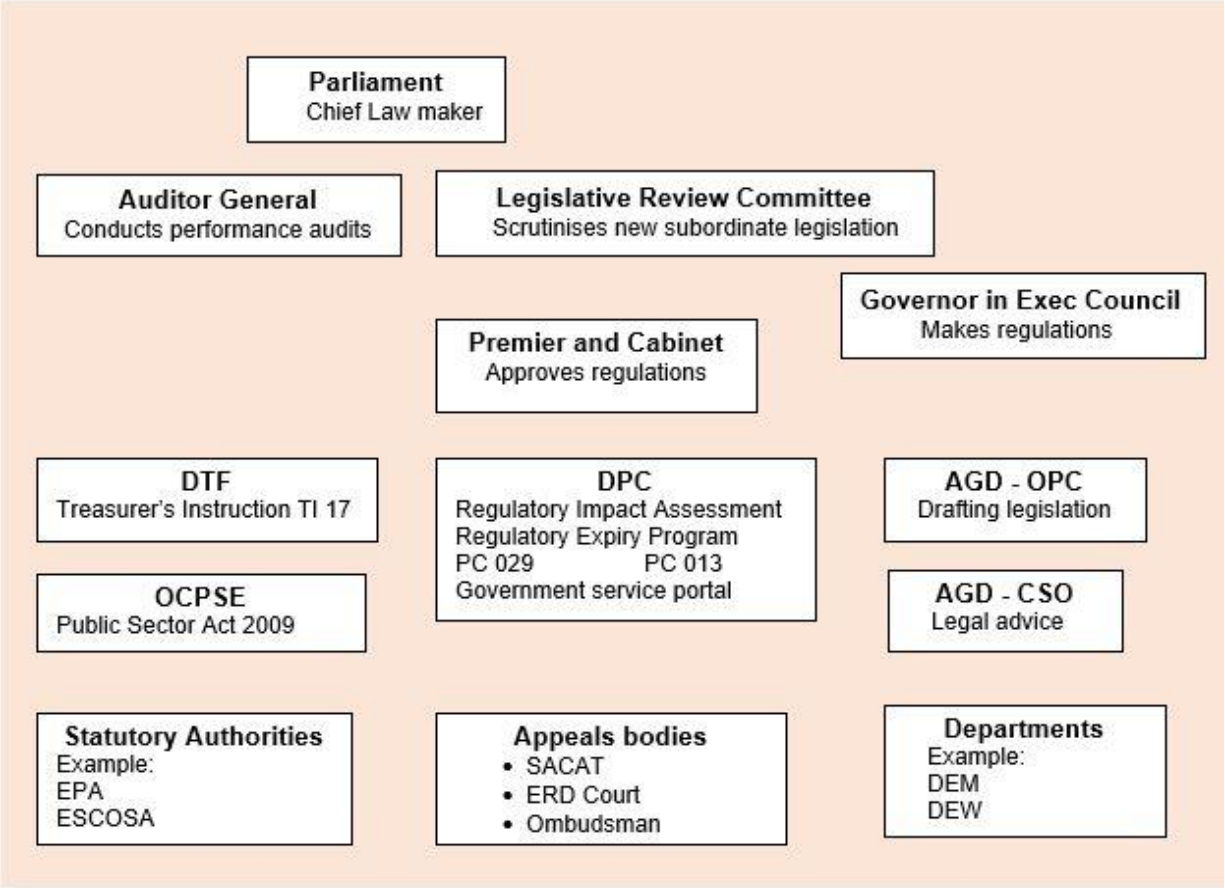
A variety of factors (both internal and external to regulators) can influence whether regulation is fit for purpose and achieves its stated objectives, including: the efficiency of regulator processes for monitoring and enforcement and stakeholder engagement; regulator governance structures; resourcing; capability and culture; and changes in technology.

Key state government bodies and policies which guide each stage of the regulatory lifecycle in SA are discussed in more detail in later chapters. Design and development are discussed further in chapter 2, implementation, administration and enforcement in chapter 3 and post-implementation review and expiry in chapter 4.

Current system-wide regulatory architecture in SA

This section provides an overview of SA's current system-wide regulatory architecture. This is presented in Figure 1.3.

Figure 1.3: SA's regulatory framework governance structure.



Source: OSAPC

In SA, acts and their associated regulations are committed to ministers, who are responsible to parliament for the effective and lawful implementation of the requirements contained in statutes. As examined in chapter 2, the power to develop, manage and implement regulation is always shared between the legislative and executive branches of government. Unless self-regulation or quasi-legislation are used to achieve regulatory outcomes, the executive's power to create regulation using subordinate legislation is always based on a power 'borrowed' from Parliament and prescribed in the applicable enabling legislation.

The 'mixed' nature of regulation as a form of black letter law is most noticeable when regulatory obligations are introduced through subordinate legislation, such as regulations within the meaning of the *Subordinate Legislation Act 1978* (Subordinate Legislation Act). That said, regulatory schemes introduced under primary legislation are also affected by the complex interaction between regulators, other levels of government (including local government) and Parliament as the state's chief lawmaker.

In SA, the parliamentary role in the regulatory framework is bifurcated. Parliament creates law with a regulatory impact by enacting primary legislation, such as the *Environment Protection Act 1993*, and by delegating limited authority to the government to make law

using different forms of subordinate legislation (including regulations). Parliament also has the power to hold the government to account for the laws that it creates using subordinate legislation. Parliament's scrutiny function is largely exercised by the Legislative Review Committee (LRC), which is responsible for examining all instruments referred to it under section 10A (1) of the Subordinate Legislation Act.

The LRC has the power to recommend the disallowance of any regulation within the meaning of section 4 of the Subordinate Legislation Act. Both Houses of Parliament also have the right to disallow a regulation irrespective of whether the LRC has recommended disallowance. As noted in chapter 2, Bills are not subject to scrutiny by the LRC, but Parliament can resolve to establish a select committee to scrutinise provisions contained in a Bill.

Parliament's role in the state's regulatory framework is also informed by the Auditor-General's annual program of audits. Along with financial audits, the Auditor-General work program includes a range of performance audits to assess whether the functions for which agencies are responsible have been carried out in an efficient and effective manner and have achieved their stated aims. The Auditor-General's enabling legislation, the *Public Finance and Audit Act 1987*, establishes the office as independent of executive government. The Auditor-General reports directly to Parliament through the Economics and Finance Committee and is required to table an annual report on audit findings in Parliament.

The creation of regulation through executive lawmaking generally involves several government agencies, which exercise some responsibility for the development and making of regulation. Ministers, both individually and as members of Cabinet, are ultimately responsible for both the development and administration of regulation, with their responsibilities delegated to the public sector agencies within their portfolios. In addition to the administration and enforcement activity undertaken by both policy agencies and independent regulators, the Department of the Premier and Cabinet (DPC) and the Attorney-General's Department (AGD) exercise central functions within SA's regulatory framework.

Cabinet Office in DPC is responsible for ensuring that ex-ante assessment of regulatory impact, as outlined in the Regulatory Impact Assessment (RIA) framework in the *Better Regulation Handbook*, is undertaken appropriately by agencies. Agencies are required to produce a Regulatory Impact Statement (RIS) if a regulatory proposal meets or exceeds the impact threshold outlined in the handbook.

Cabinet Office's role in ensuring adherence to the handbook is bolstered by *Treasurer's Instruction 17 – Evaluation of and approval to proceed with Public Sector Initiatives* (TI–17). Treasurer's Instructions, which are issued under section 41 of the *Public Finance and Audit Act 1987* (Public Finance Act), are statutory instruments that impose obligations on government agencies and are administered by the Department of Treasury and Finance (DTF). Importantly, TI–17 requires Chief Executives to ensure, among other obligations, that all regulatory initiatives are evaluated in accordance with the requirements contained in the *Better Regulation Handbook.* The scope of TI–17 is limited to ex ante assessment and does not create obligations on agencies to engage in ex-post evaluation of regulation.

Cabinet Office also has lead responsibility for managing the Regulation Expiry Program (REP), which involves ex-post evaluation of instruments that fall within the definition of regulations contained in section 16A of the Subordinate Legislation Act. The REP is undertaken on an annual basis, with the Office of Parliamentary Counsel (OPC) providing specialist legal support to Cabinet Office.

Apart from its role in regulating a large cross-section of South Australian businesses through Consumer and Business Services (CBS), the AGD plays a significant role in the state's regulatory architecture through the OPC and the Crown Solicitor's Office (CSO). While the latter does not have any formalised responsibilities in relation to the development and management of regulation, its function as the primary legal adviser to government means that it often plays a critical role in the development phase of the regulation life cycle. This is particularly true when new or amended regulations raise legally complex questions, over and above the policy considerations that the regulatory proposal is designed to address.

The OPC drafts bills at the request of members of Parliament. Its responsibilities are carried out by a specialised team of lawyers and administrative staff. Legal staff are present in Parliament during the passage of Bills to advise ministers and other members of Parliament on the provisions contained in, and the implications of, proposed legislation. The OPC's staff provide an objective and politically impartial legislative drafting service to both government and private members of Parliament and treat all drafting instructions and associated discussions as confidential. The services provided by OPC do not extend to the provision of policy advice on the appropriateness or necessity of regulation. Policy considerations remain the responsibility of the minister and agency proposing the introduction or amendment of regulation.

In common with other Australian jurisdictions and international best practice, SA possesses a developed system of judicial appeal against decisions taken by regulators, which forms part of the state's broader framework of administrative law. This is in addition to internal review processes which several regulators operate. An appeal against a regulator's decision can be subject to a 'merits' review, which considers whether the agency's decision is preferable, and to a full judicial review. The latter involves the court considering whether the law has been appropriately applied in the case in question. In contrast to a merits review, the court's ruling will not consider whether the regulator's decision was, on balance, preferable in the circumstances.

Following the establishment of the South Australian Civil and Administrative Tribunal (SACAT) in 2015, which saw the abolition of a few specialist tribunals and boards, appeals against certain types of decisions by regulators are heard by SACAT. Some appeals are still heard by other judicial bodies, however, such as the Environment, Resources and Development Court. The specific appeal pathway against a regulator's decision is generally prescribed in its enabling legislation, such as the *Environment Protection Act 1993*, which allows some decisions by the Environment Protection Authority (EPA) to be appealed in the Environment, Resources and Development Court. The Commission notes that appeals against decisions by regulators can also be referred to the South Australian Ombudsman, pursuant to the *Ombudsman Act 1972*, but that an Ombudsman's determination is not directly binding on an agency.

Structure of SA regulators

Regulator structure can influence a regulator's practices and performance. A regulator may be established and operate as:

- a body corporate, for example the EPA and Essential Services Commission of SA (ESCOSA); or
- a business unit within a department, for example Biosecurity SA within the Department of Primary Industries and Regions SA (PIRSA) and water licensing within the Department for Environment and Water (DEW).

In addition to the power delegated by Parliament to develop by-laws, local government also has certain powers and responsibilities to administer and enforce regulation(s) on behalf of the SA Government under the *Local Government Act 1999* (and other state Acts). In this respect, councils are regulatory authorities for specific state government regulations. Factors impacting on regulator structure are outlined further in chapter 3.

In SA there is no comprehensive publicly available list of regulators. The Commission has identified a number of regulators and regulatory functions within departments that principally affect businesses in SA. These are listed in Appendix 3.

Many of these regulators have full responsibility or at least some involvement in all stages of the regulatory life cycle.

The Commission received responses to information requests from 32 areas within the departments and authorities outlined above that were considered to have a regulatory function. Upon further consultation with these areas, several of them did not relate specifically or primarily to business and so were deemed out of scope for further investigation. These initial consultations identified 22 different business regulation areas in SA from which the Commission obtained data on activity that is presented in the following section. Some of the departments identified provided information on several regulatory functions for which they are responsible, as shown in Appendix 3.

1.4 State government expenditure on business regulation

Some information on government spending on administering regulation within SA can be obtained from state budget papers and regulator and department annual reports. Costs of administering regulations can be funded through fees and charges and/or general budget allocations. However, there is no standard approach to how information is captured and reported by regulators or departments. Information relating to government resources allocated to each stage of the lifecycle and specific to business regulation is difficult to obtain.

The Victorian Office of the Commissioner for Better Regulation (OCBR) undertook a survey of regulators in 2018 receiving 57 responses which identified $9 billion in annual expenditure. However, this captured regulators that provide both regulatory and non-regulatory services to businesses, individuals and other non-government organisations.[10]

The Queensland Productivity Commission (QPC) used the Victorian estimate to estimate the gross cost of administering and enforcing regulations in their state at approximately $2.6 to $3.1 billion annually.[11]

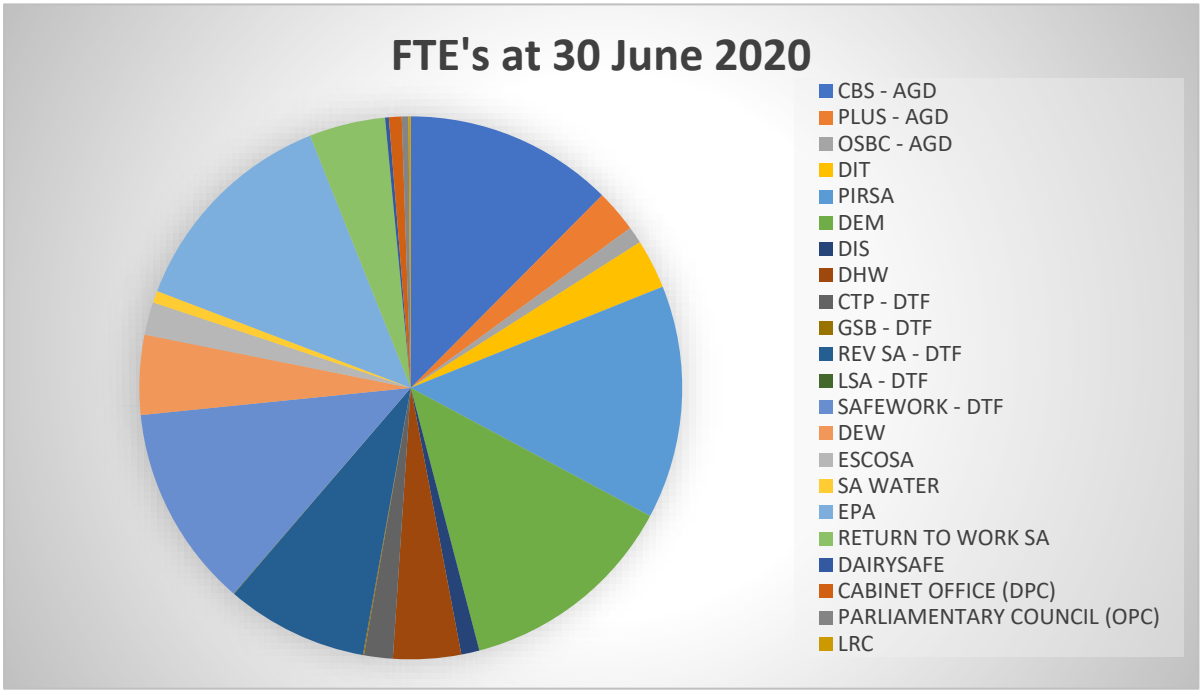
To estimate government spending on business regulation in SA, the Commission undertook a similar exercise to that of Victoria based on the regulatory areas listed in Appendix 3. Agencies were asked for estimates of direct expenditure and employment related to all stages of the regulatory life cycle. An estimate of corporate overhead expenditure, based on DTF advice, was added to regulator estimates of direct expenditure. Some regulatory activity which applies equally to households and businesses, such as vehicle registration, was excluded due to difficulties in estimating the proportion of activity applying to businesses. From this, it is estimated that SA has around 1500 FTE staff employed and expenditure of

[10] OCBR, *Victorian Regulators An Overview* (February 2019).

[11] QPC, *Improving Regulation* Research Paper (March 2021), 16.

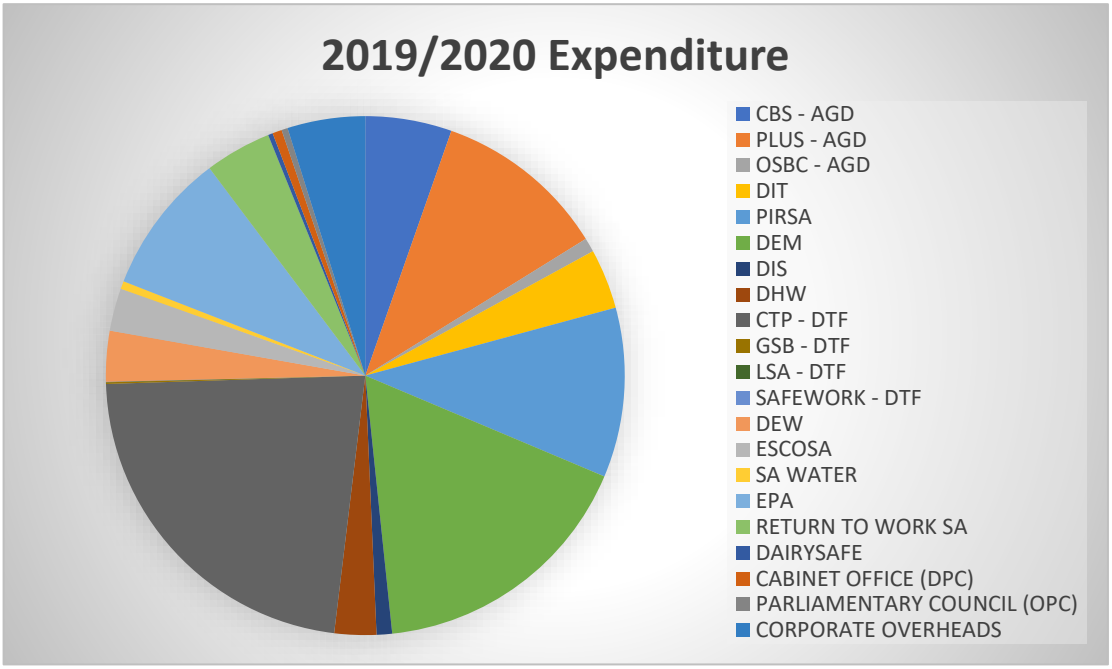
around $260 million annually associated with business regulation. A breakdown of these estimates by regulatory area is presented in Figures 1.4 and 1.5.

Figure 1.4: Regulatory staff employed by key central agencies and parliamentary functions



Source: OSAPC

Figure 1.5: Key central agencies and Parliamentary 2019-2020 expenditure.



Source: OSAPC

These estimates include key central agency and parliamentary functions related to regulation development (i.e. including OPC, Cabinet Office and the LRC). Notwithstanding that the SA estimate aimed to exclude regulation of households, and that the SA economy and number of businesses is relatively small, the Commission concludes that total

government regulatory activity is probably lower relative to the state's economy in SA than Victoria and other eastern states.

These same regulators generate around $702 million annually for SA. Return to Work SA premiums, fees and penalties make up the vast majority, followed by the EPA), the Department for Energy and Mining (DEM) and Consumer and Business Services (Attorney-General's Department).

The Commission sought advice from DTF regarding the funding arrangements for SA's regulators and the potential implications for regulator practice, performance and reform. Key features of these funding arrangements are:

- Regulatory fees and charges are generally developed through the annual budget process on a cost recovery basis. There are some instances where full cost recovery is not achieved or the government makes a decision to set a fee below a full cost recovery amount. Where regulator revenues exceed cost and result in increased cash balances for the regulator, these are used to fund future activity, including lower future fees.
- DTF argued that the application of annual efficiency dividends enables agencies to tailor approaches to savings and improve the efficiency of their regulatory activities without reducing service quality.
- There are no specific across-government mechanisms to assist agencies to fund the costs of regulatory reform (e.g. up-front costs, reduced fee revenue); the usual budget and Cabinet processes apply for the approval of any regulatory reform proposals.

1.5 Impacts of regulation on business

Regulators are effective when they deliver benefits to the community that justify the costs of regulation. The benefits of regulation include improved public health and safety, environmental protection, greater access to essential services (e.g. water and telecommunication infrastructure), and better access to information for businesses and consumers on services and products. Regulation also imposes costs on government, businesses and the community. Poorly designed and inefficiently administered regulations can impose unnecessary burdens on businesses, consumers and the economy more broadly.

Businesses can face regulatory costs related to market entry, start up and new investment, or as part of ongoing operations. Specific costs include direct payments to government (e.g. application and licence fees) and the costs of complying with regulations, especially in cases where they may be overly prescriptive (e.g. time and money spent on paperwork or getting legal advice). Unnecessary delays in regulatory processes and decisions can impact financial holding costs and delay receipt of business income. Inefficiencies can arise if regulators (and regulations) fail to deliver their expected benefits, or if the requirements they place on regulated entities are unnecessarily costly or burdensome, raising entry barriers. Duplication or overlapping requirements between regulators and lack of harmonisation and knowledge sharing can also add to the costs incurred by business.

The cumulative effects of regulation on businesses in SA, relative to other jurisdictions, are difficult to quantify. Information was extracted from the Australian Business Licence and Information Service (ABLIS)[12] on the business licensing requirements that are applied by all

[12] ABLIS provides business owners and individuals considering starting a business with information on the relevant licences and permits (Commonwealth, state and local) that they are required to obtain in the relevant state. <https://ablis.business.gov.au/>

three spheres of government for specific hypothetical businesses operating in each of SA's Growth State industries,[13] This suggests that there are fewer licensing requirements in all these industries in SA than all other jurisdictions except Queensland.[14] Other factors need to be considered, including the level of complexity, business time and resources required to comply, approval times and so on to draw conclusions about comparative total regulatory burden.

Pre-pandemic estimates indicate that the regulatory burden imposed on businesses in Australia was around three per cent of Gross Domestic Product (GDP), with state and local government combined accounting for about half of that burden In SA this amounts to an estimated annual cost imposed on businesses of $1.7 billion (noting these estimates do not account for the efficiency costs associated with regulation or the impact on economic resilience).[15]

Different approaches have been used to evaluate regulatory costs on business including large scale business surveys, case studies and interrogation of business census financial information. The Commission has been unable to identify an estimate of the compliance cost burden on SA businesses of SA Government regulation. A New Zealand (NZ) study[16] estimated that the administrative compliance costs (for business and individuals) associated with the existing stock of regulation in NZ to be around 2.9 per cent of GDP per annum. If this estimate were applied to SA's Gross State Product ($110.6 billion in June 2020[17]), the estimated regulatory burden from complying with regulation in SA would be $3.2 billion per annum.

The Commission sought information from 74 industry associations in SA on: the main challenges faced by businesses due to SA government regulations, seeking information on: whether they felt there was appropriate stakeholder engagement; their views on the performance of regulators; and suggestions for improvements. Based on the 18 responses received, industry identified the following challenges:

- inconsistent regulations between jurisdictions in the areas of in-service automotive modifications and use and transportation of dangerous substances;
- inconsistencies with licensing eligibility criteria and fees between jurisdictions in the security investigations industry and outdated regulations that are not representative of changes in technology;
- inconsistent rules across local council relating to issues such as outdoor dining; and
- delays in approvals and lack of transparency and responsiveness in the tourism and agriculture, food and wine industries.

Industry associations generally found consultation processes on regulatory design and access to regulators to communicate concerns were generally satisfactory, although some expressed a desire for additional time to respond and provide submissions.

In relation to regulator performance comments were mixed. Of concern were those related to: lack of coordination between regulators and consistency within agencies; resistance to change; variations between local councils and striking a balance between environmental

[13] South Australian Government, *South Australian Growth State* (Web page, 25 March 2021) <https://www.growthstate.sa.gov.au/>.
[14] SAPC Draft report, (August 2021), 38.
[15] QPC, *Improving Regulation,* Research Paper (March 2021), 14.
[16] NZIER, *Assessing the stock of regulation – a tool for regulatory stewards* (Working paper, 2016-01), 6.
[17] ABS, *Gross State Product,* (June 2020). Based on GSP $110.63 billion at June 2020 (pre-COVID-19)

protection and growth without onerous regulation. Suggestions for reform were mostly quite specific to the industry concerned. More generic ideas included: clearer division of responsibilities between regulators, creation of a one stop shop, pooling of compliance resources across regulators, automatic licence recognition and stopping duplication of information requests.

To gather more evidence from businesses the Commission conducted a short survey of a wide cross-section of businesses in SA. More than 24,000 SA businesses were invited to participate in a short survey seeking information on their recent experiences with SA business regulators. Key findings from this survey, based on the 376 responses received, are outlined in the Box 1.2 below. Further details on the survey are published in a separate report available on the Commission website.[18]

Box 1.2: Key business survey findings

- Businesses interacted most frequently with regulators for the purposes of monitoring and compliance, followed by approvals and reporting. Key benefits of regulations identified were a level playing field and consumer confidence. Regulations were not seen as helping businesses to be more productive, innovative or expand.
- 68% of respondents rated satisfaction with regulators at 6/10 or higher and the average rating was 6.5.
- Expensive fees and time-consuming processes were identified as the most common challenges in dealing with regulators. Nearly half of the businesses (45%) indicated they found the regulations time consuming most or all the time, while a third of businesses experienced unreasonable costs most or all the time. One quarter of businesses faced other issues most or all the time – poor communications, inflexible regulation and duplication.
- Of the 333 businesses that found processes time consuming, processes identified as the most time consuming were waiting time for approvals (65%) filling in forms (63%) and seeking advice (57%).
- Of the 319 businesses that identified unreasonable costs as an issue, the most common types of regulatory costs seen as unreasonable were registration, permit and licensing fees (53%), penalties and fines (42%) and additional staff costs to get approvals and ensure compliance (40%).
- Of the 323 businesses that identified poor communication as an issue, most commonly cited communication issues were difficulty in finding information (47%) and lack of communication on the status of approval processes (41%).
- Of the 309 businesses that identified outdated or inflexible regulations as an issue, the most cited issues were the use of a one size fits all approach (54%), requirements being too prescriptive (44%) and requirements not matching business risk (42%).
- Of the 307 businesses that identified information requirements as the biggest challenge, the common issues were amount of information required was not proportionate to level of risk (41%), inconsistent information from multiple individuals within the same regulator (40%) and additional or repeated requests for information from the same regulator (33%).
- 29% of the business respondents traded outside SA. 19% of these businesses considered SA had more regulations, while 57% considered SA had the same or fewer regulations. 55% of businesses trading outside SA thought that compliance with SA regulations was the same or easier than other states.
- Most commonly sought improvements were communication, improved turn-around times, consistent information and lower fees.

Source: Office of the South Australian Productivity Commission (OSAPC) based on McGregor Tan report

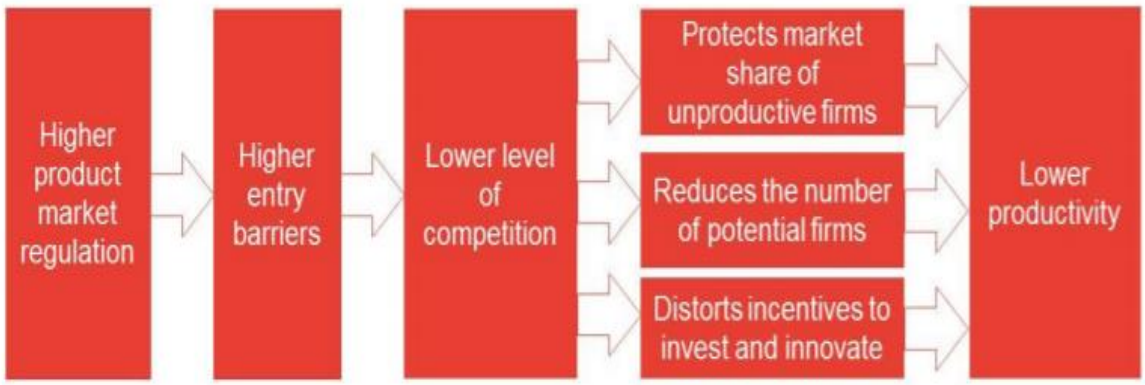
[18] McGregor Tan Business survey report – link to SAPC website to be added

1.6 Economy-wide impacts of regulation

A well-designed and administered regulatory framework can provide lower compliance costs and greater certainty and confidence for businesses thereby creating a potential competitive edge for business investment compared to other jurisdictions. Conversely, poorly designed and/or inefficiently administered regulation can 'both fail to achieve its safety, environmental or consumer protection objectives and have unintended effects on prices, competition and business flexibility'.[19]

Regulation can operate in a way that restricts competition and limits incentives to invest in new technologies. A United Kingdom (UK) study concluded that increases in the volume of product market regulation[20] can discourage business start-ups, reduce competition between existing businesses, distort prices, and diminish a business's incentive to innovate and invest. Figure 1.6 illustrates this relationship.

Figure 1.6: How higher product market regulation can impact on productivity



Source: Frontier Economics Ltd, The impact of regulation on growth: a report prepared for the Department of Innovation and Skills, (2012), 7

Price and entry regulation can have a negative impact on economic activity and growth.[21] Burdensome regulation on market entry, products and labour markets can distort or deter investment choices.

The regulatory environment has been identified by businesses undertaking foreign direct investment across Australia as the fourth most important factor influencing their investment decisions, following domestic market growth, proximity to market/customers and availability of a skilled workforce.[22]

A prescriptive and rigid regulatory framework can affect a government's capacity to adopt innovative forms of regulation, such as approaches grounded in new technologies, including advanced data analytics and artificial intelligence (AI). It can also constrain the government's capacity to implement contemporary approaches to regulation that are outcomes-based and to overcome the 'pacing problem', which can see regulators struggle to deal with the disruptive effects of new technology or external shocks to the economy.

[19] Queensland Productivity Commission (QPC), *Improving regulation,* Research Paper (March 2021), 2.
[20] Product market regulation is defined as the broad range of rules that affect business operations during the business life cycle including start up, operation, expansion and exit.
[21] James Broughel and Robert W. Hahn, *The Impact of Economic Regulation on Growth* (December 2020), 32.
[22] fDi Markets Cross Border Investment Monitor, *Trends report* (April 2021).

1.7 Recent regulatory reform in SA

SA Governments have used various initiatives to reduce regulatory burden. They include programs to address specific issues, such as the *Rip it Up* initiative, implemented in 2017, that sought to reduce the complexity of government forms and, where possible, digitise paper forms. Larger-scale initiatives include the *Red Tape Reduction* program, which took place from 2006-2012 focusing on regulator practices and culture, and the *Simplify Day* initiative in 2016 and 2017 which aimed to amend or repeal regulatory provisions in primary and delegated legislation.

There were two 'rounds' of the Red Tape Reduction (RTR) program with the first operating from 2006 to 2008, and following its success, a second round from 2009 to 2012. According to its final report, the RTR program resulted in savings in regulatory compliance costs to businesses of approximately $320 million annually.[23] The benefits extended further than strictly financial, encouraging a discipline within agencies to avoid over-regulation, supported by guidelines designed to offset future regulatory cost burdens.

The RTR program was complemented by the Small Business Statement released in 2009 to build awareness of government services and to implement red tape reduction initiatives focusing on small businesses.

In 2010 SA Cabinet approved the *Better Regulation Handbook*, as part of a national reform, to introduce the RIA process managed by Cabinet Office. Adherence to the RIA process is mandatory for all SA Government agencies.[24] Chapter 2 provides further information on RIA and its relevance today.

From 2016 to 2018 the state government ran an annual Simplify Day Program to remove outdated and redundant laws and regulations. SA established a strong engagement and consultation mechanism with business and the broader community to encourage suggestions on red tape reduction opportunities. From the several hundred contributions and ideas considered, amendments were made to 41 Acts and 27 regulations and a total of 22 Acts of Parliament repealed.[25]

The regulatory reforms implemented via Simplify Day impacted on a wide range of industries including transport, fisheries and agriculture, second-hand vehicle dealers and commercial property managers. Reforms included updating administrative processes to incorporate online capability and remove outdated technology, revising and updating applicable thresholds and streamlining application processes.

The Rip it Up' initiative, was subsequently introduced to minimise unnecessary forms and offer a single online portal for everything government-related, sa.gov.au. The MySA Gov account was also introduced to enable simpler interactions between government and individuals/businesses.[26]

Changes to economic and social structures, community opinions and technology may limit the relevance or effectiveness of regulation over time. Regulation may become outdated and require repeal or amendment. The 'sunsetting' of regulations in South Australia takes place

[23] Government of South Australia, *Reducing Red Tape for Business in South Australia* (2013).
[24] Government of South Australia, *Better Regulation Handbook*, 5
[25] <https://yoursay.sa.gov.au/simplify-day-2017-red-tape-reduction-and-regulatory-reform/news_feed/update-3>
[26] *Report on Jurisdictional Approaches to Regulatory Reform* (2017) (n6).

according to the REP managed by Cabinet Office. The purpose of the sunsetting requirement is to seek opportunities to reduce regulatory burden and identify any trade-offs between burden reduction and other policy outcomes. The REP and other initiatives to manage the stock of regulation are further explored in chapter 4.

The SA Government has also delivered significant industry-specific regulatory reforms in recent years through amendments to legislation in such areas as planning, mining, liquor licensing, radiation protection and control and controlled substances.

SA has also participated in the progress of regulatory reforms at the national level. The SA Government has supported the automatic mutual recognition (AMR) of occupational licences to improve occupational mobility between states. Following the passage of Australian Government legislation in 2021, adopting legislation for SA is expected to be in place for AMR to apply in SA from early in 2022. Under this uniform national scheme interstate licence holders coming to SA will no longer be required to acquire a SA licence and SA licence holders seeking work interstate will not be required to acquire an interstate licence.

SA has also been participating through the Council for Federal Financial Relations (CFFR) in examining opportunities to modernise business communication, which is now focused on electronic signing of statutory declarations, deeds and other documents, and streamlining overlapping regulation which is likely to have an initial focus on 'tell us once' initiatives (business registration, business reporting, product safety and fit and proper person tests). The CFFR is also overseeing the adoption of electronic invoicing.

All Australian jurisdictions responded to the pandemic by enacting legislation specific to COVID-19, such as South Australia's *COVID-19 Emergency Response Act 2020* (SA) (COVID-19 Emergency Response Act), and by amending existing acts to address the public health and economic effects of the pandemic. Except for the Australian Government, which relied on provisions contained in the *Biosecurity Act 2015* (Cth), these responses were strengthened by provisions in jurisdictions' respective emergency management Acts. These statutes provide state and territory governments with significant powers to deal with an unfolding emergency, once a state of emergency has been declared.

The Attorney-General recently introduced legislation into the House of Assembly to make permanent a range of legislative amendments that had been introduced on a time-limited basis to assist in the state's response to the pandemic. The amendments cover a range of measures that are designed to ensure that the ongoing COVID-19 pandemic can be managed effectively over the long-term. The *Statutes Amendment (COVID-19 Permanent Measures) Act 2021*, once commenced, will amend multiple acts to embed COVID-19 measures within the state's statute book, such as changes to the Parliamentary Committees Act to enable standing committees to meet using audio-visual means at any time.

1.8 The Commission's task

The Commission has been asked to make recommendations to modernise SA's regulatory framework to better support investment, employment and productivity growth. The medium to long-term aim is to propose reforms that can position the state's regulatory framework as a potential source of competitive advantage. The inquiry has also explored opportunities to support and accelerate the state's economic recovery from the pandemic in the shorter term.

More specifically, the inquiry aimed to identify reforms to:

- institutionalise ongoing improvement and good practice by the state's business regulators, drawing on better practice approaches;

- incorporate in the state's regulatory framework the lessons learned for better regulation from the COVID-19 pandemic, to safely grow jobs, raise productivity and encourage sustainable economic growth;
- embed the application of best practice regulation principles, drawing on the work of the OECD and regulatory reforms in Australia, throughout all stages of the regulatory life cycle; and
- establish a clear, fit for purpose and an across-government accountability framework for ongoing improvement to the statewide system of regulation.

The scope of this inquiry was limited to SA Government regulation impacting principally on businesses, including regulations and by-laws where local government acts as a regulator on behalf of the government. The terms of reference for the inquiry are in Appendix 1.

The Commission received 23 submissions (20 public and 3 confidential submissions) in response to the issues paper and 17 submissions (15 public and 2 confidential) in response to the draft report. The list of submissions is in Appendix 2. The Commission also received 19 responses from industry associations to information requests and 13 responses to information requests from regulatory departments/authorities that, upon consultation, were deemed to relate specifically or primarily to business. This information has greatly assisted the Commission's understanding of various aspects of its task. The Commission undertook wide consultation, including 40 bilateral meetings and 7 virtual roundtables with government and non-government stakeholders, to deepen its understanding of the regulatory environment in SA.

The Commission acknowledges with thanks the assistance from businesses, state government departments, industry associations, relevant peak bodies and other stakeholders who contributed to this process. Work was commissioned in three areas to obtain data and build the evidence base for the inquiry:

- a business survey, discussed earlier, to inform the Commission on how government regulations and regulator behaviour affect SA businesses;
- a survey of 27 major government regulatory areas to provide a deeper understanding of regulator practices in SA; and
- 13 case studies of specific aspects of regulator practice to identify areas of good practice as well as opportunities for improvement.

All reports will be published on the SAPC website.

This inquiry is complemented by two regulatory reviews by the Commission addressing opportunities to improve regulatory practice – regulatory referrals in the development approvals process and tourism regulation, with specific attention to nature-based tourism and agritourism. This final report is structured as follows:

Chapter 1: discusses the importance and economic impacts of regulations

Chapter 2: considers the development of regulations in SA.

Chapter 3: discusses regulator structure, practice and performance.

Chapter 4: explores how the stock of regulations is managed

Chapter 5: discusses the importance of technology and innovation for regulators

Chapter 6: examines the role of statewide architecture in the efficient and effective management of the regulatory life cycle.

2. Developing regulation

2.1 Introduction

This chapter focuses on the efficiency of the development phase of the regulation life cycle and the effectiveness with which this phase contributes to the realisation of regulatory objectives. The Commission is not concerned here with assessing the strategic objectives of regulation, which are policy decisions on the part of government.

The chapter contributes to the Commission's overall task by examining the statutory and institutional framework within which regulation is developed, with a specific focus on the whole-of-government regulatory impact assessment (RIA) framework, including better practice principles developed in other Australian jurisdictions and by the Organisation for Economic Development and Cooperation (OECD).

2.2 Statutory framework

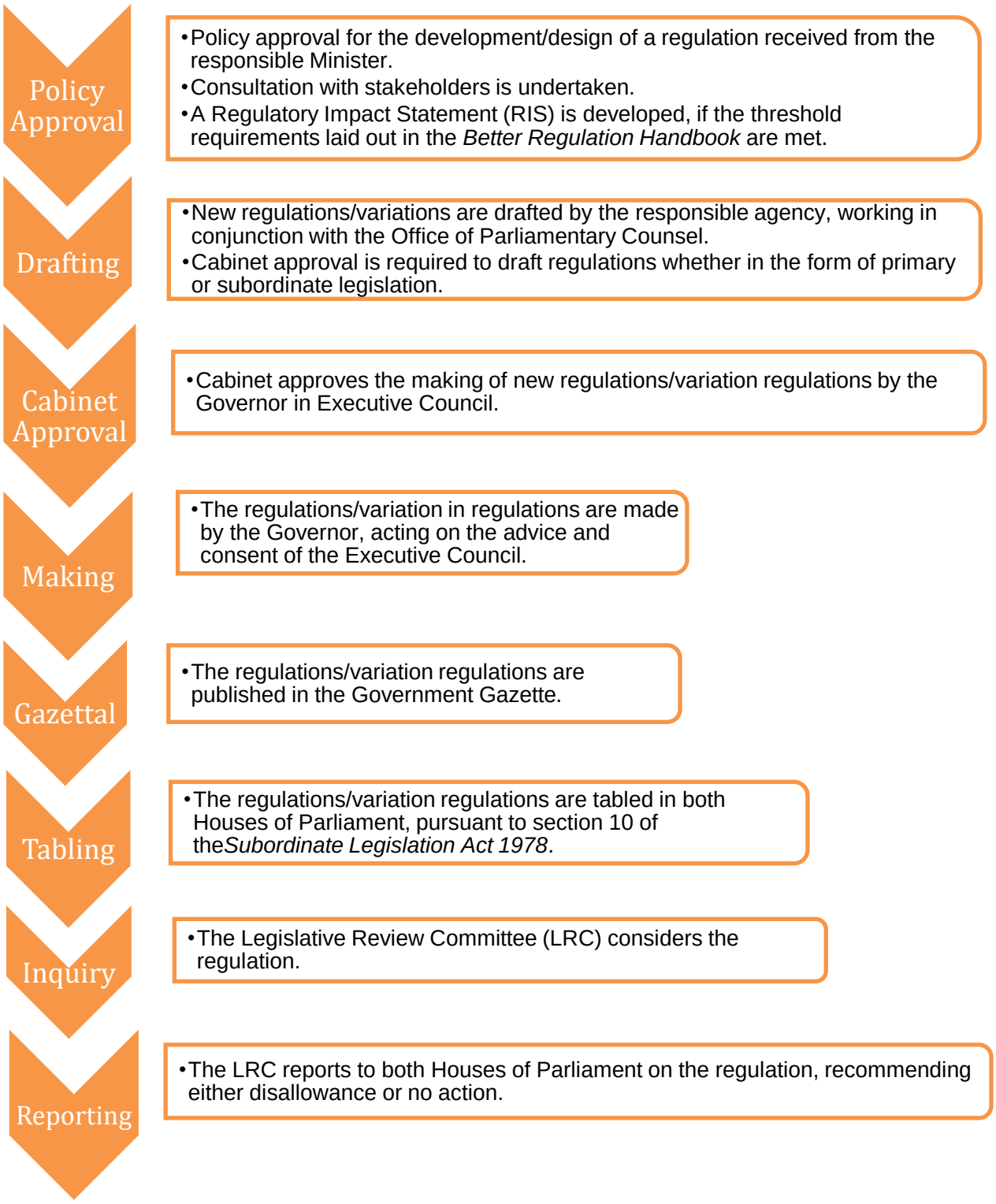
The imposition of regulation in South Australia can be undertaken in several ways, as illustrated in Figure 2.1. This can range from self-regulation to the imposition of legally enforceable principles or standards. In practice, the institutional and statutory architecture within which regulation is made is created by the interplay of a relatively small number of key pieces of legislation. These include the *Subordinate Legislation Act 1978* (Subordinate Legislation Act), the *Acts Interpretation Act 1915* (Acts Interpretation Act) and the *Parliamentary Committees Act 1991* (Parliamentary Committees Act). These statutes work in conjunction with other primary legislation to structure the regulation development process. The creation of legally enforceable requirements, generally referred to as 'black letter' law, can be achieved through:

- regulatory provisions contained in an Act, usually referred to as primary legislation; or
- requirements laid out in a variety of instruments that fall within the meaning of the Subordinate Legislation Act; or
- regulatory obligations contained in statutory instruments within the meaning of the Acts Interpretation Act, which are not captured by the Subordinate Legislation Act, such as the Planning and Design Code.

The formal process that structures the development and making of regulations, the most common form of subordinate legislation in South Australia, is outlined in Figure 2.1.

The quality of the regulatory instruments with which regulators undertake their functions often affects the efficiency and effectiveness of their practice. This is likely to be the case regardless of whether regulators rely on provisions contained in primary legislation, subordinate legislation or in different types of quasi-legislation. Most regulators are likely to rely on a combination of instruments, ranging from legally enforceable obligations to guidance notes or codes of practice that do not have a statutory backing. The appropriateness of regulatory instruments will also depend on the nature of a regulator's remit and the characteristics of the industries that are under the regulator's oversight.

Figure 2.1: The process for making regulations



Source: OSAPC, adapted from information in the Legislative Review Committee Information Guide.

Several recent reviews of regulatory systems and practices in other Australian jurisdictions, including the final report of the *NSW Regulatory Policy Framework Independent Review* (the Greiner Review), have highlighted the decisive effect of the statutory framework on the efficiency and effectiveness of regulators' practice:

> *Governments cannot expect regulators to adopt modern practices if they are hamstrung by outdated legislation that does not take into account recent changes in technology and regulatory methods…NSW Government should enact legislation that provides flexibility for regulators to apply best practice in how they work… [The Government must] ensure that existing legislation is not a barrier to innovative regulatory development methodologies or regulatory models.*[27]

The Commission notes the view in some academic commentaries that primary legislation is often overly abstract, complicated and incapable of responding nimbly to shifting priorities. This can limit its capacity to promote regulatory effectiveness and efficiency, and could make it more difficult to maintain a regulatory framework's fitness-for-purpose, hampering regulators' capacity to respond to technological change (the pacing problem) and limit their ability to deal with severely disruptive events like the COVID-19 pandemic. The propensity of primary legislation to lag economic and societal change is generally a consequence of the greater prescriptiveness required in statutes (to avoid statutory ambiguity) and the longer timeframe required to develop legislation and shepherd Bills through Parliament (compared with subordinate legislation).

The relative rigidity of regulating through primary legislation is often contrasted with the greater agility and flexibility of executive law-making, especially if a rapid regulatory response is required. Regulatory obligations that are made using a form of subordinate legislation, most commonly regulations, can be made relatively quickly and are not subject to the higher degree of parliamentary scrutiny afforded to Bills. This can facilitate a more agile and responsive approach to regulation and can allow regulators to deal more effectively with changing economic conditions, rapid technological change and disruptive events like COVID-19. A few stakeholders, such as the Department of Primary Industries and Regions SA (PIRSA), have highlighted the importance of deploying different regulatory approaches to respond to challenges in different industries. These approaches can range from prescriptive to outcomes-based:

> *… regulations managed by PIRSA range from prescriptive to outcomes based. Examples of outcomes-based standards include the Primary Production Standards included in the Australia New Zealand Food Standards Code adopted as regulation under the South Australian Primary Produce (Food Safety Schemes) Act 2004. Although outcomes-based regulation provides flexibility for industry in the way it demonstrates compliance, there can be challenges for some small to medium business which need to be managed accordingly and which may require greater guidance and support from PIRSA or other industry bodies, through clearer guidance; agreed 'deemed to comply' provisions; agreed definitions and terminology; and assessment frameworks (PIRSA, correspondence).*

The uneven effect of different regulatory approaches on businesses can be partly a consequence of the types of instruments that are used by regulators. The effectiveness of quasi-legislative instruments, such as guidance documents and codes of practice, can be adversely affected by the appropriateness of the statutory instruments at regulators' disposal. If the instrument used to enforce compliance with regulatory obligations is not fit for purpose, then even well-designed quasi-legislative instruments, such as guidance notes or codes of practice, will not compensate fully for a flawed statutory instrument.
Some stakeholders, such as Business SA, consider that regulated entities generally benefit from regulatory provisions being enacted in both primary and subordinate legislation. A balance of regulatory flexibility and statutory certainty is likely to improve outcomes for regulated entities:

[27] NSW Government, *NSW Regulatory Policy Framework Independent Review* (Final Report, 2017), 35.

> *There is benefit in a reasonable balance between primary and subordinate legislation. From our perspective, primary legislation provides ongoing certainty for the business community knowing that strategic planning can take place with the comfort that legislation cannot be rapidly changed with little notice. However, while regulation does not offer this same stability, it is far more flexible and responsive, and enables relatively rapid update of ineffective or outdated legislation and encourages innovation. Further, although quasi legislation offers an additional tier of clarification, it can sometimes prove complicated when interpretation appears to conflict with formal legislation (Business SA, DR 2, p.2).*

The form in which regulation is enacted is dependent on the willingness of Parliament to allow significant regulatory provisions to be enacted through subordinate legislation. This is particularly true if a government does not control both houses. Overall, the Commission understands that successive South Australian Parliaments have deemed it more appropriate for substantive regulatory provisions to be enacted though primary legislation. There are a few exceptions to this tendency, such as the Planning and Design Code, but Parliament has not chosen to extend this practice to other areas of state regulation.

In practice, the Commission considers that the form of a regulation's enactment is less significant than the quality of the regulation policy development and impact assessment processes that underlie new or amended regulation. In addition, the appropriateness of a regulatory instrument will also be affected by the way in which it is drafted, regardless of whether it is introduced through primary or subordinate legislation.

The *Radiation Protection and Control Act 2021* (Radiation Protection Act 2021), which has received royal assent but is yet to commence, is a good example of effective policy development supporting the creation of regulatory tools that are more effective, efficient and fit for purpose. The new Radiation Protection Act 2021 is to be administered by the Environment Protection Authority (EPA) on behalf of the Minister for Environment and Water. It will repeal the *Radiation Protection and Control Act 1982* (Radiation Protection Act 1982). The new statute introduces a range of provisions that address statutory deficiencies in the earlier Act. These limited the EPA's capacity to apply contemporary, risk-based approaches to the sector. The new act will modernise the way that activities using radiation sources are regulated, including by creating 2 new licence categories that will replace the 7 categories prescribed in the Radiation Protection Act 1982. (see Box 2.1)

Box 2.1: Modernising primary legislation to improve regulatory practice.

In South Australia, the Environment Protection Authority (EPA), in accordance with the *Radiation Protection and Control Act 1982,* regulates activities involving radiation sources and provides for the protection of people and the environment from the harmful effects of radiation. Parties that are regulated under the legislation include hospitals, dentists, veterinarians, soil analysis companies, mining companies, radiographers, radiologists, and ports.

Despite the importance of this legislation, it has not undergone substantial revision since its commencement in 1982 and, as a result, many of the standard administrative and enforcement provisions are outdated. The ability for the EPA to regulate using modern regulatory practice is effectively constrained by dated administrative provisions and the lack of modern regulatory tools available in the primary legislation.

A new Act, the *Radiation Protection and Control Act 2021*, was given royal assent in February 2021. The South Australian Parliament, in finalising this new Act, has provided for a considerable modernisation of radiation protection regulation in South Australia through the

provision of modern regulatory tools and, more generally, a progressive risk-based approach that builds on and improves the current system.

The new Act will reduce administrative burdens on small business through the streamlining of licensing from the existing 7 separate licence categories down to 2 licence categories, a radiation use licence and a radiation management licence. In addition, registrations of equipment will be able to be included on radiation management licences, providing a single document for businesses to manage their regulatory obligations whereas the current system requires individual registration of equipment separate from licensing.

The 1982 Act contains no expiable offences and has no head power to prescribe expiation fees for enforcement in the Regulations. As a result, enforcement of the Act and Regulations cannot take place without prosecution through the courts. This is an inefficient method for less serious offences under the Act as it is time consuming and expensive. Further, it does not provide an effective deterrent for recalcitrant licence holders who act in the knowledge that no expiation fees can be applied to them. The new Act includes expiations for some offences and allows for further expiable offences to be established via regulation.

The new Act also provides for order making powers that can be used to obtain compliance without the need for more costly court proceedings. Court proceedings are appropriate for significant offences and for applying a punishment as a deterrent to others but achieving compliance on minor issues is much more straightforward and a lower cost to all parties with the use of orders.

The review of administrative decisions in the 1982 Act is upon application to the Supreme Court. The less burdensome South Australian Civil and Administrative Tribunal has been in operation for more than five years, yet the primary legislation was not changed to reallocate jurisdiction. The new Act allocates jurisdiction for administrative appeals to the South Australian Civil and Administrative Tribunal.

The incorporation of modern regulatory tools and improvements to administrative elements within the new Act provides an excellent example of the role that Parliament has in establishing legislative frameworks that provide the necessary regulatory infrastructure to allow regulators to deliver on regulatory best practice expectations.

Source: OSAPC based on information from Environment Protection Authority

As the example of the *Radiation Protection Act 2021* makes clear, there is a close connection between effective and efficient regulatory practice and the types of instruments at regulators' disposal. In practice, regulatory effectiveness is closely associated with the rigour of the process that is used to determine whether and how to regulate. Therefore, the development of effective regulatory policy, including the selection of the right regulatory instruments, is ultimately dependent on an analytically sophisticated and consistently enforced Regulatory impact assessment (RIA) framework. This is the focus of the following section.

2.2 Regulation impact assessment

2.2.1 Better practice principles – Australian jurisdictions

Most Australian jurisdictions, including the Australian Government, have assessment frameworks in place to ensure that a regulatory response is fit for purpose, proportionate and minimises unnecessary burdens on businesses and the wider community. The requirements

embedded in these frameworks are generally very similar to international better practice standards, including, for instance, those developed by the UK Government.[28]

The Australian Government provides guidance on implementing better practice principles in regulation development through its *Guide to Regulatory Impact Analysis*, which is maintained by the Office of Best Practice Regulation (OBPR) in the Department of the Prime Minister and Cabinet.[29] The Australian Government requires government departments, statutory authorities, boards and public entities to comply with the Regulatory Impact Assessment (RIA) process when drafting or amending proposals that will have a regulatory impact. A regulatory impact statement (RIS) is mandatory for regulatory proposals that require a Cabinet submission and are likely to have more than a minor impact on business, community organisations or individuals.[30]

The Australian Government's RIA framework is based on five fundamental requirements. These create a set of clear responsibilities for agencies proposing either the imposition or amendment of regulatory obligations:

- Preliminary assessment – this is completed by the agency and submitted to the Office of Best Practice Regulation (OBPR) to obtain advice on the need for, and depth of, a RIS.
- Early assessment – if a RIS is required, the agency develops a short version of the RIS and submits it to the OBPR to obtain advice on whether more consultation is required or if the RIS can be forwarded for a decision without additional consultation.
- Final assessment:
    - First pass – the agency provides the OBPR with a RIS covering all major parameters and the OBPR provides formal advice on the quality of the RIS analysis and process within a five-day timeframe.
    - Second pass – the agency addresses any issues raised during OBPR's assessment, before resubmitting the RIS for further assessment. The OBPR is required to prepare final written advice, which is provided to the decision maker along with the agency's RIS, within five days.
- Publication – the OPBR obtains agency's approval to publish the RIS following the announcement of a final decision. OPBR's assessment is also published.
- Post-implementation review (PIR) – agencies are required to undertake, and subsequently publish, a PIR for regulatory proposals with a major economic impact within two to five years after enactment.

Other Australian jurisdictions mirror many of the key aspects of the Australian Government's RIA framework but have often reduced the scope of the RIS process. In NSW, the RIA framework is incorporated into the policy development process through the application of the *NSW Government Guide to Better Regulation* and provisions contained in the *Subordinate Legislation Act 1989* (NSW). Minsters and their agencies are required to ensure that regulatory proposals submitted to Cabinet or the Executive Council meet the better regulation requirements outlined in the guide.[31]

[28] For further details, see Department for Business Innovation and Skills (UK), *Principles for Economic Regulation 2011, (*Department for Business Innovation and Skills*, 2011);* OECD*, Regulatory Policy Outlook 2015 (2015a);* OECD*, Regulatory Impact Assessment, OECD Best Practice Principles for Regulatory Policy (2020a).*

[29] See, for example, Australian Government, *Australian Government Guide to Regulatory Impact Analysis* (2020).

[30] For further details, see Australian Government, *Regulation*, <https://pmc.gov.au/regulation>

[31] For further details, see NSW Government, *NSW Guide to Better Regulation* (2019).

The key requirements include:

- develop, submit and publish a Better Regulation Statement to accompany regulatory proposals that meet the 'significant' criteria;
- demonstrate the application of the guide's Better Regulation Principles for regulatory proposals that do not meet the significant criteria by:
  - addressing each principle in the submission if submitting to Cabinet;
  - for regulatory proposals to be submitted to Executive Council, include analysis justifying the regulatory proposal in accordance with either Schedule 1 or Schedule 2 (depending on the proposal) of the *Subordinate Legislation Act 1989* (NSW);
- ensure analysis incorporates plans for implementation, compliance, enforcement and monitoring, and commit to a post-implementation review; and
- for proposals that involve a new or amended licence, include an assessment against the licensing framework in the guide.

Other major Australian jurisdictions, including Victoria and Queensland, use similar RIA frameworks to ensure the quality and appropriateness of regulation. The principles underlying these frameworks align with the fundamental requirements embedded in the Australian Government's RIA framework but include some requirements that are jurisdiction specific.

Some Australian jurisdictions have found in recent reviews that the formal requirements associated with RIA frameworks have not always led to rigorous policy development that critically assesses the costs and benefits of policy options, including both regulatory and non-regulatory approaches.[32] In New South Wales, the final report of the NSW Regulatory Policy Framework Independent Review (the Greiner Review) found that 'stakeholders reported that the quality of RIAs is inconsistent and that robust assessments are far from the reality.[33] The Greiner Review proposed reforms, backed by legislative amendments, aimed at embedding regulatory impact analysis within the policy development process. This was to ensure that regulatory impact analysis would not be relegated to the end of the policy process and become an analytical afterthought.[34] The Commission has not been able to locate evaluations of the effectiveness of other jurisdictions' RIA frameworks.

OECD

The OECD's better practice principles on the development of regulation are based on an interrelated set of requirements, the most significant of which involves the importance of a whole-of-government framework. The OECD maintains that a holistic perspective will substantially reduce the risk that the roles and responsibilities of agencies involved in the development of regulation will be adversely affected, or even undermined, by fragmentation and compartmentalisation.[35]

An explicit and whole-of-government commitment is required to create regulatory systems that work together as a cohesive whole, in which regulatory tools are built into government and parliamentary processes (such as regulatory impact assessment frameworks and effective parliamentary scrutiny powers, usually exercised by a committee with responsibility for the technical review of subordinate legislation).

[32] See, for example, NSW Government, *NSW Regulatory Policy Framework: Independent Review – Final Report* (August 2017), 42.
[33] Ibid., 42.
[34] Ibid., 44.
[35] OECD, *Recommendation of the Council on Regulatory Policy and Governance* (2012), 22.

Effective regulation development presupposes that agencies understand the relevant policy issues from the perspective of stakeholders while developing regulation. This requires engaging with stakeholders that are likely to be the beneficiaries of regulatory protection, as well as those that are subject to enforceable regulatory obligations.[36] Regulatory processes that are transparent and accountable will also assist in: building trust in regulators and regulatory systems; increase stakeholders' awareness and understanding of regulatory regimes; and support compliance by regulated entities.

The OECD's better practice principles emphasise the centrality of RIAs to effective regulation development. RIA processes ought to be undertaken as a part of the policy development process, before a new regulation is first proposed. Impact assessments are all forms of ex ante assessment, which provide government decision makers with information on whether, and how, they should regulate to achieve public policy goals.[37] The OECD has developed comprehensive principles and guidance on how to effectively undertake an RIA.

An effective RIA process must always:

- occur at the inception phase of the regulation development process;
- clearly identify the problem and desired goals of the proposal;
- identify and evaluate all potential alternative solutions (including non-regulatory ones);
- attempt to assess all potential costs and benefits, both direct and indirect;
- be based on all available evidence and scientific expertise; and
- be developed transparently with stakeholders, and have the results clearly communicated.[38]

Regulatory impact statements constitute one of the primary tools of any RIA framework. The OECD's *Best Practice Principles for Regulatory Impact Analysis* recommends that governments take targeted action to strengthen public sector agencies' capacity to undertake effective RIA analyses. Whole-of-government RIA processes should also be subject to continuous monitoring, evaluation and improvement.[39] These requirements are fundamental to a successful whole-of-government implementation of effective RIA processes.

2.2.2 The South Australian RIA framework and the *Better Regulation Handbook*

South Australia's current regulatory impact assessment (RIA) framework was introduced in 2011 and is based on the Council of Australian Government's best practice regulation principles. The RIA framework is administered by the Cabinet Office in the Department of the Premier and Cabinet (DPC), with the framework's policy rationale and mandatory requirements laid out in the *Better Regulation Handbook*.[40]

The RIA framework was bolstered by subsequent better regulation initiatives like the Regulation Expiry Program (REP) and additional specific red tape reduction strategies. This included initiatives like Simplify Day, which would culminate in the annual introduction of a Bill to amend or repeal a variety of regulatory provisions (see chapter 1). The Simplify Day initiative lapsed in 2019. The RIA framework was introduced via a Cabinet decision, rather than on a statutory footing, and adherence to its requirements is mandatory for all

[36] OECD, *OECD Regulatory Policy Outlook 2018* (2018), 29.
[37] *OECD Best Practice Principles for Regulatory Policy* (2020).
[38] OECD, *Regulatory Impact Assessment, OECD Best Practice Principles for Regulatory Policy* (2020) <https://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm >
[39] Ibid., 7.
[40] For additional information see, South Australian Government, *Better Regulation Handbook*, <https://www.dpc.sa.gov.au/responsibilities/cabinet-and-executive-council/cabinet/writing-a-cabinet-paper/thinking-about-the-impacts/regulatory-impacts>.

government agencies. This includes those established under their own enabling legislation, such as the EPA, along with agencies established administratively.

Agencies are required to undertake an RIA process whenever the government contemplates the introduction of new regulations or the amendment of existing regulatory obligations, regardless of whether these requirements are contained in primary or subordinate legislation. The RIA is designed to assess the potential effects of proposed regulation, including whether other approaches are likely to achieve the intended effects more efficiently and effectively. Any proposal that introduces or amends a significant regulatory burden on the broader community, including businesses, must be accompanied by an RIS. That said, the *Better Regulation Handbook* includes three exceptions to the general requirement to undertake a formal RIS:

- the proposed regulation or amended regulation is likely to have no, or only minor, impacts;
- the proposal is subject to an exemption; or
- a regulatory proposal requires implementation urgently and the RIS timeframe would be prohibitive.

In the absence of a South Australian equivalent to a dedicated Office for Better Practice Regulation, Cabinet Office acts as the gatekeeper of the impact assessment process. Agencies are required to receive approval from Cabinet Office for any RIS prepared as part of a Cabinet submission. Cabinet Office also provides advice to agencies on whether an RIS is required to support a proposed regulatory action. Cabinet Office's role in the RIS process is strengthened by *Treasurer's Instruction 17 – Evaluation of and approval to proceed with Public Sector Initiatives* (TI–17). Treasurer's Instructions, which are issued under section 41 of the *Public Finance and Audit Act 1987* (Public Finance Act), are statutory instruments that impose obligations on public sector agencies and are administered by the Department of Treasury and Finance (DTF). TI–17 requires Chief Executives to ensure that all regulatory initiatives are evaluated in accordance with the *Better Regulation Handbook.*

The RIA framework also calls on proponent agencies to engage with several referral agencies to seek advice on any regulatory proposals that have a bearing on other portfolios. As a result of machinery of government changes implemented since the *Better Regulation Handbook* was published in 2011, a few agencies involved in the RIS process have been abolished or their functions have been absorbed by other agencies. It is unclear how some of the mandated requirements that underlie the RIA framework, such as the requirement for proponent agencies to seek advice from specialist referral agencies, are now undertaken. The Commission notes that the principles outlined in the *Better Regulation Handbook*, although it has not been reviewed since its initial publication in 2011, are broadly consistent with the better practice principles implemented in other Australian jurisdictions and the ex-ante principles developed by the OECD.

Agencies are expected to ensure that any regulatory action is both consistent with, and complementary to, existing regulations both in SA and other jurisdictions. As the *Better Regulation Handbook* also makes clear, agencies must engage with other levels of government, including the local government sector, during the development phase of the regulatory life cycle. The *Better Regulation Handbook* requires agencies to examine ways to achieve regulatory harmonisation, if possible and desirable, including regulatory provisions that affect South Australian border communities:

> Other Commonwealth, state, territory and local governments should be consulted to gain information about how they are addressing similar problems and to ensure that the proposed regulatory option would be non-duplicative, consistent, and complementary to existing regulation in the other jurisdictions.[41]

The Victorian Cross Border Commissioner has observed that border communities in both states are routinely affected by a range of regulatory anomalies, with overlapping and duplicative regulatory obligations being among the most common concerns:

> *In border areas, the anomalies are observed and experienced as – having to do two of, pay two of, research two of, find two of, apply for two of, report two of etc. In the Renmark (SA), Mildura (Vic) and Wentworth (NSW) areas, two of will sometimes become three of. … I have found that anomalies are created, for the most part, unknowingly. That is, the designers of the laws, rules, policies, and so on have little to no idea that they have or are about to create an anomaly. … In the face of this environment, a border business (or resident) can try to manage the situation, internalising compliance costs and the cost of errors as best they can, and a business might try to recoup these costs from its customers.*[42]

The SA border communities facing NSW and Victoria are part of significant cross-state economies that can incur adverse impacts from inconsistent regulatory approaches between the three states. The differences can be compounded by state regulations and policies that can be metropolitan-centric in their design and application. The Commission has not been able to determine whether, or to what extent, SA agencies routinely assess the consistency of proposed or amended regulation with interstate and international regulatory standards.

Some regulators at the state level operate in a system of jurisdiction shared with the Commonwealth, for example, consumer protection, land transport and food safety.

The South Australian Freight Council (SAFC) and Business SA have highlighted the importance to their members of regulatory alignment or harmonisation between jurisdictions.

The SAFC maintained that national harmonisation of regulatory schemes has yielded considerable benefits for the road and rail freight sectors.[43] While national harmonisation generally requires lengthy and complex multilateral negotiation between jurisdictions, it can improve outcomes for businesses operating across states by reducing the costs associated with duplicate or inconsistent regulatory obligations in different jurisdictions.

Another option that can deliver similar gains is to establish the equivalence of regulation in different jurisdictions rather than complete harmonisation. An example is the recent agreement among Australian jurisdictions to expand mutual recognition provisions under the *Mutual Recognition Act 1992* so as to include the automatic recognition of occupational licenses.

That said, the Commission notes that the South Australian Government currently makes decisions on entering into regulatory schemes involving other Australian jurisdictions on a case-by-case basis, subject to a rigorous assessment of the net benefits to the state.

2.2.3 The South Australian RIA framework in practice

Between January 2019 and April 2021, a total of 366 cabinet submissions were lodged for Cabinet under the 'Bills and Regulations in Principle' category, including 82 submissions related to primary legislation, 238 seeking approval to make subordinate legislation, and the

[41] South Australian Government, *Better Regulation Handbook*, 41.
[42] Correspondence received from the Victorian Cross Border Commission.
[43] South Australian Freight Council, DR19

balance, 46 submissions, proposing a combination of primary and subordinate legislation. The Commission has not been able to find evidence of the extent to which, if at all, agencies engage in RIA analyses that are not assessed by Cabinet Office.

During the period in question, a total of 293 submissions were exempted from the RIA framework because their implementation would either create no regulatory impact or their likely impact was assessed as minor. A total of 21 submissions were subject to specific exemptions contained in the *Better Regulation Handbook* (including proposals on amending existing criminal laws). An additional 37 submissions were exempt from the requirement to prepare an RIS due to the urgency associated with implementing the proposal. This category included proposals to respond to a range of state emergencies, such as bushfires and the COVID-19 pandemic. (see Table 2.1)

Table 2.1: Number of proposals triggering a regulatory impact statement, SA (January 2019 to April 2021)

***Better Regulation Handbook* criteria**	**Proposals 2019**	**Proposals 2020-21**
Nil or minor impacts	122	172
Subject to exemptions (changes to existing criminal laws, budgetary in nature or already supported by a national RIS)	9	12
Required to be implemented urgently (COVID-19 responses, bush-fire emergency)	0	37
RIS required	5	9
Total	**136**	**230**

Source: OSAPC, based on data prepared by Cabinet Office, DPC

A total of 14 submissions met the threshold for a full RIS assessment between January 2019 and April 2021, but the Commission was advised by Cabinet Office that only 5 assessments were undertaken. The remaining submissions—which covered a diverse range of regulatory areas—were supported by impact analysis methods separate from the RIS framework. The Commission was advised that agencies undertook extensive stakeholder consultation, commissioned reviews from external experts, and made use of alternative impact assessment methods, such as taskforces, to determine the likely regulatory impact on businesses. According to Cabinet Office, the combination of formal RIS analyses and ad hoc impact assessment methodologies has ensured that, in practice, Cabinet's decision-making has been supported by an effective ex-ante assessment framework.

The Commission has not been able to assess the quality of RIS assessments or the effectiveness of alternative assessment methodologies employed by agencies. That said, the available data suggests that the RIA framework does not produce a consistent approach to determining regulatory impact. Of the 27 South Australian regulators surveyed by the Commission, six indicated that a RIS had been a part of their ex-ante assessment of regulatory impact in the last five years. Only one regulator responded that RIS assessments were conducted for all new regulatory proposals.

Three regulatory areas within the Attorney-General's Department indicated that, in place of separate RIS assessments, the likely impact on businesses was addressed in cabinet submissions seeking approval for new and amended regulations. It is unclear, however, what methods were used to assess the regulatory impact of these proposals in the absence of an RIS analysis. It is also noteworthy that only a minority of agencies reported routinely

publishing their RIS assessments, as required by the *Better Regulation Handbook*. Although most regulatory agencies appear to have policies in place related to RIS analyses, the relative paucity of such assessments makes it unclear whether the current RIA framework operates as effectively as it could if ex-ante assessments were undertaken more consistently.

As a guiding principle, the Commission considers that reforms to the structure and processes that underlie the state's RIA framework ought to address agencies' capacity to develop robust and proportionate regulatory policy. This is the area in greatest need of reform to improve the quality of regulatory proposals put to Cabinet and to the Parliament. The quality of the regulatory policy development process, which needs to include thorough but proportionate regulatory impact assessment, is central to the development of efficient and high-quality regulation.

Recommendation 2.1: Developing regulatory proposals for Cabinet

To improve the efficiency and effectiveness of regulation development processes and the quality of regulatory proposals to Cabinet, the Commission recommends that the SA Government strengthen governance, policy guidance and policy capabilities by:

- committing to an across government policy to support regulatory quality, drawing on the OECD's better practice principles, to ensure that the economic, social and environmental benefits of business regulation justify the costs and that distributional effects are considered in order to maximise the net benefits of regulation;
- strengthening the Cabinet Office's gatekeeper role in respect of its responsibilities under the Regulation Impact Assessment (RIA) framework;
- increasing agency adherence to the RIA framework through provision of improved guidance material and coordination of training by Cabinet Office;
- establishing a central agency support and advisory function to enhance agencies' capacity to undertake effective regulatory policy development and impact assessment (see recommendation 6.3);
- developing and implementing a strategy to build public sector expertise in regulatory policy development and review, including through establishment of communities of practice for policy makers (see recommendation 6.1);
- enhancing transparency as well as capability to undertake RIAs through publication of regulation impact statements;
- subjecting the RIA process to monitoring, regular evaluation and continuous improvement; and
- improving policy guidelines to assist agencies to evaluate the potential for national and international harmonisation or regulatory equivalence in the development of regulatory proposals.

2.3 Conclusion

The Commission is of the view that the most salient consideration in determining the effectiveness of a regulatory framework is whether it is based on a combination of effective regulatory policy development and thorough impact assessment. Despite the greater flexibility of subordinate legislation, if only in respect of the superior agility and speed of its associated processes, the effectiveness of a regulatory instrument is largely a function of the quality of the regulatory policy that underlies it. If the development of regulatory policy is supported by a rigorous impact assessment process, including both ex-ante and ex-post evaluation, then the form of enactment is likely to contribute to effective and efficient regulatory practice.

The available evidence suggests that the state's RIA framework is broadly consistent with other Australian jurisdictions, but that, in practice, it falls somewhat short of the better practice principles developed by the OECD. In particular, agencies do not routinely undertake ex-ante assessments that meet the requirements laid out in the *Better Regulation Handbook* and RIA requirements are not consistently enforced by Cabinet Office. South Australia also currently lacks a functional equivalent of the Australian Government's OBPR, which works to enhance agencies' assessment capabilities and acts as a framework gatekeeper. The Commission has also not been able to determine whether agencies, as required by the *Better Regulation Handbook*, routinely engage with other jurisdictions and local government, to identify opportunities for harmonisation and reduce unnecessary duplication especially in border communities.

3. Regulator practices

The Commission has been asked to make recommendations to improve the efficiency and effectiveness of regulators in the administration and enforcement of regulations, and to embed ongoing improvement and better practice. This chapter is about regulator conduct, good practice, practice improvement strategies and performance review. Substantial focus is placed on what can be learnt from established regulator performance frameworks, used in other Australian jurisdictions and internationally, in terms of regulator efficiency and effectiveness This informed the Commission's methodology for examining current regulator practice in South Australia (SA). The chapter also sets out the key findings from a Commission survey of SA regulators on their current practices. The chapter is structured as follows:

- Section 3.1 highlights the importance of regulator conduct and briefly describes key principles underpinning good regulator practice.
- Section 3.2 reviews frameworks for regulator performance monitoring and continuous improvement, used in other jurisdictions and internationally and identifies key lessons for SA.
- Section 3.3 sets out the findings of the Commission's survey of SA regulators and implications for improving efficiency and effectiveness of regulatory practice.

3.1 Good regulator practice

3.1.1 What is good regulator practice?

A sound regulatory regime requires good conduct by regulators themselves. Regulators play a vital role in the regulatory system by creating, implementing and reviewing regulations, and enforcing regulatory rules. In particular:

> *[t]he role of the regulator, how it co-ordinates with other public institutions, the powers it is given and how it is held accountable for exercising these powers together form a 'governance architecture'. This architecture needs to be well crafted and appropriately implemented if the regulator is to succeed in combining effective regulation with a high level of trust*.[44]

Regulators have a responsibility to implement regulations with the aim of achieving their underlying social, economic or environmental policy objectives, and in accordance with the powers and authority given to them through legislation and government direction.[45] Their practices impact on the efficacy of regulatory law in two ways.[46] First, as regulators interact with stakeholders 'at the coal face', they are well placed to identify issues that can help shape improvements to regulatory rules. Second, the manner in which regulators administer and enforce regulation itself has a direct effect on the costs and benefits of regulation to businesses, consumers, and the broader community.

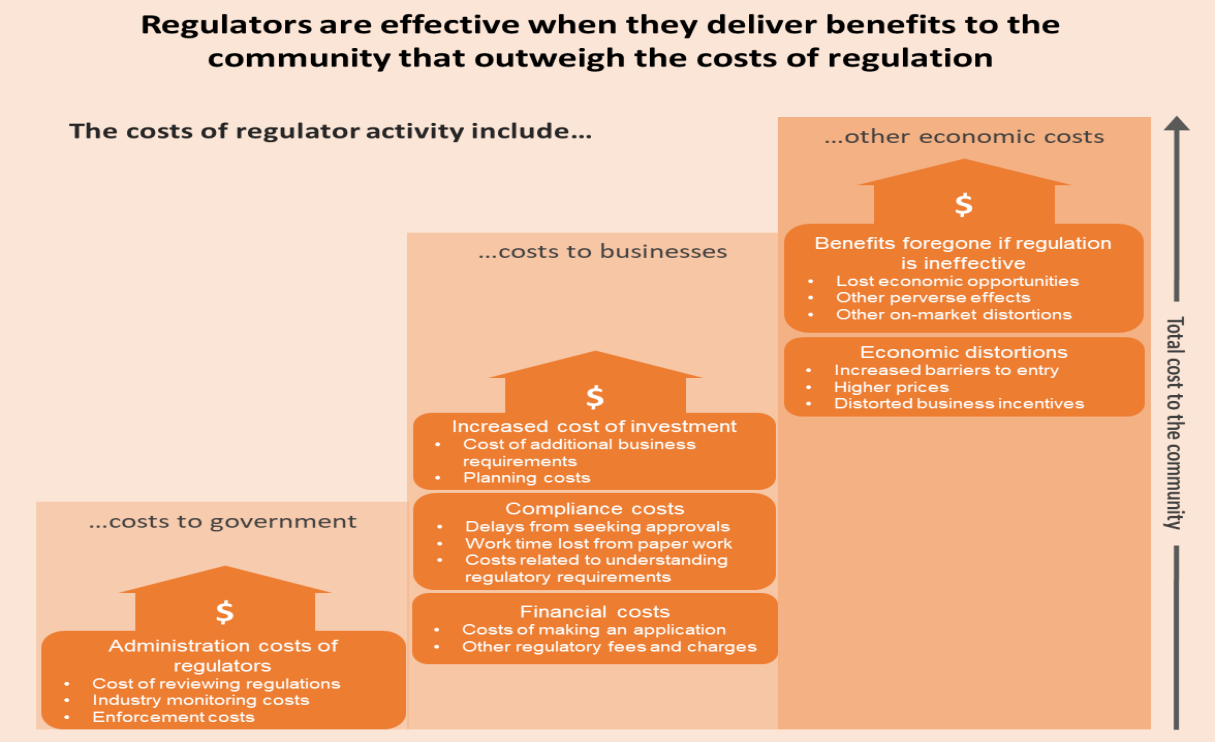
[44] OECD, *Governance of Regulator's Practices: Accountability, Transparency and Co-ordination,* (OECD Publishing, 2016) < https://www.oecd-ilibrary.org/governance/governance-of-regulators-practices_9789264255388-en >.
[45] ANAO (Cth), *Administering Regulation: Achieving the Right Balance, Better Practice Guide* (Commonwealth of Australia, 2013).
< https://webarchive.nla.gov.au/awa/20140801032936/http://www.anao.gov.au/Publications/Better-Practice-Guides/2013-2014/Administering-Regulation >.
[46] Productivity Commission (Cth), *Implementing and Evaluating Regulation Reforms* (Productivity Commission, 2014), 2 < https://www.pc.gov.au/research/supporting/regulator-audit-framework/regulator-audit-framework.pdf >.

Regulatory authorities may carry out a range of activities that impact on how markets function, including:

- economic regulation;
- approving registrations, licensing and business activities;
- setting standards and codes of practice**;**
- monitoring and encouraging compliance**;** and
- responding to adverse events, non-compliance or regulatory failure.[47]

Regulators are most effective when they deliver benefits to the community that justify the costs of regulation. The benefits include: more productive and efficient markets and economic activity; public health and safety; environmental protection; more equitable social outcomes; greater access to essential services; and better information for businesses and consumers on services and products. On the other hand, regulation incurs costs to government, businesses, the community and the economy more broadly (Figure 3.1). For example, businesses can face increased costs related to market entry and new investment (e.g. application and licensing fees), or as part of ongoing operations (e.g. time and money spent on paperwork or getting legal advice). Inefficiencies can arise if regulators (and regulations) fail to deliver their expected benefits, or if the requirements they place on regulated entities are costly or unnecessarily burdensome.

Figure 3.1: Costs of regulator activity



Source: Adapted from Productivity Commission (Cth), Identifying and Evaluating Regulation Reforms: Research Report (2011), 12; Marneffe, W & Vereek, L 'The Meaning of Regulatory Costs' (2011) 32(4) European Journal of Economics.

[47] ANAO (Cth), *Administering Regulation: Achieving the Right Balance, Better Practice Guide* (Commonwealth of Australia, 2013); Productivity Commission (Cth), *Regulator Audit Framework* (Productivity Commission, 2014).

3.1.2 Best practice principles for regulators

The OECD has identified seven principles for the design and conduct of regulators (Box 3.1), which overlap with some of the best practice advice discussed earlier in this report These are: (1) regulator role clarity; (2) preventing undue influence over the regulator and maintaining integrity and public trust; (3) establishing an appropriate decision-making system within the regulator's governing structure; (4) accountability and transparency in regulatory practice; (5) effective engagement with key stakeholders; (6) adequate government funding for the regulator to undertake its responsibilities effectively; and (7) conducting formal evaluations of the regulator's performance.[48]

Box 3.1: Seven principles for the governance of regulators

1. **Role clarity:** For a regulator to understand and fulfil its role effectively it is essential that its objectives and functions are clearly specified in the establishing legislation. The regulator should not be assigned objectives that are conflicting, or resolution mechanisms should be available in case of conflicts. The legislation should also provide for clear and appropriate regulatory powers in order to achieve objectives, and regulators should be explicitly empowered to cooperate and coordinate with other relevant bodies in a transparent manner.

2. **Preventing undue influence and maintaining trust:** Independence from the government and from the industry that is regulated can improve the regulatory outcomes by allowing the regulator to make decisions that are fair and impartial. It is important that regulatory decisions and functions are conducted with upmost integrity to ensure that there is confidence in the regulatory regime. This is even more important for ensuring rule of law, encouraging investment and having an enabling environment for inclusive growth built on trust. This requires a proactive approach to regulating that is accessible by regulated entities and yet within the national or state strategic priorities. To maintain trust, the regulator's directions and communication with the political process should be clear and transparent. In addition, there should be criteria for the employment of the governing body and staff of the regulator that protects from any conflicts of current or future interest. Formally protecting the independence of a regulator is an important element of achieving true independence, and a strong culture of independence and appropriate working relationships with government and other stakeholders must also be in place.

3. **Decision-making and governing body structure for independent regulators:** Regulators require governance arrangements that ensure their effective functioning, preserve its regulatory integrity, and deliver the regulatory objectives of its mandate. The governing body structure of the regulator (e.g. a single head or a board of directors) should be determined by the nature of the regulated activities and their motivation. The membership of the governing body should also protect from potential conflicts of interest or influence from the political process and should be ultimately for the public interest.

4. **Accountability and transparency:** Businesses and citizens expect the delivery of regulatory outcomes from government and regulatory agencies and the proper use of public authority and the resources to achieve them. Regulators are generally accountable to three groups of stakeholders: (i) minister and the legislature; (ii) regulated entities; and (iii) the public. A regulator operates in accordance with the power conferred to it by the legislature. Accountability and transparency are the other key elements of independence. The expectations for the

[48] OECD, *Governance of Regulator's Practices: Accountability, Transparency and Co-ordination*, *The Governance of Regulators* (OECD Publishing, 2016) < OECD iLibrary | Governance of Regulators' Practices: Accountability, Transparency and Co-ordination (oecd-ilibrary.org) >.

regulator should be published and the regulator should regularly report on the fulfilment of their objectives, including through meaningful performance indicators. Key operational policies and other guidance material, covering matters such as compliance, enforcement and decision review should be publicly available. Regulated entities and the public should have the right of appeal preferably through a judicial process and the opportunity for independent review of significant regulatory decisions should also be available.

5. **Engagement:** Good regulators have established mechanisms for engagement with stakeholders as part of achieving their objectives. The knowledge of regulated sectors, businesses and citizens affected by regulatory schemes assists to regulate effectively. Regulators should also regularly and purposefully engage with regulated entities and other stakeholders to enhance public and stakeholder confidence in the regulator and to improve regulatory outcomes.

6. **Funding:** The amount and source of funding for a regulator will determine its organisation and operations. It should not influence regulatory decisions and the regulator should be enabled to be impartial and efficient to achieve its objectives. Funding levels should be adequate and funding processes should be transparent, efficient and simple.

7. **Performance evaluation:** It is important that regulators are aware of the impacts of their regulatory actions and decisions. This helps drive improvements and enhance systems and processes internally. It also demonstrates the effectiveness of the regulator to those it is accountable toward and helps to build confidence in the regulatory system. The regulatory decisions, actions and interventions of the regulator should be evaluated through performance indicators. This creates awareness and understanding of the impact of the regulator's own actions and helps to communicate and demonstrate to stakeholders the added value of the regulator.

Source: OECD, Governance of Regulator's Practices: Accountability, Transparency and Co-ordination, The Governance of Regulators (OECD Publishing, 2016), 8.

More broadly, the literature is highly consistent on what constitutes good regulator practice (Box 3.2), pointing to a range of common principles and standards of conduct:

- clearly defined regulator roles and responsibilities;
- integrity and independence, preventing undue influence, and maintaining trust;
- good communication and engagement with stakeholders and regulated entities;
- efficient interactions with stakeholders and timeliness in decision-making;
- transparency and accountability to the public and to the parliament;
- consistency, coherence and predictability in decision-making and enforcement;
- efficient and cohesive processes within and between regulators;
- appropriate resourcing, including agency funding and technical capability of personnel;
- effective use of impact assessment and ex-post evaluation in developing and reviewing regulations;
- implementation and enforcement that is proportionate, risk-based and concerned with the potential for harm; and
- a focus on outcomes, evaluation and continuous improvement, ensuring that regulators meet their objectives and deliver benefits to the public.[49]

[49] Australian Government (C[th]), *Regulator Performance Framework* (Commonwealth of Australia, 2014).

Box 3.2: Principles and practice standards from existing regulator performance frameworks

Australian Government principles of regulator best practice [1]	***Victorian Government Statement of Expectations Framework for Regulators*** [2]	***OECD*** [3][4]
• Continuous improvement and building trust • Risk-based and data driven • Collaboration and engagement	Mandatory elements: • Timeliness • Risk based strategies • Compliance-related assistance and advice Recommended element: • Incentive-based regulation Other suggested elements: • Role clarity • Cooperation amongst regulators • Stakeholder engagement • Accountability and transparency • Clear and consistent activities	Principles for regulator governance: • Role clarity • Preventing undue influence and maintaining trust • Decision-making and governing structure for independent regulators. • Accountability and transparency • Engagement • Funding • Performance evaluation iREG Score • Regulatory impact assessment • Stakeholder engagement • Ex-post evaluation

UK Hampton implementation reviews [5]	***Australian Productivity Commission's recommended framework*** [6]	**RegX atoms of excellence** [7]
Principles • Risk-based regulation • Transparency and accountability • Economic progress Practice standards are around: • Design of regulations • Advice and guidance • Data requests • Inspections • Sanctions • Focus on outcomes	• Clear and effective communication • Risk-based requirements and proportionate actions • Consistency in decision-making, the application of rules, and engagement with clients or stakeholders • Accountability and transparency in actions • A commitment to continuous improvement, including acting on findings on the need for, and the effectiveness of, regulation	Utmost integrity • Fidelity to law • Respect for democracy • Commitment to public interest Empathic engagement • Even-handedness • Listening • Responsiveness Stellar competence • Analytical capability • Instrumental capacity • High performance

Sources: [1] Australian Government (Cth), Regulator Performance Guide (Commonwealth of Australia, 2021) [2] Department of Treasury and Finance (Vic.), *Statement of Expectations Framework for Regulators* (State of Victoria, 2017); [3] OECD, *Recommendation of the Council on Regulatory Policy and Governance* (OECD Publishing, 2012); [4] OECD, *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy* (OECD Publishing, 2014; [5] National Audit Office (UK), *Hampton Implementation Reviews* (Commonwealth of Australia, 2014); [6] Productivity Commission (Cth), Regulator Audit Framework (Productivity Commission, 2014); [7] Coglianese, C., *Listening, Learning and Leading: A Framework for Regulatory Excellence* (University of Pennsylvania Law School, 2015).

3.2 Lessons from other jurisdictions

While good practice principles are easy to identify, measuring regulator performance is not a straightforward task. Firstly, regulators are not a homogenous group, and differ in size, structure and function, making it difficult to benchmark and compare performance. Secondly, regulators work in complex social environments and deal with broad objectives, such as improving social, economic and market conditions, risk reduction, and the minimisation of harm.

Nevertheless, other jurisdictions in Australia and internationally have developed policies and frameworks to assess regulator performance and foster continuous improvement. In many

cases, there is substantial flexibility to tailor regulator practice assessment strategies to the regulator's specific characteristics and responsibilities. This reduces administrative requirements on regulators while increasing accountability and promoting improvement. SA's policy framework for regulator improvement is under-developed in comparison. The Commission's assessment of SA regulator practice draws on some of these established regulator performance frameworks.

3.2.1 Australian jurisdictions

The Commission has identified three Australian jurisdictions that currently have dedicated regulator performance frameworks and improvement strategies in place. Such models seek to increase the transparency, accountability, and quality of regulator practice by establishing centralised oversight and continuous review of regulators. These are primarily self-assessment models, with regulators evaluating their own performance, so that they can identify and implement improvements to practice over time. This is sometimes supplemented by ad hoc independent evaluation or external audit.

Australian Government

The Australian Government has had a targeted regulator performance policy since 2013, but recently implemented reforms to streamline and enhance its operation. In October 2020, as part of a broader deregulation agenda, the Australian Government established a central function in the Department of the Prime Minister and Cabinet to drive accountability for regulator performance, build regulator capability, share best practice, and support a culture of excellence. This includes overseeing the government's new regulator performance framework which articulates the government's expectations for regulator performance in three principles of best practice, with regulators required to demonstrate their progress putting these into effect. The principles are:

- Continuous improvement and building trust: regulators must adopt a whole-of system perspective, continuously improving their performance, capability and culture to build trust and confidence in Australia's regulatory settings.
- Risk-based and data-driven: regulators must manage risks proportionately and maintain essential safeguards while minimising regulatory burden and leveraging data and digital technology to support those they regulate to comply and grow.
- Collaboration and engagement: regulators must be transparent and responsive communicators, implementing regulations in a modern and collaborative way[50].

The new regulator performance framework (Box 3.3) differs from previous arrangements in two respects. Firstly, it ceases a requirement for regulators to provide a stand-alone report on their performance each year. Instead, regulators can include this reporting as part of their corporate plan and annual report. Secondly, the framework makes regulators' commitments towards good practice clearer and more transparent through a Statement of Expectations (SOE) process[51] (Box 3.4). The framework is supplemented by other initiatives under the regulator performance program to embed good practice.

Box 3.3: Australian Government promotion of regulator performance improvement

[50] Australian Government (Cth), *Regulator Performance Guide* (Commonwealth of Australia, 2021) < https://protect-au.mimecast.com/s/urnuCP7yDXIvQEDBtzOYfS?domain=deregulation.pmc.gov.au>.
[51] This was modelled on the *Statement of Expectations* framework already established in Victoria (discussed later in this section).

The Australian Government's new regulator performance framework makes regulators' commitments toward good practice clearer and more transparent through a Statement of Expectations process, whereby regulators report against their performance and deliverables set by the relevant Minister. The regulator issues a Statement of Intent describing how it will deliver on the Minister's expectations and against the framework's best practice principles. These statements should consider:

- the economic and social environment in which the regulator operates, and the Government's policy objectives and priorities, including the Deregulation Agenda;
- the strategic direction (to the extent allowed by legislation) on the conduct of the regulator, its role, and how the regulator should engage with business, the community, other regulators and policy agencies including the states and territories;
- the expectation that regulators act in accordance with the Government's principles of regulator best practice and strive for continuous improvement against these principles;
- how the responsible Minister proposes to engage with the regulator, including undertakings on how the Minister will help provide an enabling environment for the regulator to consistently implement best practice;
- a request that the regulator responds via a Regulator Statement of Intent, outlining how it will deliver on the Minister's expectations.

Commonwealth regulators must integrate these statements into performance reporting as required as part of a corporate plan and/or annual report (as required under *the Public Governance, Performance and Accountability Act (2013)*), to be made publicly available on regulator websites and on transparency.gov.au. The new framework ceases a requirement for regulators to provide a stand-alone report on their performance each year. These changes are intended to 'support greater transparency and accountability' (since annual reports are subject to audit and parliamentary scrutiny) and reduce 'duplication in regulator performance reporting'.

The new framework is supported by other strategies, including:

- piloting a benchmarking project, which will leverage an independent survey of businesses and the community to develop measures of regulator performance from a stakeholder perspective;
- establishing a new 'Regulator Leadership cohort' comprising heads of regulators and senior department leaders responsible for significant regulatory functions; members bring expertise and ideas to help address roadblocks and drive recommended actions and the cultural change required to support best practice performance;
- working with the Australian Public Service Commission and the Department of Agriculture, Water and the Environment to deliver the Regulator Training Pilot; the pilot is designed to lift the capability and performance of agricultural export regulators and will also lay a foundation for upskilling and professionalisation of other APS regulators and help drive cultural change; and
- showcasing and sharing existing best practice: developing a library of practical case studies and reference material on the Deregulation Agenda website to share best practice against the Regulator Performance Guide; and supporting agencies to establish regulator communities of practice to share lessons learned and collectively solve problems.

Source: Australian Government (Cth), Regulator Performance Guide (Commonwealth of Australia, 2021).

Victoria

Led by the Better Regulation Commissioner, Better Regulation Victoria (BRV) is an independent advisor to the Victorian Government on state regulatory performance. BRV plays a comprehensive role in promoting good regulatory practice across government, including by:

- assisting regulatory agencies with the design, application and administration of regulation and opportunities for improving the quality of regulation;
- assessing the adequacy of regulatory impact assessments (RIA) and legislation impact assessments;

- maintaining productive relationships with around 60 Victorian regulators, providing training and facilitating regulator forums; and
- liaising with stakeholders to monitor regulatory issues, including running a Red Tape Hotline for businesses.

The Victorian Government has a well-established SOE framework (led by the Victorian Department of Treasury and Finance), which requires regulators to identify, monitor and report to the government and publicly on regulatory practice against minimum practice standards.[52] Responsible ministers issue a letter outlining the SOE to regulators in their ministerial portfolio every two years, which is developed collaboratively between regulators, policy departments and the Department of Finance and Treasury. Under the SOE framework, a regulator must:

- initially conduct a self-assessment against the elements of good regulatory practice set out in the Victorian Government's Statement of Expectations for Regulators policy document and establish a performance baseline;
- develop a Good Regulatory Practice Plan focusing on issues identified in the self-assessment, which forms the basis of a Ministerial SOE letter;
- publish a response to the Ministerial SOE letter explaining the actions the regulator will take to meet the SOE; and
- publicly report on progress against the SOE, predominantly through corporate planning and annual financial reporting cycles.[53]

Policy departments are also required to conduct post-implementation evaluations of regulator performance, with findings used to improve the development of the regulator's next SOE. Regulators must report against three elements of good regulatory practice identified as mandatory under the SOE framework: timeliness; risk-based regulation; and compliance-related assistance and advice.[54]

The minimum standards of practice set out under each element of the SOE framework are outlined in Box 3.4. Like the Australian Government Regulator Performance Framework, the SOE framework does not specify a performance measure. By requiring a common set of mandatory elements and minimum standards, the SOE framework provides a degree of consistency in performance reporting, enabling benchmarking and comparisons between regulators, as well as the ability to monitor progress over time.

[52] Department of Treasury and Finance (VIC), *Statement of Expectations Framework for Regulators* (State of Victoria, 2017) < https://www.dtf.vic.gov.au/reducing-regulatory-burden/statement-expectations-regulators >.
[53] Ibid., 3.
[54] Ibid., 11-12.

Box 3.4: Victorian Statement of Expectations Framework for business regulators.

	MANDATORY ELEMENTS	
Timeliness	a)	Processes/systems are in place to make it as easy as possible for businesses to complete forms.
	b)	Regulator provides clarity about the timing and scope of regulatory processes. Timetables for completing forms consider all requests for information that a regulated party is dealing with, including from other regulators.
	c)	Processes/systems are in place to make it easy for businesses to submit required data and to check on the status of any applications.
Risk based strategies	a)	Regulator has collected relevant data to inform a risk-based approach to regulation, and to evaluate outcomes.
	b)	Regulator has an established approach to risk assessment.
	c)	Requests for data from regulated parties are proportionate to risk.
	d)	Risk based approaches to compliance and enforcement are considered and adopted where appropriate (for example, regulator tailors sanctions so that they are proportionate and meaningful).
Compliance related assistance and advice	a)	Regulator provides assistance and advice in order to secure compliance.
	b)	Advice is: easily available; accurate; easy to understand; comprehensive; timely; and, regularly reviewed and updated in light of feedback.
	c)	Administration and enforcement are accompanied by ongoing advice.
	d)	Regulator judges the effectiveness of its assistance and advice by monitoring regulated parties' awareness and understanding of the services.
	e)	Regulator provides clarity about the status and objectives of advice (i.e. whether it is statutory or non-statutory).
	RECOMMENDED ELEMENTS	
Incentive-based regulation	a)	Regulator has collected relevant data to evaluate regulatory outcomes.
	b)	An understanding of regulated entities' behaviour and incentives.
	c)	Incentive-based approaches to compliance are considered and adopted where appropriate. (eg: rewarding a track record of compliance with a less frequent, audit inspection cycle; rewarding investment in risk-mitigating processes or equipment).
	OTHER SUGGESTED ELEMENTS	
Role clarity	a)	Regulator has in place a monitoring and assurance regime to ensure that their regulatory objectives are being met.
	b)	There is a clearly understood and documented chain of accountability and communication between departments and their regulators.
	c)	Formal instruments clarify regulator roles where there are shared accountabilities and promote cooperation amongst regulators (see below).
Cooperation amongst regulators	a)	Regulators come together to identify good practice and share lessons.
	b)	Regulator has considered and explored ways to facilitate data sharing.
	c)	Regulator performance is benchmarked.
Stakeholder engagement	a)	Forms, data requests and other administrative and compliance processes are regularly reviewed with feedback sought from stakeholders (eg, forms include a short feedback section with suggestions for improvement).
	b)	Regulator provides feedback on the outcome of consultation exercises to those who took part.
	c)	Regulator understands the changing needs of business and the community throughout the regulatory cycle.
Accountability and transparency	a)	Regulator is transparent about how they administer and, where appropriate, how they enforce regulation (eg, transparent complaints and disputes mechanisms and transparency about the reasons for enforcement decisions)[1].
	b)	Regulator collects and publishes data that enables it to measure its operational performance.
	c)	Government priorities are addressed as part of regulator performance reporting.
Clear and consistent activities	a)	Regulator has documented key administrative and compliance processes and activities.
	b)	There is a clear purpose for all information that is collected.
	c)	Regulator is responsive to lessons learned.
	d)	Regulator undertakes appropriate planning and resource management.

Source: Department of Treasury and Finance (VIC), Statement of Expectations Framework for Regulators (State of Victoria, 2017).

Queensland

The Office of Best Practice Regulation within the Queensland Treasury oversees regulator performance reporting under the State's Regulator Performance Framework.[55] The framework sets out five 'model practices' to promote improvement, through better interactions between regulators and their stakeholders, and by reducing the burdens and costs of regulation for all parties. It encourages regulators to:

- ensure regulatory activity is proportionate to risk and minimises unnecessary burden;
- consult and engage meaningfully with stakeholders;
- provide appropriate information and support to assist compliance;
- commit to continuous improvement; and
- be transparent and accountable in actions.[56].

Under the framework, government regulators whose activities impact businesses are required to publicly report annually on their regulatory performance against the model practices. Reporting requirements are flexible in recognition of the diversity of regulators and regulatory activities across government. Regulators can determine the appropriate level, form and content of their reporting, having regard to the relative size and reach of their activities and the nature of their stakeholders. This helps to minimise the administrative burden on agencies while maximising the relevance of the reporting to their stakeholders.

Regulators also have the flexibility to present their information in a way that is most relevant and accessible to those they regulate and are required to publish their annual performance report on their website. All regulator performance reports are also published on the Office of Best Practice Regulation website. The Office is required to undertake an evaluation of the framework's effectiveness in 2021.

3.2.2 International models of regulator performance assessment

The Commission has reviewed several international models of regulator assessment for the purpose of informing this inquiry. These models have been developed for external audit, avoiding potential problems around bias that can arise from regulator self-assessment models. An independent third party collects evidence to make an objective assessment of regulator's performance, by applying indicators or quantitative measures, or by comparing performance against minimum or best practice standards. Two examples of established external review frameworks are (1) the OECD iREG composite measure and (2) the UK Hampton Implementation Reviews (see Box 3.2).

3.2.3 Lessons and opportunities for SA

Currently, there is no statewide policy for performance monitoring and practice improvement across SA regulators. Regulators are individually responsible for identifying priorities and strategies for review and continuous improvement. There is also no specific requirement for regulatory agencies to report publicly on their performance, aside from their own statutory

[55] Queensland Productivity Commission *Regulator Performance Framework*, (Web Page, no date) <https://qpc.qld.gov.au/regulator-performance-framework/>. Note that the QPC was recently integrated into Queensland Treasury to establish the new Office of Productivity and Red Tape Reduction.

[56] Queensland Treasury, *The Queensland Government Guide to Better Regulation* (State of Queensland, 2019), Section 5: Regulator Performance Framework <https://qpc.blob.core.windows.net/wordpress/2019/06/Queensland-Government-Guide-to-Better-Regulation-May-2019.pdf>

reporting requirements, or as part of annual reporting processes. Consequently, the Commission has found it very difficult, using public information, to assess the efficiency and effectiveness of SA regulators. Additionally, the quality and effort focused on performance reporting and practice improvement is highly variable across SA regulators.

The only across-government frameworks in SA for organisation performance monitoring and reporting that the Commission is aware of are those contained in the Premier and Cabinet Circular for annual reporting (PC013), which is public and the Premier and Cabinet Circular for chief executive performance appraisal (PC029), which is not made public. Neither of these cross-government requirements are complete in their coverage of SA public sector regulatory functions. Chief executives subject to PC029 are required to identify and report on agency specific priorities and key performance indicators (KPIs) that relate to desired outcomes. While there is no stated requirement, chief executives may select KPIs for regulatory functions residing in their departments. While broad in its coverage of agencies, PC013 does not require or encourage specific reporting of KPIs related to regulatory functions residing in agencies. Both mechanisms would require significant changes to provide an adequate basis for performance monitoring and improvement of SA's regulators.

The Commission's consultations with regulators indicate that only some regulatory entities have mature systems of performance monitoring and improvement. These are usually the larger agencies that are better resourced, but there are also significant regulatory entities where the 'score card' of good performance is blank. There appears to be no clear policy mechanism by which lower performing regulatory agencies might be identified or encouraged to improve. Indeed, there was some appetite from stakeholders in submissions to this inquiry for an enhanced performance framework for SA regulatory bodies:

> *Dairysafe is not aware of administrative instruments, such as SOEs, applied within SA's regulatory framework, but is of the view that such instruments could contribute to better practice thinking and continuous improvement in making and administering regulations. (Dairysafe, DR7, pp. 7-8).*
>
> *SAFC is not aware of any South Australian regulator performance review programs or initiatives; but would be supportive of the concept. Like effective individual performance reviews, they should include the opinions of the regulated (managed) to generate additional potential action and improvement points. Pure self-assessment is unlikely to be effective. Indeed, this may be a role for the SAPC to provide ongoing review management and cross-regulator benchmarking services.*
>
> *In preparing such a regulator performance framework, SAFC views the international examples contained within the issues paper as more valuable than domestic examples – particularly given the difficulties our industry has with the ACCC, which presumably regularly 'passes' the Commonwealth scheme, despite its poor service to industry. (South Australian Freight Council (SAFC) Inc., DR19 pp. 3-4)*

The Commission considers that more could be done to strengthen regulator performance in this state through an across-government regulator performance framework. In doing so, models offered by other Australian jurisdictions and internationally provide important lessons on how such a framework should be designed.

Flexibility is key

Regulators differ significantly in size, structure and function. Regulator performance frameworks adopted in other jurisdictions consider this heterogeneity by adapting a principles-based approach that allows regulators to identify the areas of practice most relevant to them and to evaluate the extent to which they implement good practice. Such an

approach also ensures that regulators are not tied up with a performance regime that is irrelevant and unnecessarily increases administrative obligations.

Performance measurement and reporting should be outcomes focused, and include a focus on the ease of interactions with regulated entities

The Commission has observed that it is difficult to obtain a view on how effectively regulators deliver on their outcomes. This is, in part, because of the complexity of regulators' work and the broadness of their objectives. Nevertheless, it is essential that regulators demonstrate net benefit in delivery of outcomes. Regulators should continue to review how they go about measuring and reporting on their performance in a way that captures impact and outcomes, and not just levels of activity.

Performance measurement and reporting is a necessary but not sufficient condition for good regulator practice—other strategies focused on practice improvement are necessary

Regulator performance reporting regimes adopted in other jurisdictions are supplemented by other strategies to directly assist regulators to improve their practice. This is particularly important for a small state such as SA, where agencies do not necessarily have the same scale and resourcing as their counterparts in other jurisdictions to individually implement practice improvement strategies. Some practical strategies to improve regulator performance include, for example, establishing regulator practice forums, providing practical assistance and advice on how to conduct regulatory impact assessments and funding targeted projects to improve particular aspects of practice (e.g. BRV's *Better Approvals* project). Across-government regulator improvement strategies may deliver greater efficiencies because individual regulators would not need to develop or duplicate such programs themselves.

Regulator practice self-assessment should be supplemented by external review

Regulator self-assessment frameworks should be supplemented by some form of external review. As the Australian Productivity Commission (APC) observed, 'an external audit process to check the reliability of self-assessment would reduce the incentives for bias in self-assessment, as can the publication of the report'. The Commission understands the SA Auditor General has authority to conduct performance audits of agencies but, to date, does not appear to have conducted any such audits of regulators. Nevertheless, there is evidence that external review can provide an independent perspective on regulator performance and give a substantial incentive for regulators to improve their practices. A 2018 report on SafeWork SA by the Independent Commission Against Corruption (ICAC) provided a catalyst for SafeWork SA to implement major changes to the way it operates (Box 3.5). Regulators have also suggested that peer review, by other regulators, is an effective mechanism of external review, since they can scrutinise practice from a position of strong expertise.

Box 3.5: SafeWork SA's renewed approach to risk-based monitoring and enforcement

A 2018 report on SafeWork SA's practices, policies, and procedures by the Independent Commission Against Corruption (ICAC) provided a catalyst for SafeWork SA to implement major changes to the way it administers work, health and safety (WHS) legislation in South Australia. ICAC raised concerns about SafeWork SA's approach to workplace inspections, including lack of a clear framework for determining matters such as inspection priorities, the balance between proactive and reactive inspections, and between announced and unannounced inspections, and the quality and consistency of inspections.

In response, SafeWork SA implemented a structured change management process underpinned by a strong human-resources focus. This included restructuring the organisation to break down silos between teams, implementing a range of business process improvements and developing a new training framework, including dedicated training for staff involved in implementing and monitoring compliance and enforcement.

One recommendation was that SafeWork SA ensure its proactive inspection activities be driven by intelligence, assessment of risks, and research on how to assist workplaces in adhering to WHS laws. In response, SafeWork SA developed a Proactive Compliance Campaigns program for priority areas identified based on analysis of historic injury risk data. The campaigns aim to achieve a reduction in work-related injuries, illnesses and fatalities and reduce the incidence of non-compliance with WHS requirements.

Processes for planning and conducting proactive activities are now documented in an Audit Program and Proactive Compliance Campaign policy, which was finalised in late 2020. Campaigns are scheduled throughout the year to assist with resource needs, communications and reporting. Campaign briefs are developed that outline the objectives, campaign triggers and justification, key actions, risks and reporting requirements. Once an area is identified for a campaign, SafeWork SA publicises its intention to undertake it and releases information explaining the basis for the campaign. It also provides detailed guidance material to assist relevant businesses to identify and address WHS risks.

After the conclusion of a campaign, SafeWork SA publishes an evaluation to inform stakeholders and improve future campaigns. SafeWork SA has to date published three campaign reports: Respirable Crystalline Silica, Elevating Work Platforms Audit Report and Safe Work Method Statement in high-risk construction.

Source: OSAPC based on information provided by SafeWork SA

3.3 SA regulator practice survey results

This section sets out the results of the Commission's Regulator Practice Survey which sought to obtain a high-level view of current regulator practice across SA. The Commission developed its own framework for assessing SA regulator practice drawing on best practice guidance and frameworks used by the OECD and in other Australian jurisdictions and internationally. The framework focuses on eight categories that the literature and good practice frameworks suggest are indicative of an efficient and effective regulator: (1) legal structure and regulatory powers; (2) approvals and decision-making; (3) regulatory impact assessment/ex-ante assessment; (4) ex-post evaluation; (5) stakeholder engagement; (6) monitoring and enforcement (risk-based and proportionate actions); (7) regulatory impact assessment (RIA)/ex-ante assessment; and (8) regulator performance review and continuous improvement. More detail on the framework is presented in Appendix 5.

The Office of the SAPC engaged BDO Advisory (SA) Pty Ltd in June 2021 to administer the survey. The aim of the survey was to help inform the Commission's recommendations to government on ways to embed good regulatory practice in the state, which is a key part of

the terms of reference for this inquiry. Twenty-seven regulatory areas across 13 SA Government departments, independent statutory authorities and other state entities were invited to participate in the survey. In addition, the Commission collected case studies focussing on four categories in its analytical framework, of good regulatory practice or recent improvements to practice among regulators These are presented, where relevant, throughout this report (in this chapter, see boxes 3.6,3.7,3.8, 3.9, and 3.10). A full compilation of the case studies is available on the Commission's website.

The remainder of this chapter sets out the most pertinent findings of the survey for the purpose of this inquiry. The *Regulator Practice Survey Report*, which sets out survey methodology and results under each category of practice, is available on the Commission's website.[57] Importantly, the survey provided a mechanism for individual regulators to raise a wide range of regulatory issues impacting on their areas of responsibility, and actions that could be taken to address these. While the parameters of this inquiry do not allow the Commission to examine these issues in depth, they are noted in Appendix 6 to this report as potential areas for the SA Government to consider further.

The vast majority of regulators consider they have clearly defined roles and effective regulatory powers…

Twenty-three of the 27 regulatory areas surveyed (85%) considered that issues have not arisen, or have only arisen to a small extent, due to a lack of clarity about their area's role or objectives. This indicates that for the most part, the majority of regulatory areas believe they have a clearly defined and good understanding of their purpose. The majority of regulatory areas (n=21) also reported little to no issues arise within their area due to insufficient or inappropriate regulatory powers. The stand-out exception to this was the response from the Controlled Drugs area of the Department of Health and Wellbeing, which advised that legislative changes are required to improve the clarity of its role and to modernise its powers in this area of regulation.

…but the state can do more when it comes to coordinating across regulatory areas and addressing overlapping responsibilities…

Overlapping responsibilities causing inefficiency was the most commonly reported problem by state government regulatory entities, with 11 regulatory areas indicating this is an issue. However, a third of respondents (n=9) also indicated that inefficiencies are caused by overlapping responsibilities between their area and Commonwealth regulatory entities. There was less concern reported about overlapping responsibilities with local government and with regulatory entities in other states and territories. This result indicates that efficiencies could be gained by addressing overlaps in responsibilities between regulatory areas at the state level, noting that at least some of these overlaps are being managed with various memoranda of understanding (MOUs) between SA regulatory entities.

…and coordination with local government could be improved

Respondents were most positive about how well they coordinate with other state government regulatory entities. They were least positive about how well they coordinate with local government, with eight saying they did this 'not at all' well or well 'to a small extent'. They were also less positive about how well they coordinated with Commonwealth regulatory

[57] BDO, *SA Productivity Commission: Regulator Practice Survey Report*, (SAPC, 2021) <ADD THE WEBSITE LINK>

agencies, with six reporting that they did this 'not at all' well or well 'to a small extent'. Similarly, regulatory areas were overall most positive about how well their area shares data and information about regulated entities with other state government regulatory entities, with 13 saying they did this 'to a large extent' or 'to a very large extent'. They were least positive about how well they share this data and information with local government, with 22 per cent of regulatory areas (n=6) reporting that they did not do this at all well with local government.

While this result may reflect no business need to interact with local or Commonwealth governments for some regulators, it is consistent with submissions made to this inquiry by councils and the Local Government Association, which has asserted that SA Government should do more to work with them on regulatory matters and that data and information sharing should be strengthened.

Regulatory impact assessment and ex-post *evaluation are not common practices, suggesting that improvements can be made in both areas*

Survey results reveal that RIA and ex-post evaluation are not common among regulatory areas, providing further evidence for the Commission's recommendations that such practices should be enhanced in this state (refer to chapters 2, 4 and 6 of this report). Only 6 regulatory areas said they had undertaken an RIA for new regulations in the last five years. Nevertheless, 12 regulatory areas answered the follow up questions on RIA processes, suggesting that while undertaking an RIA was somewhat rare, these regulatory areas had established policies and processes to complete an RIA. All 12 regulatory areas stated that the RIA process included consideration of costs to business. When asked about the extent to which RIA's influence regulatory design and practice, two-thirds of these respondents (n=8) reported that RIAs influenced regulatory design and practice to a 'large' or 'very large extent'. Only one regulatory area reported that RIAs have had only a small influence on regulatory design and practice and no regulatory areas reported that RIAs have had no influence at all. Results also indicate that RIAs are not often publicly released, with only 3 regulatory areas reporting that they always release their RIAs. Two regulatory areas reported that they sometimes release them.

When asked how many ex-post evaluations each regulatory area had conducted in the last five years, 15 of the 27 regulatory areas surveyed (56%) said they completed at least one. Nevertheless, 12 regulatory areas (44%) reported having conducted none at all. Of those, one regulatory area (Dairysafe) said that another agency was responsible for ex-post evaluations of their regulatory area (PIRSA), while three regulatory areas pointed to processes that involve regular and ongoing consultation with industry as a way of evaluating (through feedback) their effectiveness.

Most regulatory areas have adopted good practice policies and strategies relating to stakeholder engagement

Overall, almost all of regulatory areas (n=25) reported having a legal obligation, policy or practice in place to undertake some form of stakeholder engagement. The most common responses were that 'we have a legislated mandate to engage with stakeholders' (n=17) and that 'we have a stakeholder engagement strategy or policy' (n=16). A third of the regulatory areas also reported having 'minimum standards with regard to stakeholder engagement' (n=9), while five said they have a dedicated business unit for this purpose. In relation to engaging stakeholders specifically for developing regulations, most regulatory areas (n=24) responded that this does occur.

Box 3.6: Essential Services Commission of South Australia (ESCOSA)'s stakeholder engagement process for the 2020 SA Water Regulatory Determination

ESCOSA has published *a Charter of Consultation and Regulatory* Practice, and established a consumer advisory committee (CAC), under the *Essential Services Commission Act 2002*. Stakeholder engagement is an important aspect of ESCOSA's Water Regulatory Determination function, which is a regular revenue and pricing review of water infrastructure services provided by SA Water. Each revenue reset involves a complex analysis of many aspects of SA Water's business. The revenue determination process seeks to reach an appropriate balance of the legitimate interests of the regulated business and of consumers and other stakeholders across a range of dimensions.

In completing the *2020* Water Regulatory Determination, ESCOSA took a more structured approach to gathering stakeholder input compared to previous determinations (which relied more heavily on a standard public submission process and existing forums, like the CAC). To promote better engagement, three groups were established:

- Negotiation Forum – this provided a process for testing SA Water's initial regulatory business plans prior to them being submitted to ESCOSA for review. The Negotiation Forum comprised: a three-person Customer Negotiation Committee (CNC), which was asked to elicit and represent the perspectives, preferences and priorities of SA Water's diverse customer base; three senior representatives of SA Water; and an Independent probity advisor, appointed to oversee the fairness of the process.
- Consumer Experts Panel (CEP) – which was effectively a joint sitting of ESCOSA's and SA Water's CACs. The Panel provided feedback and advice to ESCOSA during the review and prepared a Priorities Report, which set out key issues that the CEP expected SA Water to consider and respond to as it developed its Regulatory Business Proposal. There was also an important feedback loop to the CNC on matters to be considered in the Negotiation Forum process.
- Regulators Working Group – which provided a forum for the various regulators of SA Water to coordinate their efforts for achieving positive outcomes for the SA community through their combined regulation of SA Water.

This enhanced process ensured that ESCOSA had a richer information set on which to base its determination. A key strength was that consumers were better supported to put their perspective and evidence to the regulator and empowered to engage directly with SA Water through the Negotiation Forum. The new approach also improved the transparency of the determination process, by using multiple engagement forums and through the publication of key outputs from these forums. Ultimately, better engagement with key stakeholder groups enhances the legitimacy of the outcomes of the regulatory process. ESCOSA commissioned a post-project review which suggested that stakeholders believed consumer views should be at the centre of regulatory processes. Review findings will assist ESCOSA to establish the stakeholder engagement framework and approach for its next four-yearly regulatory determination for SA Water.

Source: OSAPC based on information provided by ESCOSA

Box 3.7: Environment Protection Authority (EPA) – Stakeholder engagement

EPA's regulatory activities involve a diverse set of stakeholders, including regulated businesses, government and non-government entities and local residents. EPA undertakes many different types of public engagement, on a wide variety of regulatory issues including licensing, environmental incident response, land and groundwater contamination, and policy and program development and review. Its approach is dictated by a combination of statutory requirements, corporate policy and the specific circumstances surrounding particular issues.

Some engagement processes undertaken by EPA are required under legislation or regulation. For example, the *Environment Protection Act 1993* (the Act) enables the EPA to develop Environment Protection Policies (EPPs), which define the standards to be achieved in dealing with environmental problems such as air, water and noise pollution. The Act specifies a number of consultative steps in the making of EPPs including public notification, release of an explanatory report, a public meeting, a minimum consultation period of eight weeks and prescribed bodies that must be consulted when developing legislation. Where there is specific interest from the community, the EPA will exceed legislated consultation requirements.

The EPA has recently implemented new corporate policies designed to lift the overall quality of engagement, recognising that the consultation approach should be tailored to the issue at hand. The EPA's new Engagement Charter sets out the EPA's consultation goals, approach and processes, including in relation to public notification. In particular, it outlines a 'residents first' policy. This means that when the EPA has information which affects individual residents, it will engage with, and listen to them first, before informing the wider community.

Measuring the effectiveness of stakeholder engagement

The effectiveness of public engagement is monitored qualitatively and quantitively by the EPA. All community interactions are recorded, and stakeholder data and information analysed, with regular reports published. At the conclusion of a public consultation, a community submissions report or community engagement report is published summarising the feedback and key issues raised during the consultation. Information on public engagement is also published in EPA's annual report.

Using digital systems and technology for engagement

In 2018, the EPA procured software to complement traditional engagement methods with a digital community engagement platform. This enables members of the community to engage with the EPA digitally. The EPA's www.engage.epa.sa.gov.au is an online engagement portal that has powerful back-end tracking that enables the EPA to determine the number of visitors and what information they read or downloaded, and offers interactive tools such as Q&A, Forum, News Feed, Timeline, Document Library and online interactive maps where people can make comments about a location.

Source: OSAPC based on information provided by the EPA

Proportionate and risk-based monitoring and enforcement are established in some agencies but there is room for improvement

Survey results suggested that risk-based and proportionate monitoring and enforcement strategies were important in the practices of most regulatory areas. When asked whether they had a formalised risk assessment framework for monitoring and enforcement, 85 per cent of all regulatory areas surveyed answered yes (n=23). In response to the question 'to what extent does your regulatory area focus its monitoring and enforcement strategies on areas of greatest risk and potential for harm?', 70 per cent (n=19) of regulatory areas reported that their strategies are focused on this 'to a large extent' or 'to a very large extent'. A further 11 per cent (n=3) of regulatory areas reported that their monitoring and enforcement strategies focus on this 'to a moderate extent'.

Nevertheless, there are a small number of regulatory areas whose responses suggest that they lack proportionality and a risk orientation in their monitoring and enforcement practices. For example, five regulatory areas responded they do not have policies in place to reduce reporting or compliance burdens on regulated entities that are assessed as low risk. Two regulatory areas reported they do not focus their monitoring and enforcement strategies on areas of greatest risk and potential for harm at all.

Box 3.8: ESCOSA – Proportionate and risk-based licensing for electricity generation

ESCOSA regulates the licensing of electricity generation in SA. In performing its licensing function, ESCOSA must have as its primary objective the protection of the long-term interests of SA consumers with respect to the price, quality and reliability of electricity and gas supply.

In assessing a licence application, ESCOSA may also consider: the applicant's previous commercial dealings and the standard of honesty and integrity shown in those dealings; the resources available to the applicant (financial, technical and human); and any other matters prescribed by regulation. To improve its licensing process, and better align it with risk, ESCOSA recently undertook a risk assessment of its licence categories to identify the possible impacts arising from a licensee's failure and used this to develop a new licensing assessment process for low-risk licensees. The new low-risk class is limited to small generators (under 5 MW) connected to the distribution network, which have much smaller potential impacts for the electricity network, than for example, a large gas-fired or wind-turbine generation plant connected to the transmission network.

The low-risk applications are now assessed under a simplified process, with fewer verifications and assessments undertaken, and a simpler application form. For example, ESCOSA does not require applicants to provide details of financial, technical and human resources. Instead, applicants must warrant that they have adequate resources to undertake the operations for which they seek the licence. These new procedures are expected to reduce the administrative burden on low-risk applicants and reduce the time taken (and associated costs) for staff to assess the applications. This will have the benefit of maintaining the necessary high levels of consumer protection and system safety and security, while enabling licensees to enter the market more rapidly and at lower regulatory cost. It also allows ESCOSA staff to devote more time to the higher risk applications.

Source: OSAPC based on information provided by ESCOSA

And most regulatory areas focus on assisting regulated entities through the approvals processes, but some still lack policies and procedures for internal review

Twenty-five of the 27 regulatory areas surveyed indicated they had responsibility for regulatory approvals and there is a clear indication from the results that regulators focus on assisting regulated entities through the approvals process. Nevertheless, businesses reported difficulties in accessing and understanding information on regulatory requirements and inconsistent information being provided by staff within regulators, suggesting that this is an area for improvement.

Respondents were asked to select, from a list of standard or good practice methods, their current ways of engaging with prospective applicants and providing advice and assistance throughout an application process. The top five answers received for this (in order from highest) were:

1. providing written guidance materials;
2. providing public information on eligibility requirements/criteria;
3. providing feedback on the rationale for a decision;

4. providing a variety of consultation platforms to answer questions (in person, online virtual assistant, email, phone); and
5. providing reasons for any additional requests for information.

Interestingly, none of the top responses involved a digitised or automated solution as part of the approvals process. The potential for enhancing automation and digitalisation is illustrated by another survey result—80 per cent of the regulatory areas (n=20) reported that better use of online and digital systems would most likely deliver the greatest increase in the efficiency and timeliness of approval and decision-making processes within their regulatory area. On the matter of timeliness, 20 regulatory areas reported that their overall performance on the timeliness of key approval processes has improved over the last five years, while only one area reported that timeliness and efficiency of decision-making processes had significantly declined over the period.

Nevertheless, the Commission's survey of SA businesses, using a survey instrument developed by the OSAPC, revealed that waiting time for approvals and filling out forms are the most time-consuming interactions with regulators and identified improved turn-around times as a priority. This improvement opportunity through digitisation is discussed further in chapter 5.

Of the regulatory areas which said they were responsible for regulatory approvals and decision-making, just over three quarters of regulatory areas (n=19) reported that their area has policies and procedures in place for internal review of decisions. But six regulatory areas indicated that they do not have internal policies and procedures in place for internal review. The Commission suggests that the SA Government look further into the matter of internal review for these regulatory areas (see Appendix 6).

The Commission heard anecdotal evidence from stakeholders, during its reviews of tourism regulation and of certain referral processes related to development assessment, of instances where projects which were argued to provide significant economic benefits to the state were rejected by regulators. In any regulatory system, there is a risk that projects offering net benefits to the state are rejected by regulators; aside from difficulties in estimating the quantum, likelihood and timing of costs and benefits, such rejection may result from regulatory mandates precluding consideration of certain benefits or processes for managing trade-offs and aligning mandates between multiple regulators.

To ensure that this risk is quantified and monitored as an important indicator of the maturity and development focus of the state's regulatory system, it is recommended that approval rates be measured, monitored and reported publicly by business regulators as a key performance indicator (recommendation 3.1).

Box 3.9: Initiatives to improve regulatory approvals and decision-making

Energy Resources Division's application of the lead regulator model

The Energy Resources Division (ERD), in the Department for Energy and Mining (DEM), administers the *Petroleum and Geothermal Energy Act 2000* and associated regulations. To coordinate effectively on its regulatory obligations, ERD has adopted a 'lead regulator model', which involves taking stewardship over approval processes, and coordinating activities with other regulators using formal consultation protocols. It enables simultaneous discussions across government, enhancing scrutiny and the speed of regulatory decision-making. Communications are handled with regulated entities via one window – ERD. ERD recently applied the lead regulator model to a pre-commercial trial of an underground coal gasification plant at Leigh Creek, resulting in the approval of key engineering, groundwater and air quality monitoring plans. ERD believes that the model delivered several benefits:

- speeding up the approval process through parallel regulatory approvals processes across regulatory agencies;
- reducing the compliance burden for regulated entities—with regulated entities only dealing directly with ERD and not having to provide the same information twice;
- providing greater certainty to regulated entities by enabling the use of one instrument to capture all key regulatory obligations; and,
- better targeting of the approval process; by brokering across regulators, ERD could make the process proportional and bespoke to the Leigh Creek energy trial.

SafeWork SA's ethical decision-making initiatives

Each year, SafeWork SA conducts around 12,000 site visits of workplaces as part of its proactive audit program and in response to incidents and complaints. Its inspectors must determine whether a workplace is compliant with work, health and safety regulation, and if not, decide what actions to take. Depending on the severity of non-compliance, inspectors may decide to take enforcement actions such as issuing infringement notices. A 2018 ICAC evaluation report of SafeWork SA contained several recommendations on lifting the capability of inspectors to deal with competing pressures and integrity issues more effectively. Recommendation 33 stated that SafeWork SA should provide training to existing and new inspectors relating to managing competing pressures at workplaces, grooming and capture, and conflicts of interest. SafeWork SA has responded to this recommendation by:

- developing a conflict-of-interest framework;
- creating a grooming and training module in the Inspector Development Program (IDP) for inspectors to develop staff capability to recognise and address grooming and capture behaviours and risks; and
- developing a training program on balanced and ethical decision-making, which is compulsory for existing and new compliance and enforcement staff, all managers and team leaders.

While internal consultation on the outcomes of these initiatives is underway, they are expected by SafeWork SA to support an improved professional culture, more effective decision-making and the management of integrity risks.

Source: OSAPC based on information provided by DEM and SafeWork SA

Regulatory areas consider that improving digital systems would deliver the biggest increases in their efficiency and effectiveness

Overall, when asked to identify two areas where improvements would most assist regulatory areas to increase their efficiency or effectiveness, the most common response selected was 'ICT systems' (n=15)[58]. This suggests that enhancing digital systems would be important for

[58] The second most common response was 'budget', selected by nine regulatory areas (33%). The equal-third most common responses were 'regulatory rules – primary legislation' and 'governance and decision-making arrangements'(n=6, 22%, for each).

improving regulator efficiency and effectiveness in SA. The need for improvements to digital systems was also highlighted in responses to several other survey questions. For example, when asked how they would rate their regulatory area's digital systems for collecting, analysing and maintaining information on regulated entities, 12 of the 27 regulatory areas (44 per cent) rated their systems as 'poor' or 'fair'. Only two regulatory areas reported their systems as being 'very good' (Energy Resources and Trade Waste and Networks) and one area (Planning and Development Approvals) rated their systems as being 'excellent'.

There was also great variability in the extent to which regulators said they were able to deal with regulated entities using online digital systems. Just two regulatory areas reported that 'all' of their interactions with regulated entities can be conducted via online systems (Liquor and Gaming and Planning and Development Approvals). It was most common (n=16) for regulatory areas to report that at least 'some' or 'most' of their interactions with regulated entities can be conducted via online digital systems. Five regulatory areas reported that 'few' interactions can be conducted online, and three regulatory areas reported that they rely fully on non-digitised methods (e.g. emailing a pdf document, making a phone call or visiting an office). The use of improve digital systems and technology among regulators is discussed in chapter 6.

More can be done to support continuous improvement and increase transparency around regulator performance

The survey revealed that most regulatory areas currently rely on their annual reports as the main mechanism for publicly reporting on their performance. Analysis of survey responses indicated that the measures used across regulatory areas for monitoring their performance were generally consistent and can be categorised as indicators of 1) activity, 2) compliance, 3) time frames, 4) complaints or disputes and 5) stakeholder feedback.

Almost all regulatory areas advised that they have strategies in place for continuous improvement (n=25), but the manner in which this is done is highly variable. In describing these strategies, the most common responses provided by regulatory areas were that these were: 1) as a standard part of their normal business processes (n=11); 2) involved internal and external reviews (n=13); and 3) were undertaken as part of the business planning and/or strategic planning processes (n=8). Other specific examples included:

- reference to an International Organization for Standardization (ISO)-certified regulatory management system (Dairysafe – Box 3.10);
- 'lean reviews' and 'lean thinking' (Mineral Resources, Safework SA, EPA and Return to Work SA);
- benchmarking against other agencies and considering recommendations made for other agencies (Liquor and Gaming, Fair Trading and Related Acts and Fisheries and Aquaculture); and
- a business improvement framework to reduce enterprise risk (Training and Apprenticeship Services).

Only one regulatory area reported that it did not have a strategy for continuous improvement; however, no explanation was provided as to why. As noted earlier in this chapter, submissions to this inquiry from SA regulators and others, and feedback from regulators as part of the Commission's consultations for this inquiry, have supported an enhanced regulator performance framework, such as the SOE framework recommended by the Australian Productivity Commission.

Box 3.10: Case study: Dairysafe — applying international standards to improve practice

Dairysafe recently sought third-party certification of its regulatory oversight, accreditation, audit systems and practices against ISO 9001:2015, which is an internationally recognised quality management standard. The standard applies seven key criteria for an effective quality management system:

1. *customer focus and customer satisfaction* – whether meeting 'customer' expectations is/is not the primary focus of management (i.e. the Minister and Government, the Dairysafe Board, accredited dairy businesses, Dairysafe approved auditors, and other food safety regulators);
2. *leadership* – whether the organisation's purpose and direction are clear;
3. *involvement of people* – whether staff are competent, empowered and engaged;
4. *process approach* – whether processes deliver consistent and predictable results and are managed as interrelated processes within a coherent system;
5. *continual improvement* – whether there is an ongoing focus on improvement and an ability to react quickly to changes in internal and external conditions;
6. *factual approach to decision-making* – whether decisions are based on analysis and evaluation of data and consideration of cause and effect, including unintended consequences; and,
7. *relationships management* – whether important relationships are identified and well managed.

The certification process involved two stages:

- Stage 1 involved an external audit of Dairysafe's systems and practices against the standard to identify potential gaps and areas of non-conformance.
- Stage 2 involved a follow-up audit to assess the actions taken in response to the first audit, and to arrive at an overall assessment of whether Dairysafe's quality management systems met the standard. This stage also involved reviewing a sample of Dairysafe's internal processes. The outcome was a recommendation that certification proceed once corrective actions identified in the audits were implemented and verified.

The main benefit of the certification process was that it provided assurance to Dairysafe and its customers that its regulatory oversight, accreditation and audit systems and practices met internationally accepted standards for quality management. As it involved undertaking a full review of all key internal processes, it resulted in Dairysafe implementing actions that strengthened its internal process controls. It also improved management's oversight of progress in achieving key performance indicators outlined in Dairysafe's strategic plan.

Source: OSAPC based on information provided by Dairysafe

3.4 Conclusion

Evidence gathered for this inquiry has demonstrated good practice against the SAPC regulator practice framework among a number of SA regulators, including in the areas of stakeholder engagement and monitoring and enforcement. Overall, regulatory areas generally aspire towards good practice principles, and work to integrate these into their policies, processes and improvement initiatives. Nevertheless, the results of the survey suggest there is variability in effort and maturity in some practice areas, particularly in ex-post evaluation and regulatory impact assessment. Additionally, the state can do more to deal with regulatory overlap with other state government entities, which would strengthen SA's regulatory framework. Significantly, regulatory areas indicated that the largest gains in their efficiency and effectiveness can be made by enhancing their digital systems. This is discussed in chapter 5.

Finally, while the vast majority of regulatory areas advised that they have strategies in place for continuous improvement, SA's framework for regulator improvement is underdeveloped compared to other jurisdictions. For this reason, the Commission has made recommendations to increase the transparency and rigour of performance reporting and to foster continuous improvement among SA regulators (recommendations 3.1 and 3.2).

Recommendation 3.1: Performance measurement and reporting

To increase the transparency and accountability of SA business regulators, the Commission recommends that the SA Government establish an across government policy framework to guide measurement, monitoring, and reporting of performance by regulators, based on the Commission's regulator practice framework. This policy framework would:

- be sufficiently flexible to recognise that regulators are a heterogeneous group with different legislative obligations, roles, structures and functions;
- be integrated into each regulator's annual planning and reporting cycle;
- include reporting on approval and rejection rates, and where applications are rejected, provide the reasons and consequences of the rejection; and
- include reporting on other KPIs and stakeholder feedback on performance.

Recommendation 3.2: Statement of expectations

To provide context of relevant government priorities and to promote a culture of continuous improvement, the Commission recommends that the SA Government introduce a Statement of Expectations (SOE) framework. The framework would apply to all state business regulators. Each SOE would be developed in consultation with the regulator and be issued by the responsible minister to the regulator every two years. These SOEs would include references to:

- the contribution to the governments' economic, social and environmental objectives, recognising the regulator's mandate;
- regulatory activities that are timely, outcome focused, and proportionate with regard to managing risks;
- ensuring open, transparent and efficient dealings with regulated entities;
- the pursuit of continuous improvement and innovation; and
- public reporting on the progress of improvement strategies and their outcomes.

4. Managing the stock of regulation

How the stock of regulation, once made, is managed, so that it remains relevant, fit for purpose and cost-effective contributes to an efficient and effective regulatory framework.

The following four sections discuss:

- the size, growth and need for effective management of the stock of regulation;
- leading approaches and practices for managing the regulation stock;
- how the stock of regulation is managed in SA and other jurisdictions; and
- the challenges and barriers to managing the regulation stock and reforms to address those challenges.

4.1 The size of the task

4.1.1 South Australia's stock of regulation

The Commission was unable to obtain an easily accessible and comprehensive list of the existing stock of all SA regulation (refer section 4.4.3)—particularly regulation that impacts on business activities and decisions. In the draft report, the Commission reported that the SA Government publishes lists of:

- the 539 Acts of Parliament that are committed to Ministers in accordance with section 5 of the *Administrative Arrangements Act 1994*;[59] and
- the 103 regulations that are due to expire under the Regulatory Expiry Program (REP) plus a further 36 regulations exempt from the REP.

In the absence of a comprehensive list, these figures provide a very general, albeit incomplete, indication of the size of the stock of existing SA regulation.

Consistent with jurisdictions around the world, Australian jurisdictions have experienced a relative growth in the stock of their regulation over recent decades, in spite of initiatives aimed at curbing the flow of new regulation. Much of the growth may be attributed to the changing needs and demands of an increasingly affluent society, increases in population[60], increasingly risk-averse attitudes, cultural changes and globalisation.[61] Recent research found that this growth has been accompanied by the increasing use of restrictive obligations contained in the regulation. A study found that the use of restrictive terms contained in the Australian Government's register of regulation grew by 5.5 per cent, per annum, from 2005 to 2019.[62] This growth compares to an annual population growth rate of around 1.6 per cent and an annual economic growth rate of around 2.5 per cent over the same period.[63] Since 2019, additional short-term regulatory obligations will have been imposed to protect and support the community as a result of the COVID-19 pandemic.

[59] South Australian Productivity Commission, *Draft report: inquiry into reform of South Australia's regulatory framework*, (2021), 96.
[60] P McLaughlin, O Sherouse, J Potts, *RegData: Australia Working Paper*, (2019), 27.
[61] For further details see Australian Productivity Commission, *Identifying and evaluating regulation reforms*, (December 2011).
[62] D Wild, C Hussey, *The Growth of Regulation in Australia*, (Institute of Public Affairs, 2020), 5.
[63] Ibid., 6.

According to the published lists of consolidated Acts of SA Parliament in force[64] there was a 42 per cent increase in the number of Acts in force from 1937 to 2021. The Commission considers that the above estimates may underestimate the actual size and growth of SA regulation given the limitations of the available data.

4.1.2 Why manage the stock of regulation?

> '*Just as new regulatory proposals need to be assessed to ensure they are fit for purpose and will yield net benefits to society, so, too, do existing regulations, which tend to greatly outnumber new ones, and which were often introduced under different circumstances.*'[65]

The Commission acknowledges that growth in the stock of regulation, by itself, is not necessarily an issue. However, leading practice research has shown that unchecked, ongoing growth in the stock of regulation over time can reduce its relevance and effectiveness, and increase the risk of:[66]

- regulated entities having to comply with duplicate or conflicting compliance obligations applied by different regulators (from within or across jurisdictions);
- redundant, irrelevant and/or out of date regulation that is inconsistent with technology, community expectations and priorities that change over time;
- the application of unnecessary and/or excessive regulatory coverage beyond the original objective of the individual regulation;
- different forms of regulation that interact and create unnecessary and excessive compliance and administrative costs;
- reduced correlation and increased ambiguity between the intent of the regulation and the outcome following implementation; [67]
- unintended market distortions from cumulative regulatory impacts on business investment, innovation and pricing behaviours and decisions;
- implementing outdated regulation that inhibits the application of modern business practices and innovation; and
- unanticipated and adverse environmental and social costs that can require significant resources to resolve.

> '*All regulatory changes have the nature of an experiment, as it is usually uncertain how the patterns of actual behaviour will evolve over time*'.[68]

According to a survey of SA businesses conducted for the inquiry (refer section 1.5 of chapter 1), 63 per cent of the respondents indicated that they experienced difficulties and challenges due to SA regulations that are outdated and/or inflexible 'all of the time', 'most of the time' or 'some of the time'. The most cited issues associated with outdated and/or inflexible regulations were that the regulatory requirements are not based on risk, are not proportionate, are too prescriptive, and do not reflect modern business practices.

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[64] Legislation SA, Acts of the Parliament of SA – As enacted 2021*, Historical consolidations* – 1936 and 1975 indexes, (Web pages, July 2021) < https://www.legislation.sa.gov.au/index.aspx>.
[65] OECD, *Best Practice Principles for Regulatory Policy: Reviewing the Stock of Regulation*, (2020), 8.
[66] Australian Productivity Commission, *Identifying and evaluating regulation reforms*, (December 2011), 14.
[67] NZIER, *Regulatory Management* Toolkit, (Working Paper, December 2019), 4.
[68] Ibid., 11

Governments implement strategies to mitigate the issues associated with the growth in the stock of regulation, including those identified above. The more common strategies are:

- evaluations or reviews of specific regulation to identify if the regulation is achieving its stated objectives and is still fit for purpose; and
- across government initiatives or programs aimed at reducing the regulatory burden of existing regulation.

When determining appropriate strategies to effectively manage the stock of SA regulation, the Commission notes that the following factors are relevant:

- the extent and quality of regulatory impact assessment (RIA) that was undertaken to approve the introduction of the regulation – particularly if the regulation has had a more significant impact than originally anticipated or intended;
- the level and depth of change occurring in technologies, market structures and cultural norms and expectation in the areas in which the regulation operates;
- the terminology and language used in the regulation – including regulatory obligations using prescriptive terms that may no longer be relevant or appropriate;
- the volume and type of new regulation that has been introduced with minimal or no regard to the impacts on, and interactions with, existing regulation;[69]
- the capability and capacity of government organisations that are charged with implementing and managing the regulation; and
- the extent of commitment to proactively manage regulation over its regulatory life cycle and maintain business and community confidence in that regulation.

The Commission considers that ex post evaluation of regulation is fundamental to ensure regulations continue to deliver on their intended objectives, are effectively implemented, and remain relevant in the face of prevailing and emerging social, environment and economic conditions.

4.2 Leading practices to manage regulation stock

Reference to leading practices and strategies to manage the stock of regulation can help to assess the performance of current practices in SA and identify opportunities for reforms that are appropriate and relevant to SA.

4.2.1 OECD best practice principles for ex post evaluation[70]

The OECD best practice principles for regulatory policy state that member countries should '*conduct systemic reviews…to ensure that regulations remain…cost effective and consistent, and deliver the intended policy objectives'*.[71] In support of that objective, the OECD published a set of best practice principles for the evaluation or review of the stock of regulation in 2020. The principles (Box 4.1) are designed to provide guidance and to be used as a tool to identify improvements that are appropriate and relevant to each jurisdiction.

[69] Queensland Productivity Commission, *Improving* regulation, (Research Paper, March 2021), 22.
[70] Note for consistency 'evaluation' has generally been used instead of 'review'; OECD, *Reviewing the Stock of Regulation,* (2020), 10-13.
[71] OECD, *Reviewing the stock of regulation,* (Policy, 2012), 10.

Box 4.1: OECD best practice principles for ex post evaluations of existing regulation

Three central principles apply across all regulatory management systems.

1. Ex post evaluations should be an integral and permanent part of the regulatory cycle.
2. Ex post evaluation processes should be comprehensive.
3. Ex post evaluations should include evidence-based assessment of the actual outcomes from the regulation and contain recommendations to address deficiencies.

Eight regulatory system areas necessary to support the above principles:

1. Governance arrangements:

- Use mechanisms to support effective oversight and accountability.
- Embed pre and post evaluation processes in institutional arrangements.
- Provide advance notice of forthcoming evaluation(s) to relevant stakeholders.
- Apply proportionality to ensure evaluations are cost effective.
- Promote transparency via consultation and appropriate publication.
- Clarify roles and responsibilities to mitigate conflict of interest risks.

2. Portfolio of evaluation methods or approaches:

- Different evaluation methods or approaches may be applied to ensure the most appropriate and effective method is used.
- Set criteria to help determine the evaluation method such as: the timing of the evaluation; complexity of the regulation and/or issue; any resourcing considerations; interactions with other regulation etc.

3. Essential questions:

- include certain essential questions in all evaluations on appropriateness, effectiveness, efficiency and appetite for reform.

4. Methodology for evaluation:

- Where possible, identify, measure and compare costs and benefits as part of an evaluation – particularly if proposing significant amendments.
- Ensure the effort and resources applied to measuring impacts are commensurate (proportionate) with the significance of the regulation.

5. Consultations:

- Coverage and length of consultation for an evaluation must be proportionate to the significance and sensitivity of the regulation.

6. Prioritisation and sequencing:

- Maximise effective use of limited resources by prioritising and coordinating evaluation activity (including subsequent reform activities) based on specified criteria (e.g. coverage, clear evidence of a problem, significance, resourcing).

7. Acquire in-house evaluation capability:

- Support and implement strategies to establish and improve capability to undertake effective evaluations.
- Apply alternative options where it is more appropriate to access capability from outside the evaluating organisation.

8. Committed leadership:

- Develop a culture that champions and supports effective post evaluation processes and mechanisms.

Source: OSAPC based on OECD, Reviewing the Stock of Regulation, (2020)

4.2.2 Australian Productivity Commission's 'good design' features for ex post evaluation

In 2011, the Australian Productivity Commission (APC) published a set of 'good design features' to be applied to management and evaluation of regulation.[72] The features can be applied to individual regulations or regulators, or to whole regulatory areas, industries, or across government). The APC features include:

- allowing sufficient time and resources to plan evaluations prior to their commencement by:
    - identifying, managing and coordinating resources and consultations required for evaluations – particularly where regulation and/or impacts on stakeholders overlap;
    - implementing effective triage processes to screen and prioritise evaluations and undertake proportionate evaluations (by reference to criteria such as significance, complexity, resourcing, responsibilities etc);
    - considering the information requirements to evaluate and measure impacts, including existing or missing information and data;
- assessing alternatives to regulation when evaluating – including nil regulation;
- transparent and clear governance arrangements; and
- demonstrated commitment by leaders to ex post evaluation obligations and processes – including the provision of appropriate resources to develop evaluation capability, undertake proportionate evaluations and encourage innovation.

4.3 Current approaches to managing the stock of regulation

> *'…Despite its importance however, completing the regulatory life cycle via ex post reviews tends to be the "forgotten child" of regulatory policy, with governments often adopting a "set and forget" approach'.*[73]

Until recently, most jurisdictions including the SA Government, focussed their efforts on managing the flow of new regulation rather than managing their existing stock of regulation. Exceptions have included regulation expiry or sunsetting programs and red tape reduction initiatives that focus on existing regulation. Various ex post evaluation or review methods can be used to assess regulation. The APC has proposed that the different evaluation methods can be grouped into three categories:

1. Programmed evaluations – scheduled to be undertaken at a specific time (normally within a certain timeframe after regulation is enacted);
2. Ad hoc evaluations – may be undertaken at any time once the regulation is enacted, can be initiated by stakeholders from within or outside of government, and may be due to a range of reasons including issues arising with implementation of the regulation; and
3. Stock management initiatives – programs or initiatives that can be once-off or ongoing and are aimed at reducing red tape and/or regulatory burdens.

Appendix 4 provides a summary of various ex post evaluation methods for each of the above categories.[74]

[72] Australian Productivity Commission, *Identifying and evaluating regulatory reforms* (December 2011).
[73] OECD, *Best Practice Principles for Regulatory Policy: Reviewing the Stock of Regulation* (2020), 3.
[74] Australian Productivity Commission, *Identifying and Evaluation Regulation Reforms*, (December 2011) 14-44.

4.3.1 Regulation expiry or 'sunsetting' programs

The most common form of ex post evaluation across Australia is regulation sunsetting programs. These programs aim to formalise a process to evaluate regulation at certain time intervals after it has been enacted.

The SA Government's REP prescribes the expiry of regulations in accordance with part 3A of the *Subordinate Legislation Act 1978* (the Act) which prescribes that regulations will expire on '*1 September of the year following the year in which the tenth anniversary of the day on which they were made falls*'.[75] The Legislation SA website states that the REP is designed '*to ensure that regulations are reviewed regularly and remade in a form that is appropriate to their current context'*.[76]

Cabinet Office within the SA Department of the Premier and Cabinet (DPC) manages the REP on an annual basis in consultation with the Office of Parliamentary Counsel (OPC). Expiry can be postponed for a total of four years (not exceeding 2 years for each postponement) which means that regulation subject to the REP may continue in its original format for up to 14 years, after which it must be remade as is, or amended and remade, or expire.

Cabinet Office advised the Commission that in 2020, of the 83 regulations that were due to expire on 1 September 2020, 16 per cent were remade by individual Ministers, 78 per cent were postponed by the *Subordinate Legislation (Postponement of Expiry) Regulations 2020*, and the remaining 6 per cent were allowed to expire or were repealed before their expiration.[77] A desktop review by the Commission has indicated that approximately 65 per cent of the regulation that is currently subject to the REP may impact on business activities and decisions.[78]

Section 16A of the Act lists the conditions under which regulation can be excluded from the REP. Regulation that is excluded includes that which is required to be laid before Parliament (i.e. Acts of Parliament), regulation that is amending an Act, and regulation that was made pursuant to an agreement for uniform legislation between states and/or the Australian Government. Regulation expiry or sunsetting programs of some other Australian jurisdictions are summarised in Table 4.1.

4.3.2 Ex post evaluation of regulation

South Australia

Different methods of ex post evaluation implemented by SA Governments include:

- prescribed evaluations in accordance with the enabling statute;
- initiatives to reduce red tape (and reach red tape reduction targets), remove regulatory barriers and simplify processes (focussing on business impacts);[79]
- evaluations or reviews instigated as a result of temporary (select) or standing Parliamentary committees;

[75] *Subordinate Legislation Act 1978,* s 16B(g).
[76] Legislation SA, *Expiry Program Information*, (Web Page, June 2021) < https://www.legislation.sa.gov.au/Web/Help/Expiry%20program/ExpiryProgram.aspx>.
[77] Department of the Premier and Cabinet (SA), provided June 2021.
[78] South Australian Productivity Commission, *Draft report: inquiry into reform of South Australia's regulatory framework* (2021), 114.
[79] For more details refer to section 1.7 in chapter 1.

- agency or regulator instigated evaluations determined through internal business planning; and
- ad hoc evaluations of regulation, regulated sectors and/or entities undertaken by regulators and agencies to address issues identified by stakeholders or arising from other circumstances.

The Commission notes that 44 per cent of SA regulators who were surveyed for the inquiry advised that they have not conducted any ex post evaluations of regulation during the past five years (refer section 3.3 of chapter 3). Even accounting for the small number of regulators who undertake regular evaluations, or who assign responsibility for evaluation to a separate authority, the Commission notes that 30 per cent still have not evaluated their regulation in the last five years. These results suggest that ex post evaluations are not common. The Commission considers the extent and rigour of ex post evaluations in SA needs to be enhanced to align more closely with best practice principles and practices.

Other Australian jurisdictions

Table 4.1 summarises the methods employed in some other Australian jurisdictions to manage their stock of regulation. The Commission notes that in those other jurisdictions, the obligation to undertake ex post evaluation or review is an integral part of the overall regulatory impact assessment framework.

The key differences between the approaches applied in other jurisdictions and the SA Government are:

- all the selected jurisdictions have some type of central authority or unit that provides governance, support and oversight of the regulatory framework – including mechanisms to manage the stock of regulation; and
- except for NSW, all mandate that some form of ex post evaluation is to be undertaken within a certain period of time after implementation of any new or revised significant regulation.

Table 4.1: Approaches to managing the regulation stock in selected Australian jurisdictions

Jurisdiction	Approach to manage existing regulation stock
Australian Government	Office of Best Practice Regulation (OBPR) oversees and supports the following initiatives: • post-implementation review (PIR) is required for regulation that has been shown to have substantial impacts and/or was introduced either because of an allowable exemption or inadequate regulatory impact statement (RIS); the PIR must be completed within 2 years of implementation where there was no, or insufficient RIS, and within 5 years for regulation that has a substantial impact; annual lists on the status of PIRs across government, and on those PIRs completed and published are published on the OBPR website; • sunsetting legislative instruments requirements; • statutory obligations contained within regulatory requirements; • regulation reviews undertaken by parliamentary committees (e.g. senate standing committee for the scrutiny of delegated legislation); and • other ex post evaluations as committed to by government.

Jurisdiction	Approach to manage existing regulation stock
Victoria	Office for the Commissioner for Better Regulation (OCBR) monitors, supports and reports on the implementation of evaluation strategies[80], and provides support and guidance. Regulatory impact assessment (RIA) must include a requirement for an ex post evaluation to be conducted within 3-5 years from the implementation of new or amended regulation where: • the preferred proposal may have a significant impact (over $8 million pa); • there are complex implementation and delivery issues (e.g. multiple agencies); • impact analysis identified significant gaps in knowledge or evidence up front; and/or • there is uncertainty about the expected benefits and costs of the preferred option. If an evaluation coincides with the RIS to be completed for regulations that are sunsetting, then it can form part of that RIS.
New South Wales	Regulatory Improvement Branch at NSW Treasury provides assistance and support for RIA. Statutory rules require subordinate legislation to be evaluated every five years under the *Subordinate Legislation Act 1989* (NSW), like a sunset program. No published reference found to ex post evaluation requirements.
Queensland	Office of Best Practice Regulation oversees and supports agencies for PIRs and sunset evaluations: • PIR is normally required where a regulatory proposal is exempt from a RIS and must be undertaken within 2-3 years of implementation. Requires a two-stage process: consultation PIR and then decision PIR and both can be published. • Sunset program – subordinate legislation has a sunset or expiry date under section 54 of the *Statutory Instruments Act 1992* (Qld).
Western Australia	Treasury's Better Regulation Unit provides advice and support to agencies including for PIRs. A PIR is required to be completed within three years of implementation if an exemption to undertake a regulatory impact assessment was granted.

Source: OSAPC – derived from relevant government jurisdiction websites

None of the above jurisdictions specifically indicate that they currently use a 'regulatory stewardship' approach although, like SA, most have adopted some of the components, including arrangements to encourage collaboration and focus on regulatory systems.

Regulatory stewardship

The Commission has found that the use of the term 'regulatory stewardship' and its application in overseas jurisdictions has been limited to date, except for in New Zealand (NZ). There are numerous definitions of regulatory stewardship, with the Ministry of Justice, NZ defining it as

> '*the monitoring and care of regulatory systems for which an organisation has policy or operational responsibilities. Its goal is to ensure that regulatory systems remain fit for purpose over the long term*.'[81]

The concept of regulatory stewardship assigns government agencies as the stewards of the regulation that is entrusted to them. As stewards, they are expected to care for that regulation in the interests of current and future communities in a manner that is accountable, transparent, and mitigates risks now and into the future.[82]

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[81] Ministry of Justice (NZ), *What is regulatory stewardship?*, (Web page, June 2021) <Regulatory stewardship | New Zealand Ministry of Justice>.
[82] Prof J van der Heijden, *Regulatory stewardship: virtue, mechanism or both?*, ANZSOG opinion, (2020).

Research indicates that application of regulatory stewardship by overseas jurisdictions is limited to specific sectors such as:

- waste and recycling in Northern America, Europe and the United Kingdom (UK); and
- sections of the financial sector in the UK and parts of Europe and Asia.

In Australia, the application of regulatory stewardship has been very limited. Reference to regulatory stewardship tends to be very brief and is generally limited to mention of certain stewardship characteristics rather than specific operational requirements. For example:

- the Australian Government's new regulator performance guide briefly mentions the adoption of a regulatory stewardship approach where ministers, secretaries and agency heads are responsible for ensuring regulations and regulatory approaches under their authority are fit for purpose and minimise regulatory burden;[83] and
- a recently published NSW Productivity Commission white paper includes a recommendation to move to a best practice regulatory policy framework that is underpinned by regulatory stewardship and rigorous impact assessments (noting the government has not yet considered the report).[84]

It appears that only the NZ Government has committed to a regulatory stewardship approach across the regulatory life cycle and across regulatory systems. The key mechanism to operationalise stewardship is the inclusion of a regulatory stewardship principle in the *Public Service Act 2020 (NZ)*, which appoints agency chief executives as stewards of the regulation administered by their agency. In support of the responsible minister. NZ adopted its regulatory stewardship approach due to:[85]

- ongoing growth in the stock of regulation and associated increasing administration and compliance costs for businesses and government agencies; and
- changes to business and government behaviours and practices arising from technological, cultural and other changes over time.

Some of the key features of the NZ stewardship approach are:

- regulatory stewardship extending beyond specific regulations to regulatory systems;
- a life cycle view of regulation involving ongoing collaboration and monitoring;
- publication and reporting on expectations for agency regulatory stewards that set out their responsibilities; and
- mechanisms to keep regulation relevant and up to date including omnibus Bills to repeal legislation that is considered no longer valid and to make minor amendments to improve regulatory systems.

An example of how regulatory stewardship is applied to managing regulation by one of NZ's largest regulators is provided in Box 4.2 below.[86]

[83] Only one mention in Australian Government, Department of the Prime Minister and Cabinet, *Regulator Performance Guide* (July 2021), 3.
[84] Ibid, 119
[85] NZIER, *Assessing the stock of regulation – a tool for regulatory stewards*, (Working Paper, 2016-01), 6
[86] Ministry of Business, Innovation and Employment (NZ), *Regulatory* Stewardship (Web Page, June 2021) < https://www.mbie.govt.nz/cross-government-functions/regulatory-stewardship/> .

Box 4.2: Regulatory stewardship and the NZ Ministry of Business, Innovation & Employment (MBIE)

As one of the largest regulators in NZ, the MBIE has responsibility for stewardship of 112 statutes across 17 regulatory systems. Approximately 75 per cent of MBIE's work relates to the design, delivery and management of those regulatory systems.

MBIE's whole-of-regulatory system approach to managing regulation involves considering how all of the regulatory functions in a system work together to achieve a good regulatory outcome. Regulatory functions can include policy advice, service delivery, compliance and enforcement, monitoring and evaluation, dispute resolution etc.

In most cases, several agencies are involved in delivering the different aspects of a regulatory system; however MBIE is the steward of the overall regulatory system. MBIE must ensure there is adequate transparency and coordination so that roles and responsibilities are clarified, information is shared as required, and there is proactive collaboration.

MBIE adopted the following four measures to manage the regulation stock for which they are the regulatory steward:

- develop and contribute to omnibus amendment bills that evaluate regulation and propose amendments to ensure the regulation remains fit for purpose;
- undertake programs of assessments on different regulatory systems using cross functional teams, targeted stakeholder approaches, benchmarking and reporting;
- develop, maintain and publish charters to support the management of the regulatory systems they oversee; and
- facilitate cooperation with international regulatory organisations and institutions to share information and address inconsistencies in existing regulation.

Source: OSAPC based on www.mbie.govt.nz/cross-government-functions/regulatory-stewardship/

The Commission considers that the concept of stewardship embodies the characteristics of what is regarded as best practice regulation by Australian and overseas jurisdictions and the OECD.

Elements of a regulatory stewardship approach are already part of SA's regulatory framework – including assigning chief executives and ministers' responsibility for the regulations under their authority.

The evidence as to the effectiveness of regulatory stewardship —particularly with respect to operationalising regulatory stewardship and what it means in practice—is limited at this time given it is a relatively new and novel concept and not widely applied.[87]

The reforms proposed by the Commission are consistent with the best practice principles which are encapsulated in the notion of regulatory stewardship.

4.4 Challenges and opportunities for reform

A leading practice approach to managing the stock of regulation requires consideration of the regulation itself as well as the structures, systems and processes that support effective and proportionate ex post evaluation.

'*Individual regulations do not operate in isolation but interact as part of a system*'.[88]

[87] J van der Heijden, 'Regulatory Stewardship: the challenge of joining a virtue and a mechanism', (February 2021) *Policy Quarterly*

[88] NZIER, *Regulatory Management toolkit*, (Discussion Document, 2019), 4.

The overall aim is to have an effective and efficient approach to managing the stock of regulation to ensure that the regulation remains fit for purpose, does not impose unnecessary or excessive regulatory burdens and reflects contemporary practices and priorities. In practice, all government jurisdictions, including SA. face ongoing significant challenges when trying to effectively manage their regulation stock. The OECD concluded:

- in 2020, based on indicators of regulatory policy and governance surveys, the systems in place for ex post evaluation of regulation are less developed and less formalised than for other stages of the regulatory life cycle

  '…some form of ex post evaluation was recorded as obligatory by only 60% of member countries, compared to around 90% for ex ante assessment'; [89] and

- in 2016, '*few countries assess whether underlying policy goals have been achieved, whether any unintended consequences have occurred and whether there is a more efficient solution'* [90].

The Commission has categorised the challenges of managing the stock of SA regulation into broad themes that align with the leading practice principles and features discussed in section 4.2. Stakeholder feedback provides further evidence to identify opportunities for reform.

4.4.1 Governance

Governance arrangements that can impact on the quality and type of ex post evaluation of regulation are:

- the roles and responsibilities of the key participants and associated approval mechanisms; and
- the extent of leadership commitment and support.

In SA, the current governance arrangements for ex post evaluation are:

- Cabinet Office coordinates the REP and associated Cabinet submissions; and
- individual ministers and agency chief executives are responsible for processes to vary, remake or revoke regulation within their portfolio.

Apart from Cabinet Office's role and responsibilities, there is no overarching central authority that oversees or manages ex post evaluation of SA regulation. The Commission notes that most other Australian government jurisdictions have a central unit or authority that:

- oversees regulation evaluation (including ex post evaluation of regulation) and reform activity across government;
- provides guidance, education and information on evaluation activity;
- is normally located either within, or aligned with, a central government agency; and
- has direct lines of communication and engagement with senior management and ministers to provide advice and information on evaluations and their outcomes.

The Commission considers that some form of central coordination and oversight is necessary to promote consistency and lift the quality of ex post evaluations across government (refer chapter 6).

[89] OECD, *Reviewing the Stock of Regulation* (Report, 2020), 16.
[90] OECD, *Recommendation of the Council on Regulatory Policy and Governance* (2016), 234.

The extent of senior management and ministerial commitment to the objectives and practices to manage regulation (including ex post evaluations) influences the:

- overall culture and attitude of government agencies and their staff to proactively manage regulation;
- availability and capability of resources that government agencies can use to effectively manage regulation (from evaluation of regulation to implementation of approved reforms);
- appetite for risk and innovation – particularly if proposed reforms arising from an evaluation are likely to adversely impact the budget bottom line (in the short or longer term); and
- agency governance and accountability arrangements – particularly with respect to delegations and approvals.

The Commission heard from industry that, in their experience, it is often easier to obtain ministerial and/or senior leader approval and commitment for financial support compared to support for evaluation of existing regulation.

Factors that may influence senior leader and/or ministerial commitment to ex post evaluation (and resulting reforms) may include:

- perceptions that the creation of new regulation and/or major reforms (versus existing regulation and/or incremental reform) are more innovative and risky;
- the potential impacts on the budget bottom line – particularly if there are ongoing impacts like the reduction of regulatory revenue streams or ongoing costs to implement and maintain reforms; and
- reluctance to publicly highlight where regulation has not worked as planned or had unintended and adverse consequences.

> '…*governments may be fearful a review finds that a regulation has not helped to solve the problem that it was designed to fix*.'[91]

Senior leader and ministerial commitment to the purpose and strategies required to effectively manage the existing stock of regulation is considered a necessary element of a modern, fit for purpose framework. The Commission considers that the regulatory framework in SA would be improved through some form of central leadership and the provision of consistent policy guidance on ex post evaluation with the aim of improving the evidence base for regulatory reform (refer recommendation 4.3).

4.4.2 Consultation and engagement

Stakeholder consultation and engagement on the current stock of SA regulations will necessarily vary depending on the nature of the regulation being evaluated, the timing of the evaluation, and the available resources. However, the Commission considers that it is nearly impossible to know whether an existing regulation is meeting its objectives without hearing from those affected by it—let alone propose any changes to the regulation. In addition, a lack of complaints or stakeholder silence does not necessarily mean that the regulation is working as planned or is being managed and implemented as effectively and efficiently as possible.

The Commission has been provided with feedback which has included examples of leading practice stakeholder engagement in SA. For example, ESCOSA advises that its stakeholder

[91] OECD, *Reviewing the Stock of Regulation* (Report, 2020), 8.

engagement process with regulated industries has contributed to better outcomes for the industry and provided information that will assist with future evaluations of regulation.[92]

The Commission notes that 63 per cent of business respondents to a survey undertaken for the inquiry (refer section 1.5 in chapter 1) found poor communications with SA Government regulators and agencies made complying with SA regulation a challenge 'all of the time', 'most of the time' or 'some of the time'. Other industry feedback[93] to the Commission was that consultation and engagement:

- is often sought towards the end of the evaluation process and often after initial findings have already been developed – contributing to a perception that consultation is 'tokenistic'

  Most processors will report that input into legislative and regulatory reviews is usually tokenistic with arbitrary decisions being made regarding quotas etc. Perhaps the best examples were during the boundary 'discussions' on the marine parks where lines had been drawn within PIRSA with virtually no real consultation having taken place with fishers or processors. (Seafood Processors and Exporters Council, DR17, p.1);

- can be inconsistent, sporadic, uncoordinated and one-way

  'In our industry's experience, there is simply not enough consultation by the state with industry and industry associations on regulatory change' (SA Freight Council, DR19, p.2);

- does not account for the differences within and across different industries;
- is desired where it is well planned (i.e. timely), relevant and proportionate (commensurate with the regulation being evaluated), and coordinated (to avoid overlap)

  '*Agencies have reported duplication of consultation effort, and difficulties in engaging business when they have recently participated in other consultations';*[94] and

- needs to be coordinated so that information and data provided is shared with other government authorities where appropriate and relevant.

The Commission was also told that industry and business stakeholders support:

- the ongoing roles and responsibilities of the Small Business Commissioner and the Industry Advocate; and
- the use of forums or mechanisms that enable regular interaction between businesses and government authorities – particularly where challenges or opportunities on existing regulation can be raised and discussed (noting similar forums were set up in response to the COVID-19 pandemic).

The Commission heard from multiple stakeholders that previous reforms that encouraged collaboration between agencies and levels of government were particularly helpful. Specific mentions were made of the previous State Local Government Red Tape Taskforce which enabled state and local government to work together on business regulation priority areas.

> '*Once regulations are in place, good two-way communication can be crucial to the effective administration of regulations and to identifying ongoing refinements*.[95]

[92] South Australian Productivity Commission, *Draft report: inquiry into reform of South Australia's regulatory framework* (2021), Box 3.10, 94.
[93] SAPC, *Request for Information from Industry Associations,* (19 responses, June 2021).
[94] Australian Productivity Commission, *Identifying and evaluating regulation reforms* (December 2011), 44
[95] ibid.

4.4.3. Capability and capacity

The Commission heard from many government stakeholders about the level, type and quality of resources that are available to evaluate regulation. Many agencies advised that the level and quality of their resources (staff and systems) directly impacts on their capacity and quality of their evaluation work. The Commission heard that:

- there are areas within government where there is a perceived lack of experienced and capable regulatory or policy staff with a good working knowledge of the industry and associated legislation, and who know how to assess regulatory impacts; and
- regulation management practices would benefit greatly from improvements to data and information – particularly the type of data collected, ease of access and use, and improved information sharing across regulators.

Availability and access to relevant data and information

When considering potential improvements to managing the stock of regulation, the availability and quality of information is a crucial factor. This includes information on:

- the size, composition and content of the stock of SA regulation; and
- the ex post evaluation activity that has been undertaken, is underway and is planned.

Information and/or data on the size, composition and content of the stock of SA regulation

The Commission found it difficult to obtain and then assess appropriate data and information on the stock of existing SA regulation. Lists of regulation (in pdf or word format) had to be copied, pasted, cleaned and reformatted before any analysis could be undertaken. The lists were also focussed on specific types of regulation and did not provide a comprehensive picture of the regulation stock.

Since the publication of the inquiry draft report, the Commission has received feedback from government agencies that they would support improvements to the availability, access and usability of information on existing SA regulation. Currently, the main information sources available are:

- an agency's own data or information (which varies considerably across government and is often not shared outside of that agency for various reasons);
- other government regulatory websites – in particular the ABLIS website that includes regulatory requirements for all Australian jurisdictions;
- published reports including annual reports; and
- the websites for Legislation SA and for Parliament SA.

Legislation SA is a website that provides wide ranging information on SA Government regulation in accordance with the object set out in the *Legislation Revision and Publication Act 2002*. This includes enacted Acts of Parliament, associated subordinate legislation, and Bills which can be downloaded in a pdf or word format to save, print, or read online. The Legislation SA website also has a word search function.

The Commission investigated how other jurisdictions across Australia provide data and information on their existing stock of regulation.[96] All jurisdictions have a website that is

[96] South Australian Productivity Commission, *Draft report: inquiry into reform of South Australia's regulatory framework* (2021), Table 4.4, 112-113.

similar to the Legislation SA website although some provide some additional functions and information such as:

- list(s) or register(s) containing all different types of regulation by title (hyperlinked to the legislative instrument) that can be easily exported (i.e. to word or excel) and analysed;
- website design that is accessible to all community members and easy to navigate – including functions such as BrowseAloud which assists those requiring reading and translation support;
- information on interactions between different Australian Government regulatory instruments; and
- lists of the most popular titles available up front, weekly updates on news; and FAQs.

The Commission concludes that improving access to, and the usability of, the high-quality information that is already available on the Legislation SA website, and promoting other websites that contain useful regulatory information, would support and improve the capability of those regulatory and policy officers tasked with evaluating regulation and providing information and advice to key government decision-makers and ministers.

The Commission is mindful of the resource implications to implement proposed reforms and considers that any reforms to improve information on the stock of regulation should leverage off the high-quality resources that already exist. The Commission notes that although such reform requires some initial upfront investment longer term benefits would accrue directly to multiple regulatory and policy agencies across government – particularly those conducting ex ante and ex post evaluations to assess regulation performance and improvements.

Recommendation 4.1: Enhance SA regulation online resource

To support a system-wide approach to developing and evaluating regulations relevant to business, the Commission recommends that the SA Government leverage existing information and tools, including artificial intelligence (AI) and RegTech, to develop an online regulation information resource that is.

- based on the existing Legislation SA website;
- informed by reforms implemented in other jurisdictions to improve functionality and usability; and
- designed according to assessments of the costs and benefits of alternative approaches.

Information and guidance on ex post evaluation activity

The main source of information provided to the Commission on the level of ex post evaluation activity undertaken across the SA Government is the regulator survey (refer section 3.3 of chapter 3). Stakeholders from both industry and government advised the Commission that access to information on previous, current or planned evaluations would be useful and would assist their planning activities.

The Commission found that many other Australian jurisdictions publish information and guidance specific to ex post evaluation of regulation[97] including:

[97] South Australian Productivity Commission, *Draft report: inquiry into reform of South Australia's regulatory framework* (2021), Table 4.6, 113.

- guidance and tools on the purpose, planning and application of ex post evaluations (or reviews) for regulatory and policy officers;
- planned ex post evaluations (or reviews) and their current status; and
- reports and data on the results of ex post evaluations including the status of the implementation of evaluation strategies.

The results of the Commission's regulator survey show that 52 per cent of those regulatory areas that have completed an ex post evaluation within the last five years have publicly released those evaluations.

The Commission considers that there are opportunities to improve access to, and the quality of, information on ex post evaluation activity in SA. One immediate improvement would be to share information and data on ex post evaluation activity (and/or results) across agencies (and with industry where appropriate) by using existing channels of communication and forums.

Future reforms to improve ex post evaluation activity information could involve the application of machine learning tools or software that periodically undertake stocktakes of existing regulation and identify priority areas for evaluation (refer chapter 5).

Workforce capability

Part of ex post evaluation involves assessing the impacts of the regulation. Therefore, reforms aimed at improving policy and regulatory officer capability in regulatory impact assessment would also improve capability for ex post evaluations.

The Commission received feedback indicating strong support for reforms that help to develop capability and capacity in regulatory evaluation – particularly for those regulators constrained by limited skilled resources.

The Commission acknowledges that ex post evaluations of regulation can sometimes be more complex and may require slightly different approaches and skills depending on the nature of the regulation.

> *The reality is that ex post assessments of regulations are in some respects more demanding and less straightforward than assessments undertaken at the proposals stage. This reflects in part the challenges posed by the large number of regulations potentially involved, and a need for different approaches and methods in different contexts*.[98]

The issue of agency capability is further explored in chapters 2 and 5; however, the Commission believes that immediate improvements could be made by providing better across-government guidance for regulatory and policy officers on ex post evaluations – the purpose, steps, and risks and so on.

[98] OECD 2020, *Reviewing the stock of regulation* (2020), 16.

Recommendation 4.2: Build evaluation capability

To improve the quality and consistency of ex post evaluation of business regulation, the Commission recommends that the SA Government build public sector knowledge regarding the purpose of ex post evaluations and build capability in evaluation methods by:

- developing guidance material and tools, supported by training for agencies on the purpose, requirements, processes and different approaches to undertake proportionate and effective ex post evaluations; and
- incorporating specific guidance information on the Regulatory Expiry Program (REP) to ensure the program is targeted, proportionate, timely and effective.

4.4.4. Proportionality and risk

The Commission has heard from stakeholders that although it is agreed that ex post evaluation is an important part of managing regulation, the type and level of evaluation activity should be proportionate to the significance and risk of the regulation to be evaluated.

Industry and regulators provided feedback for the inquiry in support of ongoing monitoring and proportionate ex post evaluation for significant pieces of SA legislation. The feedback also indicated that there are circumstances where an evaluation may not be necessary or would be a routine process. They include:

- regulation that has a minor or insignificant impact on business or industry; and
- regulation that has already recently been reviewed (individually or as part of a wider review).

The Commission has also heard that the evaluating agency can sometimes apply a narrow scope and not account for interactions with other regulations. This means that the true impact on business, community and/or the environment is not assessed and this can have important consequences on those stakeholders. For example, businesses may end up still having to comply with duplicated regulatory obligations that were not identified or reformed in an evaluation.

> *'…the farmer's existence is hampered by a substantial list of forms that they are required to fill out on a regular basis for various government departments' (South Australian Dairyfarmers Association, DR18, p.1).*

By having access to a range of evaluation methods or tools, agencies can choose the method that enables them to undertake ex post evaluation that is proportionate, and risk based.

4.4.5 Evaluation method and type

Any ex post evaluation will necessarily include in its methodology some form of impact assessment in order to identify and measure the regulation's performance. A proportionate approach to measuring impacts helps to ensure that the level and type of resources and effort applied are commensurate with the impacts of the regulation. Further information and proposed reform on RIA is provided in chapter 2. Any improvements to RIA (as proposed) will also improve the quality of ex post evaluations.

Given the wide range of regulatory instruments, there is no 'one size fits all' approach to evaluating the stock of regulation. Leading practice approaches propose a 'toolkit' or 'suite'

of different methods of ex post evaluation should be available so that the most suitable method of evaluation is applied given the specific circumstances and type of regulation. Appendix 4 summarises the various types of evaluations that may be applied.

The following factors should be considered when determining what type of ex post evaluation to apply:

- the significance, risk and complexity of the regulation including impact on industry and interactions with other regulations (at the same or different levels of government);
- the capability and resources available to undertake the evaluation including other activity that may impact on the availability of stakeholders and other resources;
- the timing of the evaluation and/or its urgency;
- the events or issues that triggered the evaluation and the significance and/or sensitivity associated with those triggers; and
- previous evaluations of the regulation (including if part of a wider review), when they occurred, the findings and reforms.

Consideration of the above factors will support a proportionate and risk-based approach to evaluation.

Regulation expiry or sunset evaluations

Sunsetting or expiry programs are the most common type of ex post evaluation applied across different Australian jurisdictions (refer Section 4.3.1).

Feedback from stakeholders on the efficiency and effectiveness of the SA Government's REP and were identified through consultation and included:

- Many view the REP as an unnecessary administrative imposition that has little to no impact on the quality of the overall stock of regulation given the insignificance or administrative nature of the regulations in scope for the REP (and those that are exempt).
- Most agencies will automatically postpone regulations with no evaluation until they are required to remake or revoke the regulation.
- Most agencies will remake regulation with no amendments and following minimal to no evaluation.
- Evaluation that is driven purely by timeframes and with no consideration to significance is not a best practice approach.
- Some agencies lack the capability and resources to adequately plan for, and undertake, evaluations of regulation subject to the REP.
- Undertaking an evaluation of a regulation for the first time 14 years after it was enacted (i.e. prior to expiry) is considered inadequate and too late given the potential harm that may have already been caused (noting that the REP itself does not prevent evaluations from being conducted sooner).

  In this rapidly changing technology environment, ten years between legislative reviews does not allow Councils to innovate and support changing community needs or expectations. This timeframe also impacts on the ability for Councils to consider and implement State and Council Strategic objectives which are more visionary in nature, which may limit a council's ability to plan

in a visionary manner and realise the potential of Artificial Intelligence and smart cities capabilities (Port Adelaide Enfield Council, DR14, p.7).

The Commission found that there was a lack of guidance and minimal promotion of the purpose and benefits of the REP for government agencies, particularly when compared with similar programs in other jurisdictions. For example:

- The Australian Government publishes a guidance note and a 55-page guide to managing sunsetting of legislative instruments including templates for evaluations and exemptions.
- The Queensland Government publishes specific guidance on evaluating expiring legislation (called sunset reviews).
- The Victorian Government publishes guidance on how to prepare a regulatory impact statement for sunsetting regulations.

The Commission also found it difficult to obtain information on the outcomes of evaluations that had taken place under the REP making it difficult to determine whether the REP is working in accordance with its stated objective 'that regulations are reviewed regularly and remade in a form that is appropriate to their current context'.[99]

Various reform proposals for the REP were raised for the Commission's consideration. In the absence of further evidence, at this time the Commission did not consider that the identified issues warranted a change to the *Subordinate Legislation Act 1978* in order to expand the scope or amend the structure of the REP. The Commission considers that most issues relate to how the REP is managed and implemented and that performance of the REP can be lifted through:

- improvements to central oversight and guidance of regulatory reform (refer to chapter 6);
- better and more relevant information on the existing regulation stock (refer recommendation 4.1) and evaluation activity (refer recommendation 4.3); and
- improvements in the capability and skills of agencies to plan and undertake ex post evaluations of regulation (refer recommendation 4.2).

4.4.6 Timing and frequency of ex post evaluation

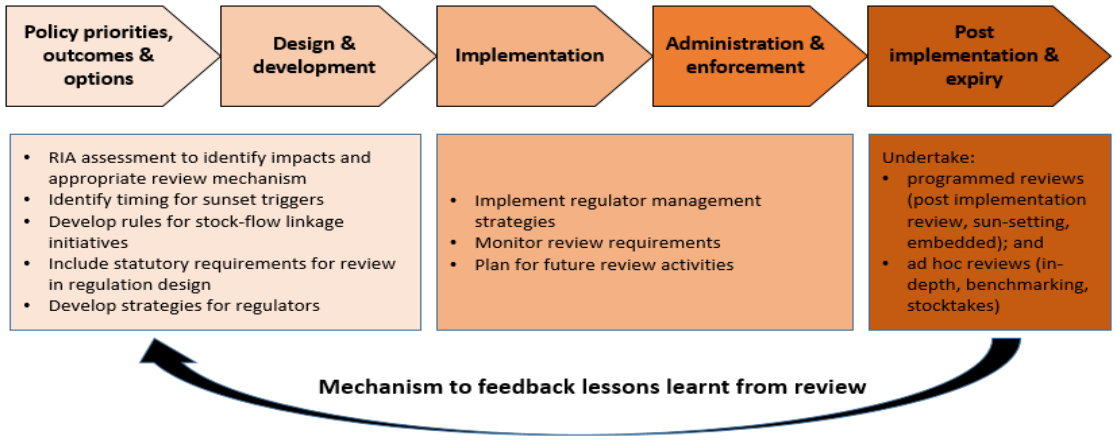
With respect to the frequency of ex post evaluations, the Commission heard from industry stakeholders that some are concerned about too many evaluations as they can tie up resources in consultations and can result in multiple changes and greater uncertainty. Conversely, stakeholders were also concerned about infrequent or nil evaluation results in regulation that is out of date and/or irrelevant.[100]

The Commission's regulator survey indicates that 44 per cent of regulatory areas surveyed had not conducted an ex post evaluation in the past five years (noting the minority who do undertake ongoing evaluations). Furthermore, the survey of businesses undertaken for the inquiry indicates that 63 per cent of business respondents find SA regulation outdated or inflexible 'all of the time', 'most of the time', or 'some of the time' when complying with that regulation. These statistics, although limited, suggest that the level of ex post evaluation of regulation in SA is not sufficient to ensure that regulation remains fit for purpose.

[99] Legislation SA, *Expiry Program Information*, (Web Page, June 2021) <https://www.legislation.sa.gov.au/Web/Help/Expiry%20program/ExpiryProgram.aspx>.
[100] South Australian Productivity Commission, *Draft report: inquiry into reform of South Australia's regulatory framework* (2021), 127.

When considering the timing of ex post evaluation, one of the key considerations is the regulatory life cycle stage as certain types of evaluations are more appropriate at different life cycle stages. (Figure 4.1)

Figure 4.1: Type of evaluation by regulatory lifecycle stage



Source: OSAPC

Figure 4.1 also indicates that leading practices suggest that any relevant findings or conclusions arising from an ex post evaluation should then be relayed back to the policy or regulatory area as part of a continuous improvement cycle. The Commission noted that the regulator survey shows 80 per cent of those regulatory areas that have undertaken at least one ex post evaluation in the past five years reported that the evaluation(s) results had influenced future regulatory design and practices to a large or very large extent.

The Commission observed that when considering timing, both industry and government stakeholders do not want decisions on ex post evaluations to be based solely on a specified timetable (i.e. x years after enactment etc). Although the length of time since previous evaluation is an important consideration (particularly where the regulated industry has experienced rapid change), it is not the only consideration.

> *Whilst the management of the stock of regulation is important, government must be mindful not to create a system that is driven by timeframes alone and results in government resources and industry/stakeholder time being used to review regulations that are operating well. (Dairysafe, DR7, p.12)*

4.4.7 Prioritising and sequencing

The Commission identified several matters that may influence a regulator's decision on whether an ex post evaluation is necessary, and on planning and prioritising evaluations (particularly when managing multiple regulations). These include:[101]

- the type of evaluation method to apply and the factors leading to that choice (refer 4.4.5 above);
- potential impacts of other evaluation activity that is occurring or planned and will impact on the regulation and/or available resources and stakeholders;
- the level and quality of the regulator's ongoing regulation management strategies (where regulation is kept fit for purpose via other ongoing mechanisms);
- current government strategic priorities and the economic influences impacting those priorities; and

[101] Based on Queensland Productivity Commission, *Improving regulation,* (Research Paper, 2021), 23.

- the level of commitment from leadership and attitudes to continuous improvement in regulatory management.

4.4.8 Ex post evaluation policy

Apart from a brief mention of the REP in the *Better Regulation Handbook*, there is no across-government policy or guidance that applies to ex post evaluation aimed at improving the quality of the stock of SA regulation. The Commission considers that a consistent policy, applied across government, would help ensure that regulations are evaluated as required, reflect modern practices and conditions, and are achieving the stated objectives. Such a policy is:

- consistent with leading practices and the notion of regulatory stewardship; and
- provides opportunities to promote and improve capability in impact assessment skills.

The Commission received stakeholder feedback indicating support for the development of an across-government policy on ex post evaluation of regulation. The Commission modified the draft recommendation that was proposed in the inquiry draft report in response to feedback and based on further information provided through consultations, surveys and other relevant sources. The policy would apply:

- at both the individual agency level (regarding the regulation that they administer), and at the lead agency coordinator (or group of agencies) level (regarding regulation across a sector or area); and
- to the REP (refer section 4.4.5 and recommendation 4.2) and other types of evaluation methods.

The Commission acknowledges that some reform activity is already underway or is planned which could impact on the implementation of the recommendations contained in this report – including recommendation 4.3 below. For example, various streams of work are being completed as part of the SA Government's Growth State Plan program of works. The Commission considers that if the recommendations contained in this chapter are supported, any implementation would leverage off reform activity that is already underway or planned, and any existing governance arrangements (if suitable). The Commission recommends that the policy be developed in consultation with key regulatory agencies including local government and once implemented, the policy be evaluated within two years.

Recommendation 4.3: Across government ex post evaluation policy

To proactively manage and improve the quality of SA regulation, consistent with the notion of regulatory stewardship, the Commission recommends that the SA Government develop an across government policy on ex post evaluation. The policy will provide information and guidance on:

- the importance and benefits of ex post evaluation;
- triggers or prompts to help determine whether an evaluation is necessary;
- planning and coordination of evaluation;
- criteria to guide how an evaluation should be undertaken including the type of evaluation with reference to proportionality and risk;
- a holistic approach to regulation review that considers associated regulatory interactions (including those with other governments); and
- sharing of plans for and reports on evaluations with regulated entities and other regulators to promote collaboration and transparency.

4.5 Conclusion

This chapter discussed the relative growth in the stock of regulation in recent decades in SA and other Australian and international jurisdictions. Much of that growth is due to the changing expectations of an increasingly affluent society, increasing population, changing attitudes to risk and increasing globalisation. By itself, that growth is not necessarily an issue. However unchecked, ongoing growth in the regulation stock over time can reduce its relevance and effectiveness and can lead to:

- a myriad of rules and regulations that create a complex regulatory environment for businesses;
- regulations that are no longer fit for purpose;
- unintended and adverse interactions with other regulations; and
- excessive and/or unnecessary regulatory costs and barriers, and reduced business and community confidence over the longer term.

The evidence gathered from the regulator survey and stakeholder consultations suggests that ex post evaluation is not common in SA and that the state falls short of best practice.

The Commission does not consider that there is one single method that can be applied to manage the stock of regulation efficiently and effectively given the impacts (including costs) arising from regulation are multi-dimensional. To address current and future challenges, the Commission considers that a range of proportionate evaluation methods is required across the regulatory life cycle.

Reforms to improve the overall quality of regulation will require a combination of improved policy, guidance, information and capability as discussed in this chapter, and are complemented by the Commission's proposed reforms for the other stages of the regulation life cycle.

5. Regulating for the future

This chapter discusses the challenges and opportunities facing regulation design and implementation, and considerations for 'future-proofing' South Australia's regulatory framework. What policy makers often refer to as 'the future' is already here. New online and digital systems, the development of new technologies, the expanding uses of real-time and big data, and applications for artificial intelligence, are both disrupting markets and broadening the frontiers of traditional regulatory practice. Governments and regulators are also grappling with how to regulate in sometimes rapidly changing market environments, and to this end, lessons from SA's recent experiences are especially instructive. Even in markets where there is not rapid change, substantial gains can be made by continuing to adopt and enhance digital and online systems which increase the efficiency and effectiveness of regulators and regulatory processes while reducing compliance costs for regulated entities.

This chapter is structured as follows:

- Section 5.1 outlines some of the challenges facing regulators because of technological innovation and digital disruption.
- Section 5.2 discusses regulatory technology (RegTech) and the ways it can improve regulatory systems and practice.
- Section 5.3 examines how regulatory systems can adapt in more novel circumstances, for innovation, and in times of economic shock.
- Section 5.4 provides some concluding comments.

5.1 Regulating in a digitised world – some challenges

The OECD identifies four broad challenges that digital transformation poses for continued regulatory efficiency and effectiveness.[102] These are:

- The *pacing* challenge – the sheer pace of technological change itself fundamentally challenges contemporary regulation. Digital technologies develop faster than regulations and the governing structures that create and administer them.
- The *design* challenge – 'fit for purpose' regulatory frameworks are more difficult to design because digital innovations are blurring traditional market distinctions. For example, technology is enabling households to be both producers and consumers in energy markets. Additionally, the digital economy has tested the boundaries of existing regulatory regimes, sometimes resulting in 'new tech' participants playing by different rules compared to their non-digital counterparts.
- The *enforcement* challenge – more complex and globally integrated supply chains make it difficult for regulators to identify and enforce obligations on regulated entities. Some typical examples include intellectual property rights and taxation, but in practice this issue can arise in any aspect of regulation where market structures are complex.

[102] OECD, *Regulatory effectiveness in the era of digitalization (*OECD Publishing, 2019) <https://www.oecd.org/gov/regulatory-policy/Regulatory-effectiveness-in-the-era-of-digitalisation.pdf >.

- *Institutional and trans-boundary* challenges – traditional ministerial, institutional and jurisdictional boundaries are no longer adequate to address issues in technology disrupted markets. New digital technologies can span multiple regulatory regimes, creating potential confusion and different risks. Also, ad hoc and fragmented responses across jurisdictions can undermine the effectiveness of regulatory action, or alternatively, create barriers to the spread of beneficial digital innovations.

SA has already faced challenges on how best to regulate new digital markets. For example, in 2018, the SA Government introduced the *Fair Trading (Ticket Scalping) Amendment Act 2018* (the Act), which sought to curb ticket scalping behaviour by setting a cap on the profits of ticket resales (110% of the original ticket price) and prohibiting the advertisement and use of websites for such ticket resales. Vendors that are found to violate the Act face financial penalties. This regulation creates clear monitoring and enforcement challenges for a market where consumers can easily act as suppliers, where the identity and location of suppliers can be difficult to verify, and where advertisers and websites are global in reach. Also, the benefits to consumers versus the costs of such regulations are not clear, and it may be more effective for national regulation to address consumer protections relating to ticket resales.[103]

Part 37N of the Act requires a ministerial review of the provisions, with the results to be reported within three years of commencement. Consumer and Business Services (CBS) is currently undertaking consultations as part of the review, with the final report intended to be provided to Government in the first half of 2022. [104]

Other examples of digital disruption to traditional markets include ride-share applications and Airbnb. Every state in Australia has responded differently to these new market developments. Some states have acted by independently introducing regulations without reference to the actions of other states, while others have chosen not to regulate at all.

5.2 The RegTech revolution

RegTech can be described as 'the use of technology to better achieve regulatory objectives'.[105] It enables regulators to implement regulation more efficiently and effectively, delivering on the basic principle that regulations should achieve their objectives at the lowest possible cost. More broadly, RegTech refers to technology used for:

> *..regulatory monitoring, reporting, and compliance to help businesses comply with regulations efficiently and in a cost-effective way. It is industry and technology-agnostic and is being used across a range of different regulatory environments and industries. RegTech also refers to the use of new technology by regulators to enable a more efficient and effective regulatory environment. RegTech solutions can be applied in any industry with regulatory and compliance requirements.*[106]

According to the Australian Productivity Commission, Australia is internationally 'well-placed for the *development* of RegTech solutions, with relatively stable and sophisticated regulatory systems and with some estimating that around 13 per cent of RegTech providers world-wide are based in Australia'.[107] Nevertheless, the uptake of RegTech across industries has been

[103] The ACCC recently successfully prosecuted ticket reseller, Viagogo AG, for making false and misleading representations related to the final price of ticket resales.
[104] SA Government, 'Ticket Reselling Review', Your Say – (Web Page, no date) https://yoursay.sa.gov.au/ticket-reselling-review.
[105] Productivity Commission, *Regulatory Technology*, Information Paper, Commonwealth of Australia, 2019), 4-5, < https://www.pc.gov.au/research/completed/regulatory-technology/regulatory-technology.pdf >.
[106] Australian Communications and Media Authority (C[th]), *New Tech Applications for Regulatory Outcomes,* Occasional Paper, (Commonwealth of Australia, 2021), 5,
[107] Ibid., 7.

uneven, suggesting that there is still a great deal of untapped potential in some areas. For example, RegTech applications in financial services (known as 'FinTech') are well advanced, which is partly due to the nature of the industry since digital services are core business. More recently, governments and industry have taken up RegTech innovations in the energy sector, which is being disrupted because of new innovations and the rapid take up of intermittent energy sources (e.g. solar and wind technologies).

This is not to say that all RegTech investment is worthwhile. Governments and regulators need to invest in RegTech in a way that delivers the greatest net benefit (i.e. using cost-benefit analysis for weighing up new projects). In the Commission's consultations with regulators to date, the Commission has found compelling examples of technology solutions being developed and implemented in SA, especially to reduce the cost of monitoring and compliance for both regulators and regulated entities (case study examples are provided in this chapter). Nevertheless, the Commission considers that there is still *substantial* opportunity for the SA Government and SA regulators to better leverage RegTech to improve regulatory systems and practice. This point was also put forward to the Commission in submissions to this inquiry (see below), and by SA regulators themselves (Section 5.2.2).

> *There are considerable opportunities for the deployment of 'regtech' in the transport regulatory sphere – perhaps in a way currently unavailable in other industries. These include charging mechanisms based on time, distance and location, and fatigue monitoring and management with electronic monitoring aids. There is some movement towards a wider use of these tools—often due to industry voluntarily utilising them first. South Australian Freight Council (DR19, pp5-6).*
>
> *Broader use of State data sets (or creating such data sets) may result in improvements to legislative review. Advancing data analytics across the state may result in KPIs which inform legislative, policy and process decision-making to support economic development. City of Port Adelaide Enfield (DR14, p.9).*
>
> *The regulation review process should consider alternative approaches to appropriately regulate the gig and sharing economy. This is to allow for a more responsive and innovative approach which supports business and economic growth. The regulated entities could be held to account through the use of data analytics including real-time data and data developed to ensure consumer protection and community safety. Further investigation should be undertaken to identify how this could be facilitated and incorporated in the South Australian regulatory framework. City of Charles Sturt (DR5, p.2).*
>
> *Digital delivery of regulatory systems is supported, as it provides efficiencies in access, implementation, management, and monitoring of regulatory performance. However, digital technology needs to be suitably resourced to ensure systems are set up and tested for operational effectiveness prior to implementation and maintained into the future. In addition, the effectiveness of digital delivery will be maximised where the regulations(s) are well written. Australian Institute of Architects (FR2, p.3)*

Finally, it is worth noting that there are barriers to regulators and regulated entities taking up RegTech. As the Australian Productivity Commission (APC) has observed:

> *Many regulators and businesses remain unfamiliar with the possibilities of regtech, creating barriers for application and procurement. Low awareness can dampen both demand and supply responses... Uptake of regtech solutions also requires regulators with the capacity and motivation to incorporate regtech, and regulated businesses and individuals that are able to incorporate new approaches in the way they operate, or are simply more open to it. New ways of operating can be*

facilitated by trusted third parties or intermediaries (such as for audit functions and the processing of approvals and payments)".[108]

The final point above on the use of intermediaries is worth highlighting. RegTech is a growing industry and many technology solutions are developed by private sector firms that act as third-party digital product developers to regulators and regulated entities. But its uptake requires openness and agreement from all parties. The Commission considers it essential that governments and regulators regularly assess their processes and systems to identify where RegTech can enhance regulation design and implementation. This requires involvement with a broad range of stakeholders, including consumers, regulators, regulated entities, third-party RegTech providers and central government agencies.

5.2.1 How can RegTech improve how to regulate?

Digital systems can be used to collect real-time, longitudinal data from whole sectors without active effort from, or repeated contacts with, regulated entities. It can also facilitate more efficient information sharing between regulators. More sophisticated digital technologies are also being developed using artificial intelligence (AI) and machine learning to allow regulators and regulated entities to proactively identify and predict risk. In fact, RegTech can be used to enhance all aspects of regulatory activity. While the literature on RegTech applications is still developing, recent work points to four key areas where technology solutions are enhancing regulatory practice:

- compliance;
- monitoring, reporting and information exchange;
- risk management; and
- identity management and control.[109]

These aspects are discussed in turn below, including some examples of recently implemented RegTech initiatives the Commission has found among SA regulators.

Compliance

RegTech can provide solutions to enable more efficient and effective compliance processes, reducing compliance costs for regulators and regulated entities, and increasing awareness of rules and rates of compliance among regulated entities. For example, software applications have been developed that support compliance by reviewing all relevant regulations and reporting to the user on regulatory obligations.[110] Another example is the use of smart contracts, which promotes compliance by allowing users to automate and authenticate processes in real time against regulatory requirements (e.g. where compliance relies on checks and verification at different steps of a process, or in different segments of a supply chain). The benefits of this automation include reduced errors and faster processes, which can allow regulators to focus their resources on more critical functions, such as harm

[108] Productivity Commission, *Regulatory Technology*, Information Paper, (Commonwealth of Australia, 2019), 7.
[109] Australian Communications and Media Authority (Cth), *New Tech Applications for Regulatory Outcomes*, Occasional Paper, (Commonwealth of Australia, 2021); Deloitte, *RegTech Business Cases: Explore the tangible value of RegTech Solutions* (2021) < https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/technology/lu-regtech-business-cases-compilation-2021.pdf >; Productivity Commission*, Regulatory Technology*, Information Paper, (Commonwealth of Australia, 2019).
[110] ACMA, *New Tech Applications for Regulatory Outcomes*, Occasional Paper, (Commonwealth of Australia, 2021), 8.

minimisation strategies and responding to adverse events. The automation of compliance processes has been identified as one of the most common uses of RegTech.[111]

The Office of the Technical Regulator (OTR) recently implemented new technology systems to enhance its compliance practices when it achieved full digitisation of the issuance of electricity work compliance certificates (Box 5.1). The Electronic Certificate of Compliance system (eCoC) is now being expanded to fulfil an additional function of providing information to the Australian Energy Market Operator (AEMO) for the Distributed Energy Resource (DER) Register. By adopting a digital system for one of its core functions, the OTR has been able to drive improved regulatory outcomes across several dimensions:

- timeliness and agility in response to AEMO's new information reporting requests;
- reduced compliance burden on electricians and contractors; and
- better targeted interventions in high-risk areas.

Box 5.1: The Office of the Technical Regulator's (OTR's) electronic certificate of compliance (eCoC) system.

In SA, electricians are required to complete a certificate of compliance for all their electrical work. This document allows an electrician to certify that their work is safe and compliant with Australian Standards and the *Electricity Act 1996*. The certificates are an essential tool for the technical and safety compliance regime. Traditionally, this has been done through a paper-based system. An electronic certificate of compliance system (the eCoC), replaced the paper-based certificate from 1 July 2018. While it took an 18-month transition period to move to the new digital system, the result is a much more cost-effective and reliable tool, which has also facilitated the faster adoption of digital technology among its users.

The eCoC system also allowed the OTR to assist SA Power Networks (SAPN) to respond rapidly to a new regulatory requirement from the AEMO in establishing an on-line register to hold and manage data on DERs (roof-top solar and home batteries). This also minimised the compliance burden by reducing duplication of data entry by electricians. An easy-to-follow user guide was also provided by the OTR. As SAPN put it:

> *We are in a privileged position in South Australia that the OTR's eCoC process is completely electronic. This means that we have been able to satisfy the requirements of the DER Register without adding an additional step for installers or contractors to complete*.

Perhaps the greatest use of eCoC data has been to inform and enable more targeted compliance activities by the OTR, using a risk-based approach, and to some extent also by SAPN. eCoC provided the OTR with a real-time window into installations that was granular, prompt and accurate. Under the previous paper certificate of compliance regime, the process to identify a site for compliance auditing was relatively cumbersome. One regulatory team within the OTR now operates a process where a set of eCoCs is extracted and the customers contacted via SMS. This allows for targeting of very recent work, and for greater visibility of the OTR-led compliance activities in the community. Additionally, contractors are only involved where a non-compliance is identified, which saves them time and allows for the OTR to operate in a way that is less easily avoided by contractors.

The OTR intends to continue the digitisation of its processes and activities in such areas as fire-system commissioning reporting and intends to further develop integration with SAPN's systems to provide more efficient ways for electricians to declare the detail of their work. These changes are enabled by eCoC and will allow for more sophisticated targeting of work for audit, as well as more efficient resolution of non-compliant installations.

Source: OSAPC based on information provided by the OTR

[111] Ibid. 8.

As a further example, the Dairy Authority of South Australia (DairySafe) has informed the Commission about new distributed ledger block chain technology which has the potential to provide to regulators the ability to monitor compliance with regulatory requirements in real time through technology.

Currently under trial with a view to implementation in the dairy industry, it will enable contract parties (and regulators) to ensure that all prerequisites and conditions under a contract (and food safety regulations) are met before a contract can commence and be fully executed.

The expected outcomes for farmers are reduced compliance costs and quicker payments because quality assurance and contact conditions are confirmed at relevant points in the supply chain through automated processes and use of sensors.

Monitoring, reporting and information exchange

A key benefit of RegTech is that it can support and streamline the generation and distribution of reports and information required by regulators. It can do this by automating manual processes and applying data aggregation tools that take information from various source databases and combining these into one complete data set.[112] Such tools may also identify any inconsistencies or inaccuracies in source data. RegTech can also support regulatory reporting by monitoring regulatory changes, and incorporating these in updates to digital systems, which enables firms to meet any new requirements more efficiently.

Recent investments in digital technologies within CBS, together with enabling changes in legislation, are improving information exchange with regulated entities for liquor and gaming licensing and have transformed the licensee's user experience. Examples provided by CBS include:

- A Liquor and Gaming Online (LGO) portal was developed, through which applications for liquor and gaming licences are submitted online. Once a licensee is registered with LGO, they can access their licence and plans, update their details, make applications to vary/change their licence and licensed area and pay annual fees.
- Personal information declarations which are required for fit and proper licence checks and applications for Responsible Person approvals are also submitted through the portal.
- All Liquor forms (and most gaming forms) are now submitted online through LGO, thereby removing any requirement for applicants to print, sign and upload PDF application forms. CBS is also working to all remaining gaming forms with iApply forms.

CBS has further advised that these changes have also improved internal reporting and tracking of applications to monitor customer timeframes.

A further example of improvements to interactions with regulated entities through the application of digital technology is provided in Box 5.2.

[112] ACMA, *New Tech Applications for Regulatory Outcomes*, Occasional Paper (Commonwealth of Australia, 2021), 9.

Box 5.2: ReturnToWorkSA's Premium Improvement Program (PIP)

The Premium Improvement Program (PIP) recently implemented by ReturnToWorkSA (RTWSA) as an example of an initiative that was designed to improve interactions with regulated businesses through the application of digital technology,

The PIP was developed in response to business feedback that existing registration and premium processes and online services were inflexible, slow and cumbersome. The PIP involved changes to premium policy, internal process redesign and development of improved online services for premium registration, premium payment and reporting and was intended to address business concerns about existing online services and deliver significant internal operational efficiencies. It was implemented in two phases over the period June 2018 to October 2020.

In October 2020 RTWSA undertook an internal review of the results of the PIP which examined the benefits to employers and RTWSA. The review identified a number of benefits from the program for employers, and for RTWSA:

The benefits include:

- a significant uptake by employers of additional flexibilities offered through the program including for example a new option of using the previous year's remuneration as the basis for calculating the current year's premiums;
- a very large reduction in the time taken to process new business registrations (from 49% within 3 business days in 2018-19; to 86% in 2019-20; and 99.5% in 2020-21). The amount of rework for new registrations (due to errors) also declined significantly. The simplified processes also enabled RTWSA to significantly reduce the number of staff dedicated to registrations; and
- Increased compliance with the requirement to submit annual returns.

Source: OSAPC based on information provided by RTWSA

Risk management

RegTech supports a more risk-based approach to practice through the collection and use of larger and more precise sets of data and applying analytical tools to identify new patterns and insights. Some advanced RegTech applications for risk management include scenario analysis, stress testing, what-if analysis and risk monitoring on internal business operations using big-data analytics to identify and evaluate risks.[113] At the extreme, RegTech can allow regulators to significantly scale back their activities in particular markets, in cases where technology provides the means for regulatory objectives to be met, such as public safety or fully informed consumers.

As an example, ESCOSA has enhanced its ability to implement a risk-based and data driven monitoring and licensing regime, enabled by its Verified Trust and Accountability (VTA) approach and through the development of a new Regulatory Intelligence (RI) database. This assists with managing risks and regulatory requirements for small-scale network providers in water and sewerage services (Box 5.3). Specifically, ESCOSA has been able to:

- establish a data base that will enable more robust, timely and adaptive regulatory decision-making;

[113] ACMA, *New Tech Applications for Regulatory Outcomes*, Occasional Paper (Commonwealth of Australia, 2021), 10.

- reduce the regulatory burden from data gathering and monitoring on industry participants, and to do this in a way that rewards trusted entities with lower reporting requirements;
- better target compliance and enforcement activity, with more effort going into the less trusted entities; and
- save time and resources on data gathering and compliance activity, which can be better deployed on other more analytical and strategic tasks.

Box 5.3: ESCOSA's use of RegTech for risk-based monitoring and licensing.

ESCOSA is responsible for the regulation of small-scale network service providers in the water, electricity and gas industries across SA, with the objective of protecting the long-term interests of consumers. It does this through a range of regulatory activities, covering both consumer protection and economic regulation – licensing, retail codes and rules of conduct, compliance monitoring and enforcement, and price regulation determinations. There are 83 small-scale network entities licensed by ESCOSA in SA. The majority (70) provide water and/or sewerage services, and predominantly for a form of sewerage service known as a Community Wastewater Management System (CWMS). Licensees are diverse and include local government, private operators, and not-for-profit organisations, who mostly serve small communities located in outer metropolitan, rural and remote areas across SA.

ESCOSA has, over the past five years, undertaken an inquiry proposing a new regulatory business model for small-scale providers, using digital tools and risk-based approaches. Two key elements of that model are the:

- Verified Trust and Accountability (VTA) approach – a risk-based framework that will classify small system operators into either: (1) a 'trusted' category, whereby consistently competent operators face lower reporting requirements; or (2) a 'not trusted' category, whereby those who cannot demonstrate consistent competent operation will face additional regulatory oversight and information reporting requirements; and

- Regulatory Intelligence (RI) system – a database that will combine licensee performance data with a wider range of key market intelligence (e.g. information from the energy and water ombudsman, or asset management information from the licensee's website) and is intended to enable ESCOSA's staff to focus on strategic analysis and assessment, rather than data gathering.

The RI system enhances ESCOSA's initial and ongoing verification processes. To illustrate, recently a small-scale water and sewerage operator applied to ESCOSA for a variation of its licence conditions in order to take over the CWMS sewerage system for a new residential development. The applicant was already providing CWMS sewerage and non-drinking water services in a local government area. Using a dashboard generated by the RI system, ESCOSA reviewed the applicant's financial management and regulatory performance for its existing water and wastewater operations.

It was also able to review data on: customer complaints; pricing; financial sustainability; current and future capital expenditure; and the indicative remaining life of their water and wastewater assets. ESCOSA was also able to match service disruptions against the complaints data. Consequently, ESCOSA was able to quickly extract the necessary performance data to conduct a timely and holistic assessment of the applicant's business and confirm its suitability for the licence variation.

Source: OSAPC based on information provided by ESCOSA.

A further example of an online tool to help manage risks is provided in Box 5.4.

Box 5.4: DairySafe's development of an on-line business continuity tool

DairySafe is responsible for ensuring the SA dairy industry complies with national food safety standards to safeguard public health.

Recently, DairySafe developed and implemented a business continuity tool for assessing business continuity risks that is designed, in part, to support DairySafe's stakeholder engagement activities. Business continuity refers to the capacity of a business to plan for and respond effectively and safely to unexpected business disruptions.

This initiative arose from discussions with other food safety regulators about the links between business resilience and food safety risk. Some regulators argued that there is a direct link between food safety outcomes and the capacity of a business to manage unexpected events causing business interruptions such as bushfires, power failures, or loss of key staff. The relevance of these risks was highlighted by the impacts of recent bushfires and COVID-19 on the SA dairy industry.

The online tool was developed by DairySafe with funding from the Department of Primary Industries and Regions (PIRSA) and enables dairy processors[114] to self-assess their vulnerability to business interruptions and identify actions to improve their resilience. Available on the DairySafe website, the tool allows a business to quickly test their preparedness for business disruption through a 15-minute self-assessment. After entering business details and responding to a range of questions, the online tool identifies tailored options to reduce exposure to business continuity breakdown, based on a two-dimensional risk matrix. One dimension on the risk matrix is product risk and the second dimension on the risk matrix is the self-assessed level of maturity in managing business continuity risks.

Based on the characteristics of the business and the self-assessed maturity level, the tool generates a list of suggestions for raising the level of maturity in managing business continuity risks. These may cover areas such as: stakeholder engagement; seeking input from experts and regulators; staff training and development; using staff incentives and awards; developing performance indicators; implementing risk management techniques such as supply-chain mapping; and testing contingency plans.

Source: OSAPC based on information provided by Dairysafe.

Identity management and control

RegTech solutions have the capacity to support procedures around identity verification. For example, some applications can draw on data aggregation and analysis tools, along with robotic process automation, to speed up the time needed to apply identity management processes. AI and machine learning can enhance identity management and control by gathering and aggregating information across multiple sources.[115] An example of a potential opportunity, raised during the Commission's discussions with SA regulators, is investment in a standardised and shared 'fit and proper person' assessment framework, facilitated by shared data and digital systems, which could streamline identification verification and licensing regimes across regulated sectors. The system would enable regulators to combine existing information on identification, security and prior conduct, to offer more streamlined and efficient delivery of fit and proper person assessment. This is being addressed through the Government Services Portal, which is discussed in the following section.

[114] The first version of the tool was tailored to dairy processors and a version tailored to dairy farmers is currently under development.

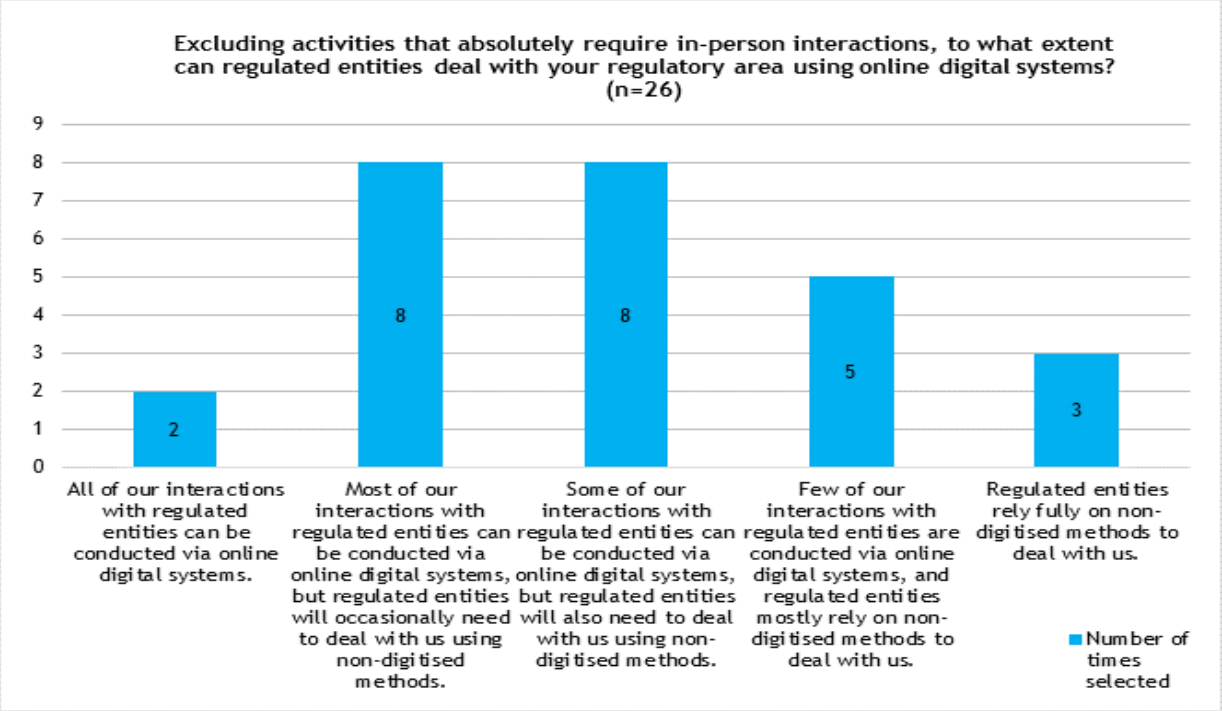
[115] ACMA, *New Tech Applications for Regulatory Outcomes*, Occasional Paper (Commonwealth of Australia, 2021), 11.

5.2.2 Implications for South Australia

The regulator practice survey, discussed more fully in chapter 3, highlights great variability in the use of digital and related technology among regulatory entities in SA, with the level of uptake currently lower than what should be expected, notwithstanding the case studies presented earlier in this chapter.

The following graph summarises responses from regulators on the current state of play regarding digital interactions with regulated entities.

Figure 5.1: Use of digital and related technology by SA regulators.[116]



Source: OSAPC, Regulator practice survey – Full Report p 25.

Further issues identified in the survey which relate to use of digital technology include:

- Almost half of the regulators (12) surveyed rated their digital systems for collecting, analysing and maintaining information on regulated entities as being 'poor' or 'fair', suggesting there is significant opportunity for improvement in this area, subject to the ability for regulators to invest in this technology.
- Eighty per cent of regulators (20) reported that having better use of on-line and digital systems would most likely deliver the greatest increase in the efficiency and timeliness of approval and decision-making processes within their regulatory area.

The business survey discussed more fully in chapter 1 identified filling in forms as one of the most time-consuming activities for businesses when complying with regulations (specified by 69 per cent of respondents) but no distinction was made between paper-based and on-line forms. Separate references to completing and reworking paperwork as other time-consuming activities would suggest the greatest issue is with current paper-based forms. Businesses

[116] Twenty-seven regulators were surveyed but one did not respond to this question.

also identified waiting times for approvals and in seeking advice as the most time-consuming processes in interacting with regulators.

Importantly, in responding to the above issues, effective use of RegTech does not necessarily mean investment in high-tech solutions. Leading edge RegTech strategies include the use of data for predictive analytics and real time monitoring, and the use of artificial intelligence. While these have great potential, they are not the only solution, can be expensive, and require longer lead times for development and implementation. The APC has recently observed that even low-tech applications like shared platforms and online registers can materially improve interactions with regulators and government.[117] Such systems can also provide the basis for future development of other tools to reduce compliance burdens**.** Indeed, feedback from participants to this inquiry, including through case studies, has suggested that immediate gains can be achieved through greater uptake of relatively simple online digital systems to increase the effectiveness of data collection and information sharing between SA regulators and regulated entities.

In consultations with regulators, the Commission heard that current budget development processes led by the Department of Treasury and Finance (DTF) do not take enough account of efficiency gains and cost savings that can be achieved through investment in greater digitisation and the use regulatory technology. Assessments in the budget process of such proposals need to take a broad view of the economic costs and benefits not only to the agency concerned, but to other regulators and to the businesses that they regulate, including savings in compliance costs and other economic benefits from business growth. These wider economic benefits should be used to help offset the initial investment and ongoing costs in a comprehensive benefit cost analysis.

Recommendation 5.1: Business-to-government digital systems enhancement

To make regulatory compliance activities faster, easier and more cost effective for both regulators and regulated entities, the Commission recommends that the SA Government:

- commit to all business regulators migrating to digital business-to-government data transfers and the greater use of regulatory technology (RegTech); and
- facilitate investment in regulatory technology design and practice by:
  - ensuring the methodology for assessing government investments in RegTech and digital solutions includes consideration of the broad, ongoing benefits (including avoided costs) to regulators and regulated entities and the state economy from reduced compliance costs; and
  - conducting a study lead by the Department of the Premier and Cabinet, working with regulators, to identify where digital and technology solutions could enhance the state's regulatory system giving particular regard to the Growth State sectors (including nature-based tourism and agritourism as identified in the Tourism Regulation Review).

The SA Government has recently invested in the development of a new government services portal (Box 5.5) which is providing agencies with a set of integrated digital platforms with

[117] Productivity Commission, *Regulatory Technology, Information Paper* (Commonwealth of Australia, 2019).

which to engage with businesses and the community in the provision of government services. Using this, and complementary strategies including a digital connectivity strategy, will be beneficial for increasing the efficiency and effectiveness of regulation and reducing compliance costs for businesses.

A number of the components of the portal have already been built including a digital identify exchange, the mobile application (mySA GOV app), ability to verify working with children checks, and verification of business identity via integrations with the Australian Tax Office and the Australian Securities and Investments Commission. It is also proposed that local government be integrated into the portal where it has business regulatory responsibilities on behalf of the state government.

It is expected that the portal will incorporate a link to the Australian Business Licence and Information Service (ABLIS). In addition, the government is considering a small business service delivery model that will complement the portal. This will involve the provision of dedicated concierge/case managers for small business to provide one-on-one tailored support, particularly for those small businesses with growth ambitions.

Box 5.5: Government services portal

The Government services portal initiative was announced in the 2020-21 state budget as part of the $120 million Digital Restart Fund (established to invest in projects that support an improved digital experience and access to information for businesses and individuals dealing with government) with an initial commitment of $13.4 million. The across government initiative is aimed at providing the SA community and businesses with seamless access to government services through a secure and accessible online portal. Over time, the services portal will enable South Australians to access government services and complete transactions online, from anywhere, at any time, on a range of devices.

The initiative is intended to lay the foundations for the way the government delivers services to local businesses and the community in the future—encouraging agencies to transform their services to be more customer-centric. This will be achieved by establishing a set of secure, modern, fit for purpose digital platforms and the ability to leverage other government systems and identity providers (such as myGovID).

For residents and businesses, it provides:

- a single login to access online services provided by the SA Government;
- services designed based on customer journeys, rather than agency functions;
- ability to draw citizens and business into digital services by communicating with them at the right time and tailoring information and services to their needs;
- electronic notifications and updates;
- a consistent and inclusive digital experience that meets accessibility standards;
- the ability to find information, make a range of enquiries and complete transactions online, quickly and easily from anywhere with any sort of connected device at any time; and
- access to an integrated eco-system able to meet a range of needs.

For government agencies it:

- reduces the need for individual agencies to invest in and maintain similar digital platforms;
- removes the burden of managing digital identity and access management;
- supports adherence to evolving security and accessibility standards;
- allows them to provide contemporary digital services to users without wholesale upgrades to existing systems; and
- supports collaboration by providing a connection between disparate systems.

A further $4.3 million was provided in the 2021-22 Budget for enhancements to the portal, including increased cyber security features and implementation of a whole of government payment pathway.

Source: OSAPC based on advice from the Department of the Premier and Cabinet and State Budget Measures Statements for 2020-21 and 2021-22.

In a small jurisdiction like SA, substantial economies of scale can be achieved by adopting a co-ordinated approach to investing in and implementing RegTech solutions that would benefit more than one regulator and in sharing the proposed solutions. Such an approach offers the additional benefit of identifying and utilising RegTech solutions to facilitate coordination between regulators to address their various interdependencies.

Recommendation 5.2: Funding across-government RegTech solutions

Based on the study in recommendation 5.1, the Commission recommends that the SA Government identify and fund specific priorities for investment in RegTech and digital solutions informed by rigorous business cases that enable:

- more efficient data collection from regulated entities;
- more efficient data sharing between regulators, including regulators in other jurisdictions where appropriate;
- multiple agency use of existing digital, data and technology assets;
- improved coordination between regulators; and
- improved speed of decision making.

5.3 Regulating in uncertain terrain

Developing and implementing regulatory systems is especially difficult for markets where the risks and benefits of regulation are uncertain. Two situations where regulators navigate heightened uncertainty are: when markets and firms are innovating rapidly; and in times of economic or other market shocks. These are discussed in turn, below.

5.3.1 Regulating for innovation

Regulators are faced with greater challenges when new markets emerge or where innovation and technologies create rapid change. The *pacing* challenge occurs because sometimes technologies develop faster than regulations and their governing structures, while the *design* challenge means it is difficult for regulators to create 'fit for purpose' regulations when innovations alter the conventional wisdom on how markets work. Regulators walk a fine line when navigating such uncertain terrain. On the one hand, it is important for new and developing markets to emerge without being unnecessarily impeded by new regulations. On the other hand, governments and regulators have responsibilities relating to issues such as consumer and environmental protection and are bound by their existing legislative settings. The established industry-wide regulations may not be effective when digitalisation changes market structures or may result in traditional and 'new wave' firms being regulated very differently.

One policy tool currently being used by governments to enable market innovation with close supervision is the 'regulatory sandbox'. It was engineered in 2016 as an experimental regulatory policy tool in the UK in relation to FinTech and as a new approach to regulatory

development.[118] A regulatory sandbox is 'a framework within which participants can test innovative concepts in the market under relaxed regulatory requirements at a smaller scale, on a time-limited basis and with appropriate safeguards in place'.[119] Current examples of the application of regulatory sandboxing in Australia are provided in Box 5.6.

Box 5.6: Examples of regulatory sandboxing in Australia

Regulatory sandbox for the national energy market

The Australian Energy Market Commission (AEMC) recently published a report on what regulatory rules should apply to a gas and electricity market sandbox. It recommended three new sandbox tools to facilitate trials in the energy sector:

- an innovation enquiry service, to provide guidance and feedback and help businesses get trials up and running quickly;
- a new regulatory waiver power for the Australian Energy Regulator so it can temporarily exempt trials from existing rules where this is creating a barrier; and
- a new AEMC trial rule change process that can temporarily change existing rules or temporarily introduce a new rule of limited application to allow a trial to go ahead.[120]

Following this, as part of the 2020-21 budget, the Australian Government committed $3.1 million over two years from 2021-22 for the Australian Energy Regulator to develop a regulatory sandbox service for the energy market, providing temporary waivers from existing rules to enable trials of new business models.[121]

Establishing the feasibility of peer-to-peer energy trading, which is the buying and selling of electricity between two or more grid-connected customers, has been identified by the Department for Energy and Mining (DEM) as one example of where this tool may be applied. This would require RegTech applications as a secure software platform using a technology like blockchain, which is generally used for the trading of electricity. As the lead legislator for the National Energy Market, South Australia is progressing the necessary legislative amendments.

Australian Government enhanced regulatory sandbox for providers of financial products and services[122]

This regulatory sandbox supersedes and extends a previous initiative administered by the Australian Securities and Investments Commission. It involves the provision of an exemption to allow 'natural persons' and businesses to test certain innovative financial services or credit activities without first obtaining an Australian financial services licence or Australian credit licence, for up to 24 months. Certain eligibility criteria need to be met before being approved to test in the regulatory sandbox, including a net public benefit test and an innovation test.The exemptions are provided under regulations; the Corporations (Fintech Sandbox Australian Financial Services Licence Exemption) Regulations 2020 and/or the National Consumer Credit Protection (FinTech Sandbox Australian Credit Licence Exemption) Regulations 2020.

Source: OSAPC based on information from AEMC and ASIC

[118] Financial Conduct Authority (UK), *Regulatory Sandbox Lessons Learned Report* (FCA, 2017) < https://www.fca.org.uk/publication/research-and-data/regulatory-sandbox-lessons-learned-report.pdf >.
[119] Australian Energy Market Commission, 'AEMC recommends new regulatory sandbox to support innovation', (Web Page, 2019) < https://www.aemc.gov.au/news-centre/media-releases/aemc-recommends-new-regulatory-sandbox-support-innovation >.
[120] AEMC (C[th]), *Regulatory Sandbox Arrangements To Support Proof-Of-Concept Trials* (AEMC, 2019) < https://www.aemc.gov.au/sites/default/files/2019-09/Regulatory%20sandbox%20toolkit%20-%20Final%20Report.pdf >.
[121] Australian Government, *2021-22 Budget Paper 2* (Australian Government, 2021) < https://budget.gov.au/2021-22/content/bp2/[download]/bp2_2021-22.pdf >.
[122] https://asic.gov.au/for-business/innovation-hub/enhanced-regulatory-sandbox/info-248-enhanced-regulatory-sandbox/.

The Commission is aware that there has been an early attempt to introduce a similar concept in SA in the form of the *Research, Development and Innovation Bill 2017*. This sought to introduce a regulatory instrument declaration to 'temporarily suspend, modify or dis-apply laws that would otherwise prohibit the pursuit of an innovative research and development proposal'.[123] While this proposal lapsed in the Legislative Council (due to prorogation), there is emerging evidence to support the concept of regulatory sandboxing as a potentially useful policy tool for the SA Government in supporting innovation.

Recommendation 5.3: Promoting regulatory sandboxing

To enable the testing of innovative concepts and responses to new challenges facing the state, the Commission recommends that the SA Government develop a legislative framework for trialling regulatory sandboxes.

5.3.2 Regulating during economic or other market shocks

The COVID-19 pandemic presented unforeseen challenges to all levels of government and for industry, requiring regulators to respond flexibly in the face of uncertainty. For example, SA Health advises that this has included finding virtual options to inspect or audit premises when the auditor is unable to travel into an area.

While the pandemic is an extraordinary event, it has served to highlight the importance of regulatory agility and the ability to respond effectively to market shocks for the state's economic resilience. For example, shocks can occur from supply chain disruptions, extreme weather events, threats to biosecurity, changes in overseas markets, or even following substantial changes in domestic government policy. Regulatory practice needs to keep pace with rapid technological change. This is occurring very widely in sectors such as energy and financial technology. Some other commonly referenced examples of market disruption include Airbnb and rideshare, where regulatory responses by governments have been diverse, even between Australian states and territories. Similarly, SA's regulatory response to ticket scalping presented challenges because of new technologies and globalised online markets (cited in section 5.1).

5.4 Conclusion

The Commission has identified compelling examples of technology solutions being developed and implemented by SA regulators in response to challenges in the marketplace and these are highlighted throughout the chapter. The SA Government's investment in the development of a government services portal, providing agencies with a set of integrated digital platforms with which to engage with businesses and the community in the delivery of government services is central to the government's strategy for digitisation and represents a major step forward.

Nonetheless, the Commission concludes that there is a significant opportunity for still further investment in digital solutions with only two SA regulators identified as conducting all interactions with regulated entities via online digital systems. At the same time, the large majority of regulators have identified that better use of on-line and digital systems would deliver the greatest increase in the efficiency and timeliness of approval and decision-making

[123] South Australia, *Parliamentary Debates*, House of Assembly (28 September 2017, (John Rau, Deputy Premier, Attorney-General)

processes, critical factors for the entities they regulate. Businesses surveyed on behalf of the Commission identified filling in forms (paper-based) as one of the most time-consuming activities in complying with regulations,

The Commission concludes that the SA Government needs to make a sustained commitment to all business regulators migrating to digital business-to-government data transfer and the greater use of RegTech. This requires the necessary precursors to be put in place, including an appropriate methodology for assessing government investments in Regtech and digital solutions, and the provision of funding for investment in priority projects that are supported by rigorous business cases. The Commission's recommendations are framed around achieving these objectives.

6. State-wide regulatory framework

6.1 Introduction

The inquiry's terms of reference require the Commission to examine issues related to South Australia's institutional framework for developing, managing and administering regulation. The Commission has also been tasked with developing recommendations to enhance the efficiency and effectiveness of the state's regulators and improve the architecture that supports the development, review, management and sunsetting of regulations affecting the business community in South Australia.

In this chapter, the Commission is concerned, first, with the way that the institutional components of South Australia's regulatory framework contribute to, or detract from, the efficient management of the regulation life cycle. Second, the chapter examines whether the current statewide regulatory framework contributes to the effective realisation of regulatory objectives. The Commission is not concerned with assessing the strategic objectives of regulation. These are policy decisions on the part of government.

6.2 Better practice principles

The following section draws on previous chapters to summarise the Commission's understanding of better practice across all stages of the regulatory life cycle. The terms 'good regulation', 'better regulation', 'better practice' or 'regulatory reform' are often used interchangeably and refer to a wide range of objectives and activities. Regulatory systems that exhibit 'better practice' principles operate more efficiently and are effectively based on several interconnected characteristics, including, but not limited to:

- improving the overall quality of the regulatory framework by enhancing the effectiveness of regulations and regulators to deliver on their stated objectives;
- increasing the competitiveness of markets by: improving competition and addressing market failures; reducing or eliminating market distortions; reducing barriers to entry; and increasing market openness;
- lowering the regulatory burden on businesses and society via deregulation and alternatives to regulation;
- improving regulatory coherence by reducing inconsistency, unpredictability and the complexity of regulations; and
- eliminating silos by ensuring that regulation works effectively across government institutions, regulatory regimes and regulators.

The OECD has issued detailed guidance on a wide range of regulatory matters in its *Best Practice Principles for Regulatory Policy* paper series, with a focus on the design and governance of regulators; regulatory impact assessment; and approaches to reviewing the stock of regulation. The OECD maintains that a high-quality regulatory framework will generally:

- embed a whole-of-government commitment and actions toward regulatory improvement;
- engage with relevant stakeholders and be transparent throughout the regulation development process;
- incorporate ex ante assessment when developing new regulations (i.e. regulatory impact assessment);

- include comprehensive ex post regulatory review (and mechanisms to review the "stock" of regulation); and
- ensure the effectiveness of regulators.

The international literature points to a wide range of policy and regulatory tools and standards that together support an efficient and effective regulatory regime. The *2012 Recommendation of the OECD Council on Regulatory Policy,* the OECD's most recent statement on best practice regulation, identifies eight actions that governments should take to create a quality regulatory regime. The *2012 Recommendation of the OECD Council on Regulatory Policy Governance* (the Recommendation) is a comprehensive statement on best practice regulatory policy. It creates a policy framework aimed at delivering ongoing improvements to the quality of regulations, and provides governments with practical advice on how to improve regulatory institutions and the application of regulatory management tools:

1. **Commit at the highest political level to an explicit whole-of-government policy for regulatory quality.** The policy should have clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, distributional effects are considered, and the net benefits are maximised.

2. **Adhere to principles of open government, including transparency and participation in the regulatory process** to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation. This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis. Governments should ensure that regulations are comprehensible and clear and that parties can easily understand their rights and obligations.

3. Establish **mechanisms and institutions** to actively provide oversight of regulatory policy, procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality.

4. Integrate **Regulatory Impact Assessment (RIA)** into the early stages of the policy process for the formulation of new regulatory proposals. Clearly identify policy goals, evaluate if regulation is necessary and how it can be most effective and efficient in achieving those goals. Consider means other than regulation and identify the trade-offs of the different approaches analysed to identify the best approach.

5. Conduct **systematic program reviews of the stock of significant regulation** against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost-justified, cost-effective and consistent and deliver the intended policy objectives.

6. **Regularly publish reports on the performance of regulatory policy and reform programmes** and the public authorities applying the regulations. Such reports should also include information on how regulatory tools such as Regulatory Impact Assessment (RIA), public consultation practices and reviews of existing regulations are functioning in practice.

7. Develop a **consistent policy covering the role and functions of regulatory** agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence.

8. Ensure the **effectiveness of systems for the review** of the legality and procedural fairness of regulations, and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that citizens and businesses have access to these systems of review at reasonable cost and receive decisions in a timely manner.

The Commission has found that South Australia's regulatory framework, while generally effective, contains some gaps that limit the extent to which international standards of better practice can be integrated into all stages of the regulatory life cycle. As discussed in preceding chapters, there are a number of areas—such as regulatory performance measurement, adherence to the RIA framework, the use of ex post evaluation, and the timeliness of decision-making—where targeted continuous improvement strategies would enhance the overall effectiveness and efficiency of the state's regulatory framework.

Recommendation 6.1: Continuous improvement of practice

To promote and support ongoing improvement of regulatory practice across the regulatory life cycle, the Commission recommends that the SA Government establish an across government accountability framework and strategy that:

- includes a policy, drawing on OECD better practice principles, to guide regulatory consistency and quality to ensure that the economic, social and environmental effects of regulation maximise net benefits to the state, consistent with individual regulators' enabling legislation;
- requires regulators to develop, implement and report publicly on improvement strategies with a focus on outcomes;
- establishes a community of practice among SA regulators and policy agencies to build capability and to share data, management systems, and best practice in such areas as technological and digital innovation and regulatory stewardship;
- includes other initiatives to improve capability, such as a dedicated training that could be rolled out across regulatory agencies;
- includes incentives and assistance for regulators to adopt new technologies that will enhance their efficiency and effectiveness; and
- is complemented by a program of external performance audits or peer reviews of selected priority regulatory agencies to examine the extent to which individual regulators deliver on their objectives and implement good practice.

6.3 Enhanced consistency, coordination and timeliness

The Commission's evidence is that the state's regulatory framework is relatively unaffected by inconsistencies between state and Commonwealth legislation, with the exception of

approval processes in parts of the extractives industry (as discussed in the draft report) and some matters of national environmental significance. A reform process is currently underway to harmonise and consolidate state, territory and Commonwealth environmental regulation, following a recent review of the *Environment Protection and Biosecurity Act 1999* (Cth).

The majority of South Australian businesses surveyed by the Commission indicated that they are rarely affected by inconsistencies arising from state regulation, while less than half of regulators surveyed reported that their practices are complicated by overlapping statutory mandates with other state regulators. These overlaps are usually resolved through the use of memoranda of understanding (MOUs), including between state regulators and local government. The Commission has not evaluated the effectiveness of these arrangements as part of its final report.

More significantly, a number of businesses reported that they routinely experience delays in decision-making by regulators, especially for approvals, and often have difficulty identifying and accessing information on regulatory requirements. These businesses maintained that the timeliness of regulators' decision-making is impacted by repeated or duplicate requests for information, often without a clear connection to risk, and by regulators providing proponents with inconsistent information. A majority of businesses nominated improved communication; expedited waiting times; and lower compliance costs as the most important areas in which regulator practice needs to improve. By contrast, the majority of regulators surveyed by the Commission reported improvements in the timeliness of their decision-making over the last five years, with the majority suggesting that additional improvement can be achieved by increasing the use of digital platforms and data management systems.

The Commission's survey of regulators showed that more than 90 per cent of regulators coordinate with other state regulatory agencies to a moderate, large or very large extent. Nonetheless, a large number of South Australian businesses observed that uncertainty is often increased, and response times slowed by the need to deal with multiple regulators. Increased coordination between state regulators can help to deal with interdependencies that inevitably arise under the Westminster system of government, where individual agencies are responsible to individual ministers and pursue different mandated goals. Increased coordination can enable potential conflicts in objectives between regulators to be identified, if not resolved, and can assist in improving the design and implementation of regulatory policies to achieve complementarities and reduce overlaps or gaps in regulation.

Improved regulator performance can be achieved in a number of ways, including by reforms enacted on the level of individual regulator practice and by enhancing coordination using a variety of across government mechanisms, such as the creation of a 'coordinating regulator' for different industries. At the individual regulator level, increasing the speed of response times and improving the quality and appropriateness of information available to proponents can be achieved by a range of interconnected mechanisms, including, but not limited to:

- enhancing IT systems to enable better communication and faster processing of regulatory applications;
- expanding the use of MOUs;
- legislative amendments to reduce or eliminate statutory barriers;
- targeted machinery of government changes; and
- establishing forums of regulators for the exchange of information, identification and resolution of issues.

Improving businesses' access to information can also be achieved through enhancements to the Australian Business Licence and Information Services (ABLIS), noting that this is managed by the Australian Government using data from all three levels of government, and through the implementation of a business concierge service within individual regulators. As discussed in chapter 5, an expansion of the government digital services portal, which provides individuals and businesses with information about government services, regulatory requirements and online transactions, is another mechanism to enhance the timeliness of regulators' decision-making and improve access to information.

The Commission's regulatory review into nature-based tourism and agritourism also identified specific opportunities to improve coordination among relevant South Australian regulators. It proposed that DEW take the lead role for nature-based tourism and that PIRSA take the lead role for agritourism.

The Commission notes that the government recently released a new public sector purpose statement, 'Making a difference so SA thrives' supported by three strategic priorities: 'economic growth', 'thriving South Australia', and 'easy to do business with'. The purpose statement is supported by a governance framework consisting, at its highest level, of three councils that correspond to the strategic priorities, including the Economic Growth Council (EGC). Each council comprises the chief executives of the relevant government agencies.

On the whole, strategies to enhance regulators' consistency and timeliness are likely to be most effective if they are implemented through these existing governance structures. The Commission considers that the strategic priorities identified in the purpose statement, many of which have regulatory implications, would be bolstered by a renewed focus on across government regulatory reform. Using existing across government committees and working groups associated with the purpose statement, such as the EGC, will help to facilitate a more coordinated approach to achieving greater consistency and timeliness in regulator decision-making. The EGC, which is chaired by the Chief Executive of the Department of the Premier and Cabinet, is responsible for overseeing strategies and initiatives to drive economic growth in South Australia, and would provide an effective, high-level forum to drive regulator coordination from an across-government perspective.

Enhanced consistency, coherence and timeliness on an across-government level can also be achieved by using a range of policy levers to create shared objectives among regulators. These measures include the introduction of Statements of Expectations (SOEs) (as already discussed in chapter 3), which are designed to clarify government objectives, policies and deliverables relevant to each regulator. To ensure consistency on an across-government basis, SOEs would specify the ways that regulators can contribute to realising the government's economic, social and environmental objectives, while recognising that regulators' statutory mandates are ultimately decisive. Issuing SOEs would also build on current actions to increase accountability and promote continuous improvement across the public sector.

SOEs could be buttressed by CE performance agreements, which have been used for some time in SA to promote collaboration between state government agencies, with CEs required to identify how they will contribute to across government objectives. The CE performance appraisal process has been reformed in 2021 and now requires selected agencies to contribute to cross sector priorities related to the three statewide strategic priorities of 'economic growth', 'thriving SA' and 'easy to do business with'.

Recommendation 6.2: Enhanced consistency, coordination and timeliness

To enhance the timeliness, efficiency and consistency of business regulator decision-making, the Commission recommends that the SA Government:

- task the Economic Growth Council with identifying options for improving the consistency and timeliness of business regulators' practice, and improving the way that SA regulators coordinate decision-making and compliance monitoring in industries where multiple regulators have jurisdiction; and
- task the Growth State sector lead agencies, in consultation with industry, with identifying regulatory barriers to economic growth and escalating these issues, where appropriate, to the Economic Growth Council.

6.4 Strengthening statewide regulatory architecture

The overall efficiency and effectiveness of regulation is decisively affected by the governance arrangements in place at both the regulator and statewide levels. As discussed in chapter 4, performance across all stages of the regulatory life cycle can be positively or negatively affected by the governance structure that is in place.

The Commission's assessment of the state's regulatory framework has identified some areas, such as regulatory impact assessment and ex post review, that are not fully aligned with the better practice principles developed by the OECD and implemented in other Australian jurisdictions. Bringing the state into closer alignment with OECD principles can be achieved through different reform pathways, some of which require greater centralisation or coordination to deliver a system benefit, while others rely on a distributed approach to reform.

As a guiding principle, the Commission considers that any reform package must be calibrated to the size of the reform task as well as of state's economy and public sector. Cost effectiveness and proportionality are central to the success of reforms. Simply importing solutions from larger Australian or international jurisdictions is unlikely to promote efficient practice in this state, and there is a need to integrate reforms into existing statutory arrangements and governance structures. The overall aim of reform must be to enhance the efficiency and effectiveness of the regulatory framework, without compromising the public interest and without necessitating the allocation of significant additional resources.

The Commission notes that the Australian Government and some states, including Queensland and Victoria, have a central unit or authority (often in the form of an Office of Better Practice Regulation or its functional equivalent) that is responsible for overseeing regulatory review and reform. These units also often collect and publish data on review activity and provide advice, training and support to ministers and agencies on regulatory review and reform. Most centralised units are tasked with providing advice to agencies, and none has the authority to block regulatory proposals. Their primary function is not to act as a gate-keeper or decision-maker, but to enhance the quality of regulation by providing advice on better practice in regulatory development, management and review. Such units are generally located in a central government agency, such as the Office for Better Practice Regulation in the Department of the Prime Minister and Cabinet and are usually accountable to a minister with specific responsibility for regulatory reform.

The Commission is of the view that centralised oversight, advice and coordination, as opposed to a fully distributed approach, is a key mechanism to ensure that regulatory agencies have access to consistent high-quality advice that is based on international best practice and clearly reflects government priorities. The Commission heard that, in many cases, the existence itself of a central unit or authority can influence agencies and regulators to prepare regulatory proposals carefully to minimise the risk of receiving a negative review by the central authority, particularly if that information is provided to Cabinet or made public and Cabinet is committed to the process.

Such a unit, reporting to a minister for regulatory reform, would lead system-wide reform without encroaching on regulators' responsibilities for administering regulations or ministerial responsibilities for their performance. A centralised unit can also facilitate collaboration of key regulatory and policy agencies to address the more complex regulatory challenges facing South Australia, such as those relating to the impact of climate change; the long term economic and social effects of the COVID 19 pandemic; or the interaction of new and disruptive technologies on the state's economy. Such cross-agency issues are often beyond the mandate or capacity of individual regulators to address effectively and require collaboration to develop solutions that are in the state's best interests.

There is value in separating the administration and gate-keeper roles for the RIA framework, which is currently vested in Cabinet Office, from a broader responsibility for enhancing the overall quality of the state's regulatory framework. A small central agency unit that is functionally separate from Cabinet Office could take responsibility for implementing reforms needed to align SA more closely with OECD principles, such as:

- reviewing implementation of the RIA framework and identifying actions to increase agency adherence to it (recommendation 2.1);
- establishing an across government policy framework to guide measurement, monitoring and reporting of performance by regulators (recommendation 3.1);
- developing guidance material on the development of SOEs by regulators with their ministers (recommendation 3.2); and
- developing across government policy guidelines on ex post evaluation of regulations (recommendation 4.3).

The unit would also lead ongoing across government initiatives designed to promote continuous improvement in performance of SA's regulatory framework across the regulatory life cycle, including:

- monitoring overall regulatory framework performance including rates of approvals by regulators and identifying areas for improvement;
- identifying major cross-cutting regulatory issues with the aim of promoting collaboration and coherence between regulatory approaches to reduce overlap, duplication or siloed approaches by regulators;
- identifying across government and across agency opportunities to reduce regulatory burden (internal and external to government) and streamline processes;
- scanning for long term issues that affect the regulatory system (such as climate change) and their implications for the regulatory framework;
- conducting independent assessments of new regulations, regulation reviews and assessments of regulator performance where required;

- providing and/or facilitating mechanisms that enable appropriate sharing of information, data and capabilities across government and throughout the regulation life cycle;
- establishing a community of practice among the state's regulators and policy agencies to share information on better practice and build capability in regulatory development and stewardship; and
- providing guidance to lift agency capability across the regulatory life cycle and assisting small agencies to access specialist expertise for RIA and regulation reviews.

This unit would provide an expert resource to assist agencies with analysis and review of regulation, drive the state's transition towards best practice and act as a steward of SA's regulatory framework.

The Commission notes that the newly established Strategy and Policy Division in the Department of the Premier and Cabinet (DPC) has responsibility, among other functions, for assisting agencies to improve the quality of business cases developed to support initiatives in Growth State industries. As some of the functions of this division align with those of the proposed central unit, this new unit could be located within the division.

Recommendation 6.3: Central leadership and oversight

To improve the performance of the state's regulatory framework throughout the regulatory life cycle, consistent with the concept of regulatory stewardship, the Commission recommends the creation of a dedicated small unit, located in a central agency and responsible to a minister for regulatory reform. The unit would undertake transformational projects as well as a range of ongoing advisory, oversight and continuous improvement functions. Operation of the unit would be guided by the OECD's 2012 recommendation on regulatory policy governance. Key areas of responsibility would include:

- leading, in collaboration with regulators, the development of across government policies recommended by the Commission, drawing on OECD better practice principles, to guide transition towards best practice (see recommendations 3.1, 3.2, 4.3, 5.3, and 6.1);
- developing across government regulatory strategy, performance and priorities;
- building capability in regulatory policy and practice;
- providing expert advice and assistance to agencies on cost-benefit analysis, regulatory impact assessment and ex post evaluation;
- providing expert advice to Cabinet Office on the need for, and adequacy of, regulatory impact assessment as part of the Cabinet Office commenting process on regulatory proposals to Cabinet; and
- monitoring and reporting on overall regulatory system performance, including KPIs on timelines for decision making, approval rates and reasons for rejections and other key indicators.

The unit would have no authority to intervene in the work of any regulator.

6.5 Cross-border issues

Inter-jurisdictional differences in business regulation can create issues for regional economies and communities along SA's borders with other jurisdictions. Inconsistencies in cross-border regulation are a regional development issue for these border communities. According to anecdotal evidence provided by the Victorian and NSW cross-border commissioners, discussed in chapter 2, two regions—Murraylands and Mallee, and Limestone Coast—are the areas most affected by cross-border issues. Cross-border regulatory inconsistency could be addressed in two ways:

- achieving national level solutions that, while difficult and time-consuming to effect, can provide comprehensive solutions; and
- enabling local bilateral (or trilateral) arrangements between adjacent jurisdictions that may be easier and faster to affect, providing benefits to the cross-border communities.

The Commission considers a systematic approach to addressing cross-border issues by a state jurisdiction would have six elements:

- identifying and evaluating the issues with local border communities;
- referring significant issues to the accountable agencies and ministers for attention;
- accountable agencies and ministers engaging with communities and developing appropriate responses;
- measuring, monitoring and reporting progress, with transparency for cross-border communities;
- considering the implications of cross-border inconsistencies when assessing the impact of new or amended legislation and regulations (as recommended in chapter 2); and
- a coordinating process across government, given that the range of issues may span several agencies.

Some of these obligations are currently addressed through the RIA framework, and such an approach would complement efforts through the National Cabinet to achieve national consistency in regulation.

A better understanding of the cumulative effects of such cross-border issues on the state's border communities requires across government coordination. A lead agency, such as the Department of Primary Industries and Regions SA (PIRSA), is needed to: coordinate the identification of cross-border issues; refer matters to relevant agencies for assessment and resolution; and monitor and report on the progress of responses. In practice, this could be achieved by extending the remit and authority of PIRSA's Regional Development Steering Committee, which is already supported by PIRSA's network of regional offices, to help coordinate and facilitate development in the state's regions, including border communities.

The Commission considers that Cabinet would need to mandate such a coordinating role for PIRSA, possibly via a Premier and Cabinet Circular, that also requires relevant agencies to address cross-border issues and report publicly on the progress on the issues. Importantly, these arrangements will maintain the accountability of ministers and their agencies for addressing cross-border issues within their responsibilities consistent with the SA Government's policy on multi-jurisdictional and national regulatory arrangements.

Recommendation 6.4: Cross-border harmonisation

To ensure that cross-border issues are effectively identified and addressed at all stages of the regulatory life cycle, the Commission recommends that the SA Government extends PIRSA's regional role, through its Regional Development Steering Committee, to gather intelligence on these issues, refer them to the responsible agency and monitor progress on agencies' responses.

6.6 Conclusion

South Australia's regulatory framework generally supports effective practice throughout the different stages of the regulatory life cycle. On the whole, the current regulatory architecture does not deviate substantially from the standards of better practice implemented in other Australian jurisdictions.

Nonetheless, the Commission considers that the overall efficiency and effectiveness of SA's framework could be strengthened by pursuing an even closer alignment with the better practice principles developed by the OECD. Significant benefits could be achieved by improving the coherence and timeliness of regulators' decision-making through enhanced coordination, increased digitisation and by embedding continuous improvement more effectively within the state's regulatory architecture.

The Commission's analysis of the different stages of the regulatory life cycle shows that some areas, including both ex ante and ex post evaluation, could be strengthened by the creation of a small centralised continuous improvement, advisory and oversight function within a central agency of the South Australian Government.

Appendices

Appendix 1: Terms of Reference

SOUTH AUSTRALIAN PRODUCTIVITY COMMISSION INQUIRY INTO REFORM OF SOUTH AUSTRALIA'S REGULATORY FRAMEWORK

I, Steven Marshall, Premier, hereby request that the South Australian Productivity Commission (the Commission) undertake an inquiry into modern regulation.

Background

Regulations can help protect the health and safety of the community, conserve the environment and make the economy work better. Poorly designed and inefficiently administered regulations can impose unnecessary burdens on businesses and consumers in terms of lost jobs, investment and slow productivity growth. They can also impose costs on the wider economy by restricting the movement of resources to their most productive uses. Pre-pandemic estimates of the regulatory burden on business in Australia were in the order of three per cent of GDP, with state and local government combined accounting for about half of this impost. This translates to a pre-pandemic burden of the order of $1.2 – 2.4 billion for South Australia annually.

Over the past five years NSW, Queensland and Victoria have reformed and modernised their regulatory systems by improving accountability, updating guidance on regulatory impact assessment, and providing support to rule makers. The regulatory framework in South Australia has not been subject to comprehensive review for many years. The government is concerned that regulations, through their design or implementation and enforcement, can be an unnecessary drag on economic activity.

The COVID-19 pandemic has demonstrated the power of regulations to change business and consumer behaviour. It has also highlighted the need for regulatory systems and structures to be agile and adaptable to external shocks and changes in technology. The pandemic has seen innovative changes to longstanding regulatory arrangements that have made it easier for some businesses to operate without compromising health risks or other public interests.

As we emerge from the pandemic induced recession, safely growing the economy is now an urgent priority. Early action to remove unnecessary regulatory barriers to business investment and job creation can make an immediate and material contribution to economic recovery.

It is timely to evaluate the lessons learned from recent regulatory reform in other jurisdictions and the pandemic, and to identify action to better position the state's regulatory framework to support business for the next decade and beyond.

Terms of Reference

1. The Commission is asked to report on reform of South Australia's institutional framework for making and administering regulations to better enable investment, employment and productivity growth. In doing so, the Commission is asked to consider the lessons learned from the pandemic and better practice thinking and principles to ensure that regulatory design and practice remain fit-for-purpose and responsive to emerging technological and other trends.

2. The Commission is asked to make recommendations to:
    a. improve the efficiency and effectiveness of regulators in the administration and enforcement of regulations and institutionalise ongoing improvement and better practice; and
    b. improve the architecture, including systems and processes for designing, making, reviewing and sunsetting of regulations.

3. The Commission is asked to identify:
    a. significant instances of regulatory overlap, duplication or inconsistency between regulators within the state or between South Australia and other jurisdictions; and
    b. specific areas for potential deregulation including the removal of redundant regulations, the simplification and streamlining of regulatory processes and the harmonisation or coordination of different areas of regulation.

Scope

The Commission will have regard to better practice regulation systems and leading practice in other jurisdictions and the OECD. The inquiry is to consider regulations that are principally directed at, or principally affect, businesses, with a focus on start-up, expansion, and entry into interstate or overseas markets.

National regulatory schemes of which South Australia is part and where change requires the agreement of other jurisdictions are excluded from this inquiry. State legislation and regulatory schemes which involve local government are in scope. The Commission is to have regard to SA's Growth State initiative and other relevant state and national policies, reviews and reforms.

In developing its recommendations the Commission is expected to have regard to their resource implications and implementation timeframes.

For the purpose of this inquiry, regulation is defined to include any principal legislation or statutory instruments made under an act, such as regulations, rules, by-laws or any instruments of a legislative character, that principally affect businesses. The inquiry will also consider, where appropriate, administrative instruments that have a quasi-legislative character and impose a regulatory burden on businesses.

Inquiry Process

The Commission will consult with SA public sector agencies, regulators, relevant organisations in other Australian jurisdictions, industry, professional associations and other key stakeholders.

The Commission may arrange for temporary assignment of employees from relevant public sector agencies in accordance with *Premier and Cabinet Circular 046 – The South Australian Productivity Commission* to support the inquiry.

The Commission is to publish an issues paper early in the inquiry process and a draft report containing recommendations for consultative purposes. A final report is to be provided to me no later than 9 months from the date of receipt by the Commission of these terms of reference.

Hon Steven Marshall MP

PREMIER OF SOUTH AUSTRALIA

29/ 1 /2021

Appendix 2: Submissions to the inquiry

Submissions in response to the draft report	Submission number
Association of Mining and Exploration Companies	FR1
Australian Institute of Architects	FR2
City of Charles Sturt	FR3
City of Holdfast Bay	FR4
City of West Torrens	FR5
Department of Education	FR6
Economic Development Australia	FR7
Environment Protection Authority	FR8
Local Government Association of South Australia	FR9
Master Electricians Australia	FR10
Primary Industries and Regions SA	FR11
SA Hair and Beauty Association	FR12
SafeWork SA	FR13
South Australian Chamber of Mines and Energy	FR14
SA Health - Health Protection and Licensing Services	FR15
Submissions in response to the Issues paper	
Associate Professor Lorne Neudorf	DR1
Associate Professor Lorne Neudorf - Additional Submission	DR2
Business SA	DR3
Campbelltown City Council	DR4
City of Charles Sturt	DR5
City of Holdfast Bay	DR6
Dairysafe	DR7
Department for Energy and Mining	DR8
Environmental Defenders Office	DR9
Essential Services Commission of South Australia	DR10
Groundwork Plus	DR11
Jason Hicks	DR12
Local Government Association of South Australia	DR13
Port Adelaide Enfield Council	DR14
Qube Ports Pty Ltd	DR15
Restaurant and Catering Australia	DR16
Seafood Processors and Exporters Council	DR17
South Australian Dairyfarmers Association	DR18
South Australian Freight Council Inc.	DR19
The Law Society of South Australia	DR20

Appendix 3: South Australian business regulators examined as part of the inquiry

Attorney-General's Department (AGD)

- Liquor and Gaming
- Consumer and Business Services (CBS)
- Planning and Land Use Services (PLUS)
- Retail and Commercial Services (Small Business Commissioner)

Dairysafe

Department for Environment and Water (DEW)

- Water licensing
- Native vegetation

Department for Health and Wellbeing (DHW)

- Food
- Controlled drugs
- Health protection
- Health licensing

Department for Industry and Skills (DIS)

- Training and Apprenticeship Services

Department for Infrastructure and Transport (DIT)

- Passenger transport

Department for Energy and Mining (DEM)

- Energy resources
- Office of the Technical Regulator (OTR)
- Mineral resources

Department for Primary Industries Resources SA (PIRSA)

- Biosecurity SA
- Fisheries and aquaculture
- Agriculture, food and wine
- Forestry
- Rural Solutions SA

Department of Treasury and Finance (DTF)

- Safework SA
- Revenue SA

Environment Protection Authority (EPA

Essential Services Commission of South Australia ESCOSA

Return to Work SA (RTWSA)

SA Water

- Trade waste and networks.

Appendix 4: Ex post evaluation methods

Type	Used for	Challenges
Programmed evaluations		
Sunsetting provisions:		
Statutory requirement for delegated legislation to expire after a certain period (normally 10 years).	Mitigates the risk that regulation continues beyond its usefulness.	Effectiveness limited by legislated scope and focus on time limits. Needs careful planning, coordination and commitment.
Statutory evaluations:		
Enabling legislation contains obligation for ex post evaluation.	Can provide a more targeted approach to identify issues and implement reforms.	Requires legislation which can be limited in scope and impact. Requires adequate resourcing and stakeholder consultation to be effective.
Ex post implementation policy evaluations:		
Evaluation undertaken within 1-2 years of legislation being implemented.	Provides 'fail safe' mechanism to evaluate regulation (including where ex ante evaluation is inadequate).	Requires suitable resourcing and planning to obtain evidence. Effectiveness can be limited by allowable exemptions and leadership commitment.
Ad Hoc evaluations		
Public stocktake evaluations:		
Businesses / regulated entities provide feedback on regulatory issues and reform opportunities.	Identifying regulatory reform opportunities across different jurisdictions, regulators and industries.	Wider scope relies on access to appropriate data and information. Very resource intensive and significant stakeholder engagement limits frequency of evaluation.
Principles based evaluations:		
Principles applied based on specific reform agenda to screen regulation and identify areas of reform.	Identifying reforms that cut across different regulatory areas but are relevant to a particular priority or reform agenda (e.g. small business).	Very resource intensive and can be very complex. May take years to implement and reap benefits depending on scope.
Benchmarking evaluations:		
Identify and measure regulatory performance within or across jurisdictions.	Providing information on comparative performance, leading practice and models for reform.	Requires 'leading practices' to be identified and to be measured against actual practices. Can be difficult to compare 'like for like'.
In-depth evaluations:		
Assesses appropriateness, effectiveness and efficiency of regulation within wide policy context.	Application to major areas of regulation with wide-ranging effects for which significant reform may be required.	Very resource intensive and can be very complex. May take years to implement and reap benefits.

Type	Used for	Challenges
Stock management initiatives		
Red tape reduction (RTR) evaluations:		
Identify and implement reforms to reduce unnecessary red tape.	Providing regulators with a mechanism to focus on reducing regulatory burden and measuring reforms.	Can be resource intensive depending on scope and difficult to measure outcomes. Requires leadership commitment, transparency and coordination.
Regulator strategy evaluations:		
Evaluations or assessments that are undertaken 'in-house' by the regulator.	Enabling regulators to assess and advise on regulations they administer and know about.	Potential for conflict of interest which can impact on implementation of reforms. Can divert scarce regulator resources from compliance activities.
Stock-flow linkage rules:		
Applies rules to restrict the flow of new or amended regulation.	Ensuring government accounts for new and existing regulatory burdens.	Must be mandatory to work. May lead agencies to stockpile poor quality regulation for future trading. Focus is on costs only.

Source: OSAPC based on Australian Productivity Commission, Identifying and Evaluating Regulation Reforms, Research Report, Australian Government, 2011.

Appendix 5: South Australian Productivity Commission Regulator Practice Framework

1. Legal structure and regulatory powers

An effective regulator must have clear objectives, with clear and linked functions to co-ordinate with other relevant bodies to achieve desired regulatory outcomes. The regulator's role should not overlap/ duplicate with other regulators' responsibilities, and it should have appropriate regulatory powers. Regulators should also work toward harmonisation of regulations across jurisdictions to improve efficiency, reduce complexity for regulated entities and promote competition.

2. Approvals and decision-making

Businesses and citizens expect timely, efficient and transparent regulatory approvals and decision-making processes. In particular, regulators that remove delays and inefficiencies in approvals processes can reduce the costs of doing businesses. In doing so, regulators are accountable to ministers and the legislature, regulated entities and the public. Regulators that remove delays and inefficiencies in approval processes can reduce the costs of doing business

3. Regulatory impact assessment (RIA)/ex-ante assessment

RIA helps ensure that regulations are well-designed and effective, while avoiding unnecessary burdens on regulated entities. RIA occurs prior to implementation, when a new or amended regulation is being proposed. It is a form of ex ante assessment, which provides government decision makers with information on whether, and how, they should regulate to achieve public policy goals.[124] It improves regulation design and sets the benchmark for later review.

4. Ex-post evaluation

Regular, comprehensive and transparent evaluation provides assurance that a regulation is delivering on outcomes and increases effectiveness when used to improve the quality of regulation design and practice. Ex post review is fundamental to ensuring that regulations remain fit for purpose, deliver on their intended objectives, are effective in their implementation, and remain relevant given prevailing social and economic conditions. Ex post review focuses on improving the stock of regulation, which is much larger than the flow, to ensure that regulations are still relevant, do not impose unnecessary costs and do not lead to unintended consequences.

5. Stakeholder engagement

To be effective, regulators must understand issues from the perspective of relevant stakeholders throughout the regulation development process. This means engaging with stakeholders that would be the beneficiaries of regulatory protection as well as those that would incur regulatory obligations – citizens, businesses, consumers, employees, the public sector, non-government organisations, international trading partners, and others. Regulatory processes that are transparent to the public also assist in building trust in regulators and regulatory systems, increasing stakeholders' awareness and understanding of regulatory regimes, and supporting compliance by regulated entities.

[124] OECD, *Regulatory Impact Assessment, OECD Best Practice Principles for Regulatory Policy* (OECD Publishing 2020a) < https://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm>

Examples of transparent and effective stakeholder engagement include:

- requiring regulators to consult with the public as part of their functions;
- engaging with stakeholders early during regulatory design and at different phases of regulation lifecycle;
- offering a variety of avenues for stakeholders to provide information and evidence (e.g. in person, in writing, by phone and online);
- making information on the processes and timing of stakeholder engagement publicly available;
- providing a formal response to stakeholders on the issues identified during consultation; and
- publicly reporting on the outcomes of stakeholder engagement.

6. Monitoring and enforcement (risk-based and proportionate actions)

Regulation practice is most efficient and effective when resourcing and activities are oriented toward areas of greatest risk and potential for harm. A risk-based approach improves the effectiveness of the regulatory framework through minimising burden on those who are voluntarily compliant and ensuring that enforcement action is proportionate and undertaken only when necessary. Efficient regulatory risk assessment takes account of the regulated activity, the nature of the regulated cohort, including its compliance history, and other external factors affecting risk.

7. Data management, information sharing and use of technology

The effective use of data, information-sharing and technology provides significant opportunities for improving the effectiveness of regulatory practice. For example, data-driven solutions enable regulators to implement a 'tell us once' approach with industry participants both within agencies with multiple regulatory functions, and across regulators where this information is appropriately shared. This can significantly reduce the cost of doing business. Businesses should not have to give unnecessary information, nor give the same piece information more than once.

Timely and accurate data enables regulators to more accurately assess and monitor risk in the regulated population, and assist regulators to better shape industry engagement and enforcement strategies. Effective use of data is integral to enabling regulators to reach intelligent, evidence-based decisions. Also, data innovations in machine learning and use of artificial intelligence could result in substantial leaps forward for efficient and effective regulatory practice.

8. Regulator performance review and continuous improvement

Efficient and effective regulators have mechanisms in place for continuous improvement, and actively monitor and report publicly on their performance. This should be a key aspect of the regulator's organisational strategy, and evidence of their impact and outcomes should be regularly collected and publicly released.

Appendix 6: Issues for further consideration by the SA Government

Under the Terms of Reference (TOR) for the inquiry, the Commission was asked to identify:

> "*Specific areas for potential deregulation including the removal of redundant regulations, the simplification and streamlining of regulatory processes and the harmonisation or coordination of different areas of regulation*." (TOR 3.b).

This appendix summarises those areas identified through submissions, consultations and surveys conducted as part of the inquiry, in accordance with the above TOR.

Source	Area for 'deregulation'
Australian Institute of Architects (FR2)	• Lack of harmonisation of regulations across Australia: e.g. regulatory responses to the Building Confidence Report

Local Government Association of South Australia (FR9)	• Reiteration of opportunities for regulatory reform identified by the former State-Local Government Red Tape Taskforce:
	  • Small/start-up business regulatory understanding and compliance
	  • Business use of crown & community land
	  • Temporary or special events
	  • Live music
	  • Food health inspections
	  • Outdoor dining
	  • Small venue liquor licensing

Master Electricians Australia (FR10)	• Multiple location of enforcement activities (OTR & CBS) for electrical licence holders which are difficult to ascertain and not well communicated
Business SA (DR3)	• Multiple energy regulators (5) impact upon price and reliability for SA businesses; review efficiency & effectiveness of energy regulators • Regulation of dangerous goods in SA inconsistent with other jurisdictions, imposing higher costs on businesses and resulting in poorer safety outcomes. Repeal the *Dangerous Substances Act 1979* and adopt the National Standard for the Storage & Handling of Workplace Dangerous Goods • Conflict between state & national requirements around public holiday employee pay rates
Campbelltown City Council (DR4)	• Need for a centralised location for information on regulatory requirements and forms for businesses
City of Holdfast Bay DR6	• Steps in the process for the assessment of applications for special events open to subjectivity and dependent on extent of delegated authority – standardise these across councils • Outdated requirements in the *Food Act 2001* impose significant and unnecessary costs to operation of a forklift within a (food) preparation area • Extension of small venue liquor licences to other metro & regional areas deferred for later review by CBS • Barriers for tourism operators to conduct experiences that involve the responsible serving of alcohol on foreshore dry zones
Groundwork Plus DR11	• Overlap of legislative requirements for a quarry site that can cause confusion and difficulty to navigate with so many regulators to report to. This is despite there being a lead regulator (DEM) • Co-regulation has still resulted in inconsistencies and ambiguous regulation of a site despite an MOU between DEM and the EPA.

Local Government Association of SA DR13	• Specific examples of reform for temporary events, live music, food health & outdoor dining • Extend small venue liquor licences beyond Adelaide metro area.
Port Adelaide Enfield Council DR14	• A number of regulatory processes are very challenging for businesses and could potentially be revised, for example: development approval processes, lease or use of public land, community land management processes, outdoor dining, mobile food trucks, permits, road closures and licences for events, coastal usage for business, liquor licensing, food inspections, bollards. • Overlap, duplication, cost shifting/sharing and confusion in some key regulations impacting local government, for example application of the EP Act and associated regulation
Qube Ports Pty Ltd DR15	• The current port access regime as set in the *Maritime Services (Access) Act 2000* (SA) does not adequately address issues around the high level of vertical integration that has developed in the SA port supply chain since privatisation
Restaurant & Catering Australia DR16	• Inconsistent rules in place across local councils relating to issues such as outdoor dining
Seafood Processors & Exporters Council DR17	• Legislative requirements onerous for processors and add substantial costs both in licence terms and in operation time and cost • Electronic reporting has eased the administrative burden, but the system is still compliance heavy in relation to reporting. • Instead, use a standards-based approach with periodic auditing of businesses
SA Dairyfarmers Association DR18	• Lengthy paper Service SA forms for farmers that cannot be submitted electronically
Regulator Survey responses	
PIRSA	• Need for greater clarity of role between Biosecurity SA and DEW in relation to animal welfare and wildlife management
PIRSA	• Duplication in environmental assessments for aquaculture (PIRSA & DIT) and overlap of national park boundaries with aquaculture leases (DEW and PIRSA)
DIS	• Overlap between workplace supervision and safety (SafeWork SA) and complaints and disputes between employers and trainees or apprentices (SA Skills Commission)
DHW	• Overlap with interstate regulatory entities in relation to cross-border regulation of prescription monitoring (prescribers & patients)
AGD	• Duplication and overlap between the ATO excise licence to produce alcohol and CBS liquor licensing requirements (a Commonwealth Deregulation Taskforce project)
PIRSA	• Multiple approvals processes for carbon farming projects due to different ministerial responsibilities – need to better integrate the processes
PIRSA	• Inconsistency in biosecurity management between jurisdictions & the Commonwealth, and the management of shark and finfish between states and the Commonwealth
EPA	• Requirement for joint assessments under Commonwealth & State legislation in relation to uranium mining (and non-uranium mining projects with naturally occurring radioactive material requiring disposal)
EPA	• Need for pre-emptive provisions in the EP Act to vary authorisations in emergency situations

AGD	• Duplication & inconsistency in provision of planning documentation with respect to the use of premises for liquor (Local government and CBS)
DEW	• Multiple approvals required for constructing a building that requires existing wells to be backfilled and/or taking water from a prescribed ground water resource (Local government and DEW)
DHW	• Multiple regulators for high-risk primary production,. For example:ready-to-eat meats (PIRSA, local government, DHW)
AGD	• Overlap between licensing & registration of building work contractors (CBS) and SafeWork SA in relation to licensing and issuing safety registrations and permits
AGD	• Overlap between licensing and registration of plumbers, gas fitters and electricians (CBS) and compliance with technical installation and safety (OTR)
DEW	• Dual approvals required for managing aquifer recharge projects; injecting water into an aquifer (EPA), and taking water out of an aquifer (DEW)
PIRSA	• Dual auditing of high risk, primary industry related business activities, e.g. production & processing of eggs (PIRSA & DHW)
PIRSA	• Overlap with DEW in fisheries management (Marine Parks, Dolphin Sanctuary, River Murray Act, Natural Parks & Wildlife Act) e.g. conservation of marine mammals
PIRSA	• Conflicting legislative powers for land management planning on pastoral lease land; Pastoral Land Management Act, Conservation Act and the Native Vegetation Act
EPA	• Duplication of regulation for activities in inland waters (e.g. dredging) (DEW – Coast Protection Board and EPA)
EPA	• Lack of a lead agency for regulation of marine vegetation; EPA or DEW – Native Vegetation Council
DEW	• Automatic recognition of Well Driller's Licences to avoid the need for a well driller to apply for a licence in each state and territory that they wish to work
EPA	• Multiple registrations across states and territories with respect to container deposit scheme registration – need for harmonisation and one application/registration portal
AGD	• State and Commonwealth overlap with assessment and approval of major projects; currently being addressed through negotiation of bilateral agreement to accredit relevant SA approvals processes
DHW	• Confusion as to the scope or remit of accreditation (Commonwealth) vis-à-vis the SA licensing system for private hospitals and private care procedure centres
OSAPC	• A number of regulators do not have internal policies and procedures for internal review of regulatory decisions.

Industry association responses to information request – May 2021
• Remove complexities associated with applications for licences and the provision of supporting materials; e.g. acceptance of 'live scam' fingerprints taken from any nationally approved agency; establishment of a centralised national security licence database; consistent national private security licensing requirements
• Need for improved clarity on Australian Consumer Law responsibilities between CBS, Small Business Commissioner & the ACCC • Reform regulation of workers liens and unclaimed goods • Reform secondhand vehicle dealers regulations (changes to forms)

- Reduce duplication and simplify compliance processes for small businesses, with particular attention to inspections and licence renewals; consider the concept of 'Interim Restaurant Authorisations' introduced into NSW liquor legislation in 2017
- Reduce duplication of information required from tourism operators; e.g. acknowledge prior recognition through recognition of the Quality Tourism Accredited Business program

- Deregulate the requirement for the registration of employment agents (*Employment Agents Registration Act 1993*) as there is no clear market failure and no known instances where a recruitment firm or other provider of recruitment services either has been inspected or has had disciplinary action under the Act taken against them.
- Financial assurance/environmental bond mechanisms capture capital in the early stages of a project that could otherwise be directed towards productive use; consider the adoption of the WA two-part financial assurance model
- Lack of clarity in the Aboriginal Heritage Act and its misalignment with other legislation including the Mining Act & the Petroleum & Geothermal Energy Act. Define the legal status of Work Area Clearances & Cultural Heritage Surveys to provide greater certainty
- Inconsistencies in licensing requirements between jurisdictions continue despite AMR due to eastern seaboard states seeking exemptions
- Excessive time taken to obtain police clearances
- Cross border issues relating to regulation of tow truck operators, and bus & coach drivers (SA–Victorian border)

Business Survey – Comments by Respondents

- *Mining approval process sped up and aligned with WA*
- *modernize out-dated regulations or change to reflect modern equipment specs and methods, safety cameras in all forms of public transport including private vehicles that do any work for the National Disability Insurance Scheme and Education Department.*

- *Gambling - one gambling responsible training that fits all forms of gambling, tab, keno, lotto & gaming. So each entity can recognise this and we do not have to have staff complete training for all three and either 2 years or yearly. Each 3 years if a staff member has been in the industry for over 5 yrs. This would reduce costs, improve staff productivity.*

- *Need for improved review / appeal processes, more flexibility in the process of fishery planning and regulation, more consistency in the application of regulation between competing sectors.*

- *Clear recognition of the difference between architects and building designers. This can be achieved in the way SA implements the National Registration Framework, with is an outcome of the recommendations from the Building Confidence Report.*

- *(If) WFH adoption continues, there is regulatory clarity needed to inform community expectations and adapt existing systems and processes to accommodate the new set of working conditions which blend regulatory requirements of a personal residence with a workplace environment*

- *Simplify crown land licences*

- *Shop trading hours – 24/7*

- *Easier application process and acquirement of additional space for the expansion of the forestry industry. Abolition of the Landscape boards that are a major hinderance to a large number of business in SA*

- *I'm in the construction industry, regulations should be simplified and not so problematic, assistance should always be available, not resistance*

- *Make planning process easier, relax SA Health requirements for things such as composting toilets and grey water usage.*

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