South Australian Productivity Commission

Draft Report

Inquiry into reform of South Australia's Regulatory Framework

August 2021

Government of South Australia

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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 existing 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.

It is important to emphasise that the Commission has no predetermined views on the matters covered by the inquiry. This draft report sets out the Commission's understanding of the relevant matters. Feedback from stakeholders will assist further analysis and review that will contribute to the development of a final report.

Making a submission

The Commission invites submissions on the draft report by Friday 10 September 2021. Submissions may address any of the issues covered by the paper and the terms of reference.

Submissions are accepted from South Australian Government agencies if approved by their Chief Executive or Minister.

An electronic submission in Word or PDF format is preferred, along with any supporting documentation containing facts, figures, data or examples:

- through our website www.sapc.sa.gov.au; or
- via email at sapc@sa.gov.au; or
- via post at: GPO Box 2343, ADELAIDE SA 5001.

Key dates

29 January 2021
Notice of inquiry

31 March 2021
Issues Paper published

April – July 2021
Initial public consultation

21 May 2021
Submissions to issues paper due

August 2021
Draft report published

August – September 2021
Draft report public consultation

10 September 2021
Submissions due on draft report

October 2021
Final report presented to the Premier

January 2022
Final report made public

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.

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Key Messages

This draft report provides the South Australian Productivity Commission's (Commission) initial findings and draft recommendations aimed at modernising South Australia's (SA) regulatory framework. The task is to identify regulatory reforms to better support investment, reverse negative productivity trends and foster economic growth while protecting public interests.

The SA's regulatory framework was examined against leading international and national practice. Significant gaps were identified, including in accountability, transparency and assessment of regulator performance; governance, policy guidance and policy capability; and across government strategy and coordination.

The area in greatest need of reform in developing regulation is the policy development process, which is central to effective and efficient regulation. The Commission proposes that the SA Government address long-standing shortcomings (relative to best practice) in this process by strengthening governance, policy guidance and policy capabilities.

The Commission observed that performance reporting and practice improvement is highly variable across SA regulators and falls short of best practice. To increase transparency and accountability and drive improvements in regulator performance the Commission proposes the SA Government establish a statewide framework for measurement, monitoring and performance assessment. This would be complemented by statements of expectations (SOE) for SA regulators and initiatives to improve the 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 establishment of a searchable online SA regulation register, rejuvenation of the Regulation Expiry Program (REP) and development of an across government policy to guide prioritisation of regulation reviews. Adoption of a regulatory stewardship approach by agencies, to proactively manage regulation, is also proposed to ensure regulation remains effective and fit for purpose.

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 use of regulatory technologies (RegTech). The Commission proposes a strategic and co-ordinated approach to promoting the uptake of RegTech and investing in technology solutions that would benefit more than one regulator.

From a state wide perspective, the Commission concluded that the level of coordination and coherence between regulators could be improved through a lead regulatory coordinator for each Growth State industry. Where possible, harmonisation or regulatory equivalence with best practice in other jurisdictions would improve competition and market access.

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 proposes establishment of such a unit, reporting to a minister for regulatory reform, to lead and drive system-wide reform and continuous improvement.

The Commission is continuing to gather information and evidence from regulators and SA businesses, which will inform the inquiry final report and potentially reshape the Commission's draft recommendations.

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 draft report provides the South Australian Productivity Commission's (Commission) initial findings and draft 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 states' business climate and competitiveness for investment. It is also an important mechanism by which the SA Government can seek to reverse negative trends in productivity growth in this state, with 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 sustainable 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 statewide 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, regulator practices and management of jurisdictional regulatory systems provides a benchmark against which the Commission has assessed South Australia's (SA) regulatory framework.

The inquiry focus is 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 22 different regulatory areas across the public sector predominantly engaged in regulating business. Many of these regulators have full responsibility, or at least some involvement, in all stages of the regulatory life-cycle.

These regulatory areas were estimated to account for employment of about 1500 FTEs, expenditure of around $260 million and revenue generation of about $702 million annually.

The Commission found little comprehensive or detailed published information, such as business surveys, on the business impacts of SA regulation which has led the Commission to undertake work in this area. It sought 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. 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 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 is interested in gathering more evidence from businesses and other stakeholders in order to make robust final recommendations 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. For this purpose, the Commission is conducting a short survey of a wide cross section of businesses in SA, which will further inform its final report.

Developing regulation

The effects of different regulatory approaches on businesses can be partly a consequence of the types of instruments that are used. The Commission understands that successive South Australian Parliaments have deemed it more appropriate for substantive regulatory provisions to be enacted though primary legislation rather than subordinate legislation.

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 this 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 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.

South Australia's systems and processes for designing, making, reviewing and sunsetting of regulations currently do not specifically address cross-border regulatory inconsistency between Australian jurisdictions, which can adversely affect the efficiency of the Australian and South Australian economies. Their effects are most directly observed in their impact on regional economies and border communities.

The Commission recommends that processes for developing legislation and regulation be amended to require consideration of the implications of cross-border inconsistencies when assessing the impact of those measures.

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. Accordingly, it cannot yet form a view on whether Cabinet's decision-making has been effectively supported by agencies' impact assessments.

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 is seeking further information on this matter.

The Commission concludes that the current system does not consistently fulfil the requirements of a fully effective RIA process as defined by the OECD and laid out in the *Better Regulation Handbook*. This appears to be a longstanding matter. 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. While good practice principles are easy to identify, measuring regulator performance to enable comparative assessment against such principles is not a straightforward task for several reasons. Firstly, regulators are not a homogenous group, and differ in size, structure and function, making it difficult to benchmark and compare regulator 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 avoidance of harm.

Nevertheless, other jurisdictions in Australia and internationally have developed policies, models 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 transparency and promoting improvement. SA's policy framework for regulator improvement appears under-developed in comparison. In conducting its own assessment of SA regulator practice, the Commission draws on some of these established regulator performance frameworks to inform the methodology.

Currently, there is no state-wide 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 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.

To increase the transparency and accountability of SA regulators, 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. In addition, to provide greater clarity about government objectives, policies and deliverables relevant to each regulator, the Commission recommends that the SA Government provide statements of expectations (SOE), including a requirement to foster economic growth, to all state business regulators. These SOEs would specify key performance indicators (KPI) that regulators will be assessed against and priorities for improvement. This action builds on current actions to increase accountability across the public sector.

While the Commission is continuing to collect evidence from regulators, our consultations with regulators to date indicate that only some regulatory entities have mature systems of performance monitoring and improvement. These are usually the larger agencies that are more well-resourced, but there are also significant regulatory entities where the 'score card' of good performance is blank. 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 regulators.

The Commission reviewed several existing international models of regulator assessment and has developed its own framework for assessing SA regulator practice drawing on the best practice guidance and frameworks used in other Australian jurisdictions and internationally. The framework has been tailored to seek the breadth and depth of information on regulator practice required to address the terms of reference for this inquiry. The Commission's framework draws mostly from the Australian and Victorian Governments' regulator performance frameworks, and those developed by the OECD and used in the UK for the Hampton Implementation Reviews.

The SAPC framework has eight areas of practice which the body of literature identifies as 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 has sought to identify areas of good practice and lessons that could be applied more broadly across SA's regulatory agencies, while also seeking regulator's views on opportunities for improvement.

The Commission is continuing to gather information and evidence on the current practices of SA regulators to inform this inquiry. The final report will provide a more comprehensive assessment of current practices drawing on further consultations, a survey of selected regulators, and case study examples.

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. It is much more than reducing unnecessary red tape – although that is an important element. It also requires the identification of leading practices and appropriate comparisons with existing practices, identification of reform opportunities, and capability and to implement reforms. This requires leadership and long term commitment to building a culture that supports continuous improvement as well as a strategic framework to guide and prioritise improvements to the quality of the regulation stock.

The Commission compared current approaches to managing the regulation stock in SA against leading practice to identify potential opportunities for reform in SA. Most notably, the Regulation Expiry Program (REP), which aims to ensure regular review of regulations and amendment where necessary to ensure they remain appropriate, requires rejuvenation. 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.

To support the REP to achieve its stated purpose, the Commission recommends that governance arrangements be improved to enhance transparency and strengthen accountability. Guidance material, tools and templates should also be developed to assist agency compliance with the program.

The Commission notes 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. This is exacerbated by the absence of a central unit with across government responsibility for collecting and publishing data on reviews or regulations themselves.

To improve knowledge and understanding of the existing stock of regulation by government agencies and businesses, the Commission recommends that the SA Government build on the existing online regulation register to create one in a format that can be readily navigated and searched, with information able to be exported to support reviews.

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. 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 such reviews from an across government perspective.

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 and coordinated approach to regulation review that considers associated regulatory interactions when appropriate.

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 their life cycle, to ensure regulatory systems remain fit for purpose.

Some elements characteristic of regulatory stewardship are embedded within SA's regulatory architecture, including the fact that ministers and their portfolio departments are already responsible for, and are therefore the 'stewards' of, their part of the state's stock of regulation. The Commission recommends that the SA Government adopt the stewardship model, which would introduce a more outcomes-focussed approach to managing the entire regulatory life cycle. It is likely, however, that it may necessitate legislative amendments, as was the case in New Zealand, including possible consequential amendments to the Subordinate Legislation Act.

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 five key areas where technology solutions are enhancing regulatory practice; compliance; reporting and transaction monitoring; risk management; and identity management and control.

The Commission has so far found some good examples of digital and technological innovations being implemented among certain SA regulators. That said, consultations with regulators and regulated entities alike suggest that the level of digital and technology uptake

among regulatory entities 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 regulatory entities, a lack of interoperability between SA regulators' data management systems, and continued reliance on manual and paper-based systems when dealing with regulated entities or other levels of government, sometimes 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 recommends that the SA Government commit to all regulators migrating to digital business-to-government data transfers and the greater use of regulatory technology (RegTech) to make compliance activities faster, easier and more cost effective for both regulators and regulated entities.

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 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 and the use of regulatory sandboxes to test innovative approaches to regulation.

The SA Government has recently invested in a new government services portal which will provide agencies with a single platform with which to engage with businesses. This could provide a basis not only for reducing compliance costs for businesses but also facilitating more efficient interactions between regulators. The Commission recommends that the SA Government identify and fund specific investments in RegTech and digital solutions that enable more efficient data collection from regulated entities, more efficient data sharing between regulators, including regulators in other jurisdictions where appropriate, and improved coordination between regulators.

The Commission is interested in hearing from stakeholders on how well they consider SA's regulatory system is able to respond to future 'shocks' as well as innovation and technological changes in markets, and what areas require state government action.

Strengthening statewide regulatory architecture

While regulation development is guided by the government *Better Regulation Handbook*, the extent to which the later stages of the regulatory life-cycle in SA are supported by an effective whole-of-government policy framework is less clear. The Commission has been unable to find significant evidence of a comprehensive and whole-of-government framework, as envisioned by the OECD, to guide and enhance regulator practice throughout the public sector.

The OECD considers role clarity for regulatory agencies is a prerequisite for ensuring that regulatory decisions are made in an impartial and evidence-based manner. This is the most effective way of ensuring that businesses can have confidence that the regulatory system is not affected by bias, conflicts of interest or improper influence.

The Commission has not yet been able to identify significant instances of overlap between state regulators, nor has it identified areas of significant duplication between state and national regulatory schemes That said, the Commission is interested to ensure that the

state's regulatory framework is not vulnerable to the negative effects of interdependencies between state regulators or jurisdictional overlap and inconsistency.

Interdependencies inevitably arise under the Westminster system of government, where individual agencies are responsible to individual ministers, pursue different goals and have different values. Increased coordination can enable potential conflicts in objectives between regulators to be identified, if not resolved, and can assist in improving design and/or implementation of regulatory policies to achieve complementarities and reduce overlaps or gaps in regulation.

The Commission's recommended introduction of statements of expectations for all state based regulators, discussed earlier, will help to create a more integrated regulatory framework. The Commission also recommends that the SA Government establish a lead regulatory coordinator model for Growth State industries in which the lead coordinator encourages collaboration and coherence amongst regulators and seeks to reduce multiple information requests, share data and promote efficient approvals processes.

Nationally consistent approaches to regulation offer potentially significant benefits flowing from increased market access and competition. That said, the Commission notes that regulatory harmonisation is dependent on multi-lateral commitments by jurisdictions to create the necessary legislative 'infrastructure' at a national level. While there are many examples of successful national harmonisation, including in energy and transport regulation, it can be a difficult and lengthy task.

That said, the Commission recommends that the SA Government commits, where possible, to harmonisation with best practice or to regulatory equivalence with other Australian best practice jurisdictions, including in border regions of the state, while also pursuing, where possible, mutual recognition at the national level for new or amended regulation.

The Commission seeks stakeholder views on options for strengthening accountability in SA for preventing, identifying, evaluating and responding to cross border issues.

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.

The Australian Government and some states, including Queensland and Victoria, have a central unit or authority (such as Victoria's Office of Better Regulation and the regulatory policy unit in the Victorian Department of Treasury and Finance) 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.

The Commission notes that 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 notes that, as this function is not currently resourced in SA, adoption of this model would have a budget impact.

The Commission is of the view that some form of centralised oversight, advice and coordination is a key mechanism to ensure that regulatory agencies have access to consistent, high quality, whole-of-government policy direction that is based on international best practice and clearly reflects government priorities. A central unit would also be able to bring together agencies to address some of the complex regulatory challenges, such as those

related to climate change or COVID-19, facing SA which require an integrated across government response.

The Commission recommends the establishment of such a unit, reporting to a minister for regulatory reform, to lead and drive system-wide reform and continuous improvement, while not encroaching upon individual agency and ministerial responsibilities for the administration of regulations and performance of regulators. The key accountabilities of this unit would be an across government regulatory strategy, performance and priorities; building regulator capability; and expert advice on regulation impact assessment and evaluation.

The Commission's draft report presents a range of interrelated draft recommendations aimed at increasing transparency, accountability, analytical rigour and customer-centric practices of SA's regulators across all stages of the regulation life cycle. The proposed 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 the 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 Commission looks forward to testing its draft conclusions and recommendations through consultation.

Summary of draft recommendations

Draft Recommendation 2.1: Cross border issues

To ensure that cross-border issues between SA and other Australian jurisdictions are appropriately identified and addressed in the development of South Australian regulation, the Commission recommends that the SA Government amend the *Better Regulation Handbook* to require agencies to consider equivalent regulatory settings in other jurisdictions when undertaking regulation impact assessment.

Draft Recommendation 2.2: Developing regulatory proposals for Cabinet

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

- commit 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 regulation justify the costs and that distributional effects are considered in order to maximise the net benefits of regulation;
- strengthen the gatekeeper role of Cabinet Office, in respect of its quality assurance responsibilities regarding regulatory proposals to Cabinet;
- incorporate contemporary OECD better practice principles into the requirements laid out in the *Better Regulation Handbook*;
- increase agency adherence to the *Better Regulation Handbook* through provision of improved guidance material and coordination of RIA training by Cabinet Office;
- establish a central agency support and advisory function, either in DPC or DTF, to enhance agencies', especially smaller agencies, capacity to undertake effective policy development and regulatory impact assessment;
- develop and implement a strategy to build public sector expertise in policy development and review, including through training and establishment of communities of practice for policy makers;
- enhance transparency as well as RIS capabilities through publication of RIS's; and
- subject the RIA process to monitoring, regular evaluation and continuous improvement.

Draft Recommendation 3.1: Performance measurement and reporting

To increase the transparency and accountability of SA regulators, the Commission recommends that the SA Government establish an across government policy framework to guide measurement, monitoring and assessment of performance by regulators, in line with good practice principles. This framework would include the following characteristics:

- be flexible enough to recognise that regulators are a heterogeneous group with different legislative obligations, roles, structures and functions; and
- not be overly burdensome but be integrated into each regulator's performance monitoring and review cycle.

Draft Recommendation 3.2: Statement of expectations

To provide greater clarity about government objectives, policies and deliverables relevant to each regulator, the Commission recommends that the SA Government provide statements of expectations (SOE) to all state business regulators. These SOEs would include a requirement to foster economic growth and specify key performance indicators (KPI) that regulators will be assessed against and require that regulators:

- are timely, outcome focused and proportionate in managing risks;
- are open, transparent and efficient in their dealings with regulated entities;
- pursue continuous improvement and apply innovative processes to reduce regulatory burden; and
- report annually on achievement of their KPIs, based upon self-assessment and stakeholder feedback on performance.

Draft Recommendation 3.3: Continuous improvement of practice

To promote and support the improvement of regulatory practice among SA regulators, the Commission recommends that the SA Government establish an across government improvement strategy that, among other things:

- requires regulators to develop, implement and report publicly on improvement strategies with a strong outcomes focus;
- establishes a community of practice among SA regulators and policy agencies to build capability and to share data, management systems and best practice in development, operations and stewardship. The community of practice could also provide a resource for smaller regulators to access specialist skills and expertise for RIA assessment and performance review ;
- includes other initiatives to improve the 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;
- is complemented by a program of external audit of selected priority regulatory agencies to examine the extent to which individual regulators deliver on their objectives and implement good practice. This could be undertaken by the SA Auditor General.

Draft recommendation 4.1: Register of regulation

To improve knowledge and understanding of the existing stock of regulation by government agencies and businesses, the Commission recommends that the SA Government create, or build on an existing, online regulation register that lists all current SA Government regulation (primary and delegated legislation) in a format that can be readily navigated and searched and information exported to enable review.

Draft recommendation 4.2: SA's Regulation Expiry Program (REP)

To support the REP to achieve its stated purpose that '*regulations are reviewed regularly and remade in a form that is appropriate to their current context*'[1], the Commission recommends that the SA Government provides:

- guidance material to inform and guide agencies on the purpose, requirements and processes of the REP;
- tools to complement the REP guidance material and assist agencies (including templates, case study examples, FAQs etc);
- training and education that references the REP (including online options);
- a mechanism to improve coordination of the REP across agencies and enable agencies to share and report on REP activity including regulatory reviews (previous, current and planned); and
- improved REP governance arrangements be improved to better support the objectives and reaffirm commitment to the REP, enhance transparency and strengthen accountability through better coordination and reporting.

Any new guidance material, tools, mechanisms and education programs be developed in consultation with agencies.

Draft recommendation 4.3: Review priority policy

To assist in ensuring the state's regulations remain relevant, achieve their policy objectives and deliver net benefits to SA, the Commission recommends that the SA Government develop an across government policy to guide the prioritisation of regulation reviews. The policy's principles and criteria will enable regulatory and policy agencies to:

- identify and prioritise reviews of regulations, categories of regulation or regulated industries;
- determine the most appropriate review type and evaluation methodology to apply;
- support a holistic approach to regulation review that considers associated regulatory interactions when appropriate;
- coordinate and undertake effective stakeholder engagement and communication; and
- apply a proportionate and risk-based approach to regulation review that considers the actual and potential costs and benefits of the review process and outcomes.

[1] Legislation SA, *Expiry Program Information*, (Web Page, June 2021) < https://www.legislation.sa.gov.au/Web/Help/Expiry%20program/ExpiryProgram.aspx>

Draft recommendation 4.4: Regulatory stewardship

To establish a leading practice approach to management of the stock of regulation, the Commission recommends that the SA Government requires all state-based regulators to adopt a regulatory stewardship approach that:

- confirms and publicly sets out the roles, responsibilities and associated accountabilities of regulatory agencies;
- proactively manages regulation over the regulation life cycle, including through post-implementation evaluations;
- builds regulatory agency capacity and capability to improve the capture and sharing of data and information, and collaborative approaches that limit the impacts of regulatory interactions on industry through simplification and consolidation; and
- requires regulatory stewards to publicly report information on their regulatory review activity (current and planned) to improve stakeholder engagement.

Draft recommendation 5.1: Regulator innovation and 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:

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

b) facilitate innovation in regulatory design and practice by:
   - Completing a study lead by the Department of the Premier and Cabinet, working with regulators, to identify where digital and technology solutions could be best implemented to enhance regulatory practice for individual regulators and provide the greatest benefits for the state regulatory system.
   - Revising the methodology for assessing government investments in RegTech and digital solutions to consider the broad, ongoing benefits to regulated entities and the state economy from reduced compliance costs, and not just the financial impact on government or individual regulators.
   - Committing to the use of regulatory sandboxes to test innovative concepts at smaller scale, facilitate growth of emerging industries and respond to emerging opportunities in established industries.

Draft recommendation 5.2: Investment in cross-government RegTech solutions

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

- more efficient data collection from regulated entities;
- more efficient data sharing between regulators, including regulators in other jurisdictions where appropriate; and
- improved coordination between regulators.

Draft Recommendation 6.1: Lead regulatory coordinator model

To strengthen better regulation in the Growth State industries, the Commission recommends that the SA Government establish a lead regulatory coordinator model for each Growth State industry in which the lead coordinator encourages collaboration and coherence amongst regulators and seeks to reduce multiple information requests, share data and promote efficient approvals processes.

Draft Recommendation 6.2: Harmonisation

To reduce regulatory costs and duplication on business and the SA economy and to improve access of SA businesses to national markets, the Commission recommends that the SA Government commits, where possible, to harmonisation with best practice or to regulatory equivalence of the state's regulatory settings with other best practice Australian jurisdictions, including in border regions of the state, while also pursuing, where possible, mutual recognition at the national level for new or amended regulation.

Recommendation 6.3: Central leadership and oversight

To provide leadership and advice on improving and optimising the value of the state's regulatory framework, including through adoption of best practice across the regulation life cycle, the Commission recommends that the SA Government establish a dedicated unit, located in a central agency and responsible to a minister whose responsibilities include modern regulation reform. The unit's key accountabilities are:

- across government regulatory strategy, performance and priorities;
- building regulator capability; and
- expert advice on regulatory impact assessment and post implementation reviews.

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

Summary of Information requests

Information request 3.1 Assessing SA regulator practices

a) Does the SAPC's regulator performance framework sufficiently cover key aspects of good regulator practice?
b) What are some specific examples of good and poor regulator practice in SA?

Are there any other issues around specific regulator practices that the Commission should look at more closely?

Information request 4.1: Practicing regulatory stewardship in SA

In order to further develop the inquiry draft recommendations, the Commission is interested to learn from regulatory agencies about the different approaches, experiences and insights on regulatory stewardship where it has been applied.

Information request 5.1: Regulating during economic or other market shocks

The Commission is interested to learn about:

a) What lessons can be learned from the experience of regulation design, creation and implementation during the COVID-19 pandemic?
b) How responsive is SA's regulatory framework to market disruptions or changes in technology? Provide examples of regulatory arrangements in SA or elsewhere that support innovative approaches by regulators.
c) What opportunities for improvement to the state's regulatory framework are presented by artificial intelligence, big data, RegTech or other technological developments?
d) To what extent does SA's regulatory framework support innovation in business? Please provide specific examples of good practice.
e) What are some key areas where investment in RegTech would greatly enhance regulatory systems and practice in SA?
f) Are regulatory sandboxes a useful mechanism to support business innovation? Are there areas of opportunity where regulatory sandboxes could be used?

Information request 6.1: Appeals processes

Are the processes for appealing decisions by SA regulators, including both internal and external appeal pathways, effective, efficient and timely?

Information request 6.2: Cross border regulatory inconsistencies

The Commission is interested in improving its understanding of the costs of cross border regulatory inconsistencies:

a) How accurately has the Commission captured the extent of cross-border regulatory inconsistency experienced by SA businesses? What is missing?
b) What costs do these inconsistencies impose on SA businesses? Please provide examples and evidence.
c) Should institutional arrangements for identifying and responding to cross-border regulatory inconsistencies be strengthened in SA?
d) What benefits and costs do stakeholders see in options 1 – 3?
e) Is there a preferred option? Is there a better alternative?

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**.**
Externalities	The effect of production or consumption of goods and services on other parties where costs or benefits imposed on these parties are not fully reflected in the prices charged for the goods and services being provided.[2]
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"[3].
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 be generally be used in preference to 'legislation'. The term 'regulation' is distinct from 'regulations' (plural) which are a form of subordinate legislation (refer below).
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.
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 or 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.

[2] OECD, *Glossary of Statistical Terms*, (Web page, 25 March 2021) < http://www.oecd.org/dataoecd/8/61/2376087.pdf>
[3] Productivity Commission, *Regulatory Technology – Information Paper* (October 2020), 5.

Regulatory Impact Statement (RIS)	A tool designed to assist policy officers and decision makers when considering new or revised regulatory proposals. Normally it is in template form and documents the regulatory impact assessment process undertaken and the resulting data and information (including the impact analysis of different proposed policy options).
Regulatory life cycle	The various stages that are followed in the 'life' of a regulation including developing, implementing, amending or sunsetting regulation.
Subordinate legislation (also known as delegated legislation)	Statutory instruments made by the executive branch of government under a power granted by Parliament in primary legislation. The power to make subordinate legislation is generally exercised by the Governor in Executive Council. Subordinate legislation determines the law or alters its content, as opposed to administrative instruments that only apply the law in particular circumstances. The *Subordinate Legislation Act 1978* (SA) defines three types of instruments as regulations for the purposes of the act: regulations, rules or by-laws[4].

[4] South Australian Government, *Subordinate Legislation Act 1978*, s4

Acronyms

ABLIS	Australian Business Licence and Information Service
AEMO	Australian Energy Marker Operator
AGD	Attorney General's Department
BRV	Better Regulation Victoria
CBS	Consumer and Business Services
CSO	Crown Solicitor's Office
DEM	Department for Energy and Mining
DEW	Department for Environment and Water
DHW	Department for Health and Wellbeing
DIS	Department for Innovation and Skills
DER	Distributed Energy Resource (Register)
DIT	Department for Infrastructure and Transport
DPC	Department of the Premier and Cabinet
DTF	Department of Treasury and Finance
EPA	Environment Protection Authority
ERD	Environment, Resources and Development (ERD) Court
ESCOSA	Essential Services Commission of South Australia
GDP	Gross domestic product
GFC	Global financial crisis
ICAC	Independent Commission Against Corruption
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
OTR	Office of the Technical Regulator
PIRSA	(Department of) Primary Industries and Regions, South Australia
QPC	Queensland Productivity Commission
REP	Regulation Expiry Program

RIA	Regulatory impact assessment
RIS	Regulatory impact statement
SACAT	South Australian Civil and Administration Tribunal
SACES	South Australian Centre for Economic Studies
SAFC	South Australian Freight Council
SAPC	South Australian Productivity Commission
SoE	Statements of Expectations
TAS	Traineeship and Apprenticeship Services

1. Introduction

1.1 Regulatory reform, productivity and economic growth

This draft report provides the South Australian Productivity Commission's (the Commission) initial findings and draft recommendations on its inquiry into South Australia's (SA) regulatory framework. 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. The inquiry is focused on regulation established by the SA Government and impacting on businesses – particularly when they are starting up, expanding and seeking to invest.

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.[5] Lifting productivity is an essential foundation for economic growth and a sustained improvement in living standards over the long term.

The COVID-19 pandemic has created new challenges to shifting this performance. The impact on business revenue and jobs has been disproportionately high for certain industries (e.g. tourism, hospitality, arts and entertainment), types of businesses (e.g. small businesses) and regions. The COVID-19 pandemic has required businesses to quickly adapt and change to ensure they are complying with new health directions, and in order to keep trading. This has included changes to how governments and businesses interact – including greater use of digital communication technologies -supported by some regulatory amendments by governments. Some of the new ways of working by both businesses and governments may well continue after the pandemic.

Safely growing jobs, lifting economic growth and raising productivity are urgent priorities for SA. 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, raise productivity and foster economic growth.

Countries with leading practice regulatory frameworks have been found to have greater economic resilience, reducing the likelihood and impact of economic contractions over time.[6] 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.

Well designed and effectively applied regulation can help safeguard and promote the wellbeing, health and safety of the community, environment and economy. Regulation can help to ensure that externalities (consequences for others not considered by decision-makers) are identified and brought to bear by businesses and households. It can also support the operation of markets by resolving constraints related to differences in information held by businesses and their customers. Regulation is also used to deal with a lack of competition in markets.

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

Regulation is one tool that governments may use to tackle these sorts of problems and to achieve their economic, social and environmental policy objectives by influencing behaviour. Regulation can include mandatory rules and obligations on businesses (so called 'command and control' regulation), or by providing incentives (and penalties) in order to influence business decisions (including market-based policies such as taxes and subsidies).

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.

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 toward 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 investment choice.

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 performance capacity to develop and implement quality regulation. The OECD recognised the importance of a well-functioning regulatory framework to restore confidence and growth in the wake of the global financial crisis. Its 2012 policy statement called for a an across government approach to regulatory reform.[7] 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.

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

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.

Sparrow advocates a risk-based approach to regulation that focuses on identifying and reducing risks and harms. This method can use a broad range of tools (including regulations) and risk mitigation as a foundation for partnerships and engagement.[8]

> *Decisions are made by people rather than by organisations, although the structures, systems, objectives, culture and incentives that operate within organisations can affect the decisions made by the people who work in them. The focus of achieving compliance with laws should, therefore, be on affecting both the behaviour of individuals and the organisational environment.*[9]

Hodges has argued about the importance of ethical and fair behaviour, on the part of both regulators and businesses, to the design and operation of an effective regulatory system. The regulatory system will be most effective in affecting the behaviour of individuals where it supports ethical and fair behaviour. Such a system should have:

- **Ethical regulators.** Regulators should—self-evidently—adopt unimpeachable, consistent and transparent ethical practice.
- **Ethical businesses.** Businesses should be capable of demonstrating constant and satisfactory evidence of their commitment to fair and ethical behaviour that will support the trust of regulators and enforcers, as well as of employees, customers, suppliers and other stakeholders.
- **A learning culture.** A blame culture will inhibit learning, so businesses and regulators should encourage and support an open collaborative 'no blame' culture, save where wrongdoing is intentionally or clearly unethical.

[8] Malcolm K. Sparrow, Professor of the Practice of Public Management, John F. Kennedy School of Government Harvard University.

[9] Christopher Hodges Professor of Justice Systems, and Fellow of Wolfson College, University of Oxford, *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 >

- **A collaborative culture.** Regulatory systems need to be based on collaboration if they are to support an ethical regime, and to maximise performance, compliance, and innovation.
- **Proportionate responses.** Where people break rules or behave immorally, people expect to see a proportionate response.[10]

In mid-2021 the Australian Government released its new regulatory impact analysis guide[11] and new regulator performance guide[12] as part of its renewed deregulation agenda.The Australian Government has signalled 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

SA's regulatory framework comprises the legislation, regulations, governance arrangements, institutions, processes, tools and systems in place throughout the state to develop, administer, review and amend 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. The state-wide regulatory framework is explored further in Chapter 6.

Forms of regulation in SA

The inquiry terms of reference define regulation as any primary legislation or statutory instruments made under an act, such as regulations, rules, by-laws or any instruments of a legislative character.

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.

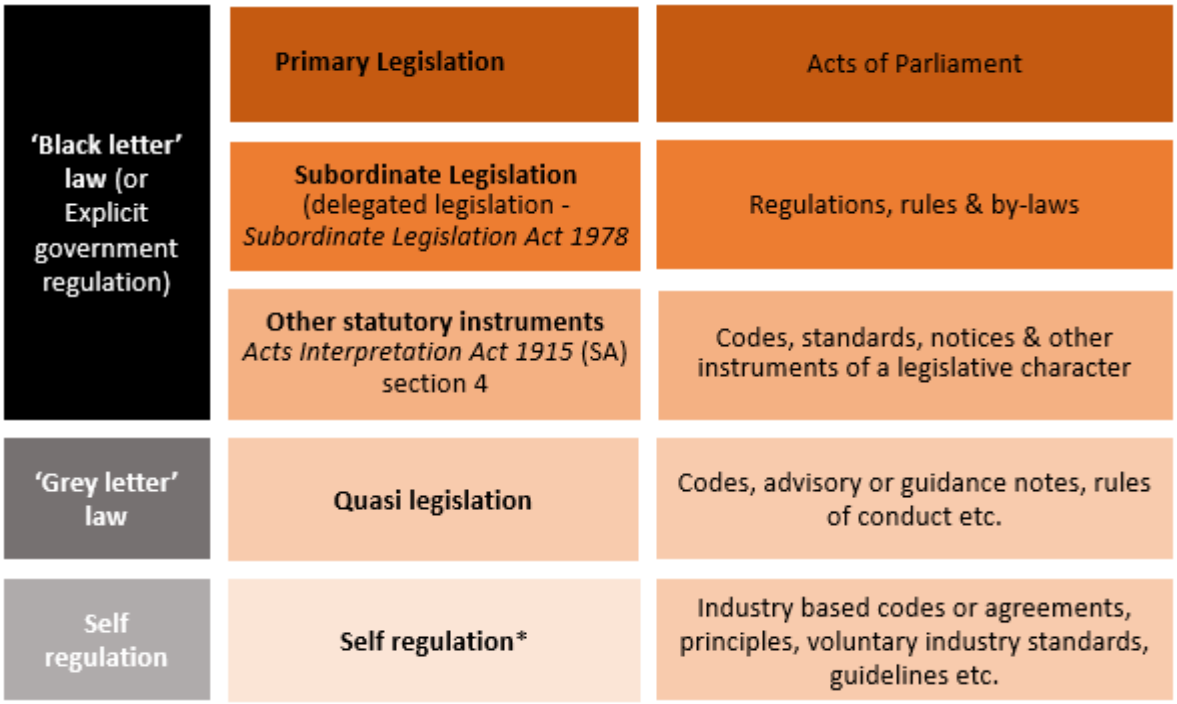
In SA, legislative provisions are contained in either primary legislation (Acts of Parliament) or subordinate legislation. Subordinate legislation is created by the government (including local government in the case of by-laws) based on power delegated by Parliament. Regulations, rules and by-laws are 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 different forms of regulation in SA are illustrated in Figure 1.1.

[10] Christopher Hodges Professor of Justice Systems, and Fellow of Wolfson College, University of Oxford, *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 >

[11] Commonwealth of Australia, Department of the Prime Minister and Cabinet**,** *Regulatory Impact Analysis Guide for Ministers' Meetings and National Standard Setting Bodies,* (May 2021).

[12] Commonwealth of Australia, Department of the Prime Minister and Cabinet**,** *Regulator Performance Guide,* (July 2021).

Figure 1.1: Forms of regulation in South Australia

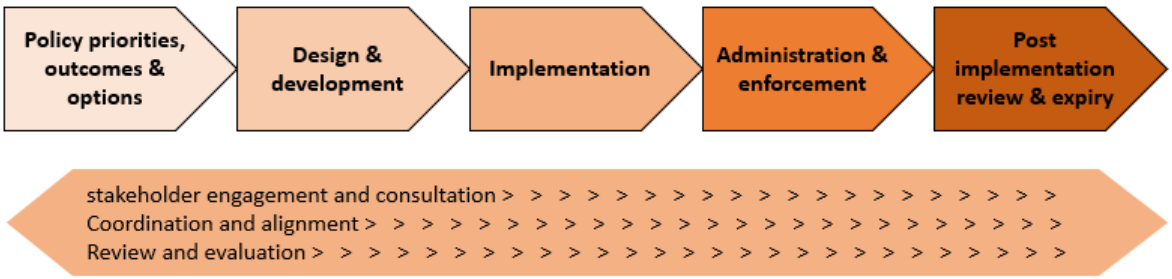


Source: OSAPC, March 2021
** Self-regulation refers to any regulatory regime which has generally been developed and funded by industry, and is enforced exclusively by industry*[13]

The regulatory life cycle

The regulatory life cycle (Figure 1.2) refers to the various stages followed in the 'life' of a regulation. Regulation is one of several possible choices of government policy instruments.

Figure 1.2: Regulatory life cycle



Source: OSAPC

Activities throughout the regulatory life cycle will generally entail policy departments and regulatory agencies developing and administering regulations, undertaking stakeholder engagement, cooperating with co-regulatory authorities, ensuring alignment with policy objectives, and coordinating within and across levels of government. This approach helps 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.

[13] Commonwealth Interdepartmental Committee on Quasi-regulation, *Report on grey-letter law,* December 1997, 6.

The SA Government's approach to developing regulations, as in other Australian jurisdictions, is centred on the executive branch of government, with the authority to make statutory instruments delegated by Parliament. Proposed regulations are assessed through a regulatory impact assessment (RIA) process administered by the Department of the Premier and Cabinet (DPC) prior to consideration by Cabinet and are then made by the Governor. As in other Australian jurisdictions, the South Australian Parliament has established a Legislative Review Committee (LRC) to scrutinise subordinate legislation. The LRC may recommend the disallowance of any instrument that it deems to be in breach of its scrutiny principles. Chapter 2 further discusses the development of regulations in SA.

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, including the decision to include provisions within primary or sub-ordinate legislation and the powers and limitations on enforcement options available to the regulator.

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.

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.

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.

Structure of SA regulators

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

- independent entities with their own enabling legislation, for example the Environment Protection Authority (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* (SA) (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. This draft report focuses on regulators whose role and functions closely align with the inquiry terms of reference. The Commission has consulted with independent authorities (see Table 1.1) and business units within departments (see Table 1.2) that are responsible for regulatory functions that principally affect businesses in SA.

Table 1.1: Key SA Independent Authorities

Independent Authority	Regulatory functions
Essential Services Commission of SA (ESCOSA)	Regulates pricing, licensing, performance monitoring and reporting, compliance and scheme administration with relation to SA's water, electricity, gas, railways and port services.
Environment Protection Authority (EPA)	Deals with regulation for environmental protection in areas such as pollution, waste, noise and radiation.
SA Water	Regulates water and sewerage services in SA to maintain health and safety, water quality, the environment and natural resources, technical standards, customer protection, pricing and service standards.
Return to Work SA	Regulates the South Australian Return to Work scheme.
Dairysafe	Ensures that SA dairy products are safe for consumers by ensuring they are produced by an accredited business operating in accordance with Australia's food safety standards.

Table 1.2 provides an overview of the major regulatory functions within departments that to relate specifically or primarily to businesses.

Table 1.2: Key Regulatory Functions within SA Departments

Department	Regulatory function
Attorney-General's Department (AGD)	Protecting the rights of all South Australians, holding people to account according to the law, improving safety, and contributing to an efficient and fair justice system. Including: **Planning and Land Use Services** - Manages the planning and land use system for South Australia. **Consumer & Business Services** - Provides a diverse range of services to protect consumers and support and regulate business in areas such as: liquor, gambling and lotteries, occupational trade, labour hire, second-hand vehicle dealers, security and investigations and pay day lending. **Small Business Commissioner** – Regulates retail and commercial leases.
Department for Infrastructure and Transport (DIT)	Diverse responsibilities for transport systems and services, infrastructure planning and provision within South Australia. Including: **Passenger transport regulation**
Department of Primary Industries & Regions (PIRSA)	Deals with market access and other regulation pertaining to primary industries, including aspects of environmental protection. Including: **Biosecurity SA, Fisheries & Aquaculture, Agriculture Food & Wine, Forestry and Rural Solutions**
Department for Energy and Mining (DEM)	Conducts assessment, approval and compliance monitoring of mineral exploration and mining activities throughout SA, including aspects of environmental protection. Including: **Energy**

	resources, mineral resources and energy and technical Regulation **Office of the Technical Regulator (OTR)** - Monitors the compliance of utility infrastructure with relevant technical standards and other requirements to ensure safety and maintenance of supply, and conducts monitoring and regulation of safety and technical standards in relation to the electricity, gas and water industries.
Department for Innovation and Skills (DIS)	Supports SA's future economy, creating prosperity and opportunity for the people who choose to live and work in the state. Including: **Traineeship and Apprenticeship Services (TAS)** responsible for the regulation of traineeships and apprenticeships in SA
Department for Health and Wellbeing (DHW)	Protects and improves the health of all South Australians by providing leadership in health reform, policy development and planning. Including: **Health Protection and Licensing Services,** and regulation of **Food & Controlled Drugs.**
Department of Treasury and Finance (DTF)	Provides key services to other government agencies and the community, including improving safety in SA workplaces, industrial relations services, and corporate, business and procurement services. Including: **Safework SA** - Provides advice and education on work health and safety, issues licences and registration for workers and plant, investigates workplace incidents and enforces the work health and safety laws in SA. **Revenue SA –** Responsible for management, collection and enforcement of SA's taxation revenue and administers grant payments
Department for Environment and Water (DEW)	Deals with regulations and makes decisions relating to the sustainable development of South Australia's natural resources including **Water Licencing and Native Vegetation**

Source: OSAPC

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 so were deemed out of scope for further investigation. These initial consultations identified 22 different business regulation areas in the SA public sector from which the Commission obtained data on activity presented in the following section.

1.4 Regulatory costs to government

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 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 expenditure. However, this captured regulators that provide both regulatory and non-regulatory services for businesses, individuals and other non-government organisations.[14]

The Queensland Productivity Commission (QPC) deducted non-regulatory services and arrived at an estimate of $3.2 billion gross public spending on regulatory services in Queensland based on the OCBR data.[15] The QPC used this to estimate that their own gross cost of administering and enforcing regulations in their state is approximately $2.6 to $3.1 billion annually.[16]

In order to reach an estimate of government spending on business regulation in SA, the Commission undertook a similar exercise to that of Victoria but only gathered data for the regulatory areas listed in Table 1.1 and Table 1.2. Relevant agencies were asked for estimates of direct expenditure and employment related to all stages of the regulatory life cycle. An appropriate estimate of corporate overhead expenditure, based on Department of Treasury and Finance (DTF) estimates, 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.

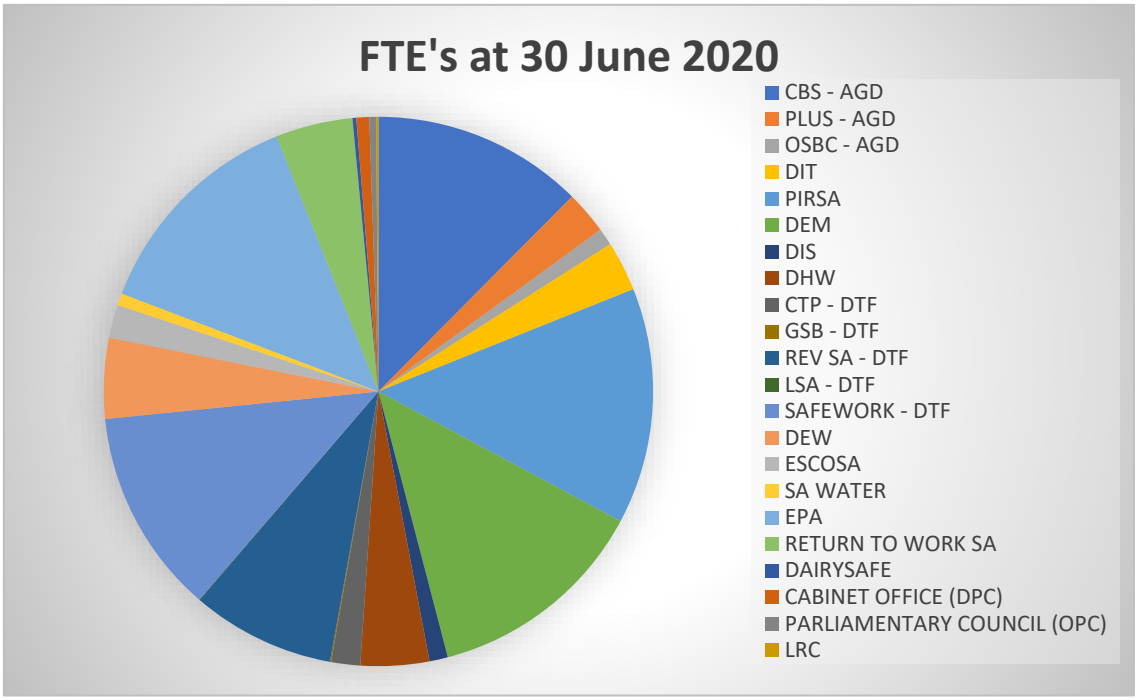
From this, it is estimated that SA has around **1500** full-time equivalent (FTE) staff employed and expenditure of around **$260 million** annually, associated with the regulation of SA businesses. These employment and expenditure estimates include key central agency and parliamentary functions related to regulation development (Office of Parliamentary Counsel, Cabinet Office and the Legislative Review Committee are included in this estimate). Notwithstanding that the SA estimate aimed to exclude regulation of households and the SA economy and number of businesses is smaller, this suggests that total government regulatory activity is lower in SA than Victoria.

A breakdown of the estimates of total employment and expenditure by regulatory area is presented in Figure 1.3 and Figure 1.4.

These regulators also generate around **$702 million** annually for the state. Return to Work SA premiums, fees and penalties make up the vast majority, followed by the Environment Protection Authority, the Department for Energy and Mining and Consumer and Business Services.

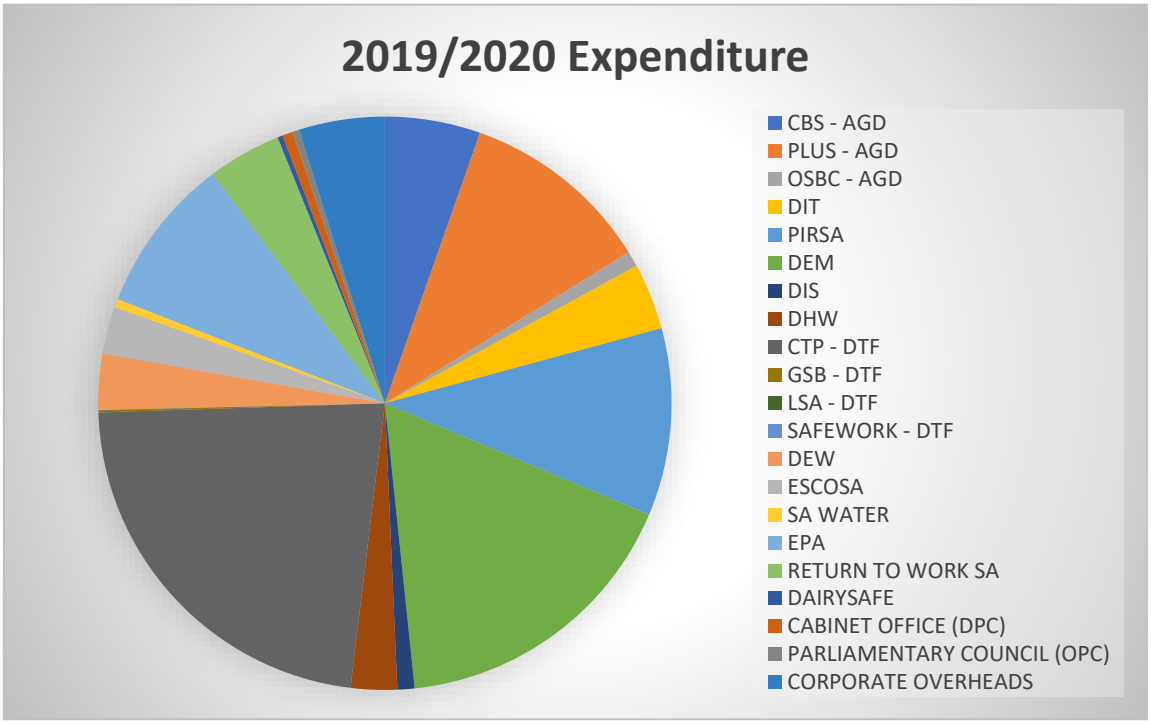
[14] OCBR, *Victorian Regulators An Overview*, (February 2019)
[15] QPC, *Improving Regulation research* paper, (March 2021), 15
[16] QPC, *Improving Regulation research* paper, (March 2021), 16

Figure 1.3: Regulatory staff employed by key central agencies and parliamentary functions



Source: OSAPC

Figure 1.4: Key central agencies and Parliamentary 2019 -2020 expenditure.



Source: OSAPC

1.5 Impacts of regulation on business

Poorly designed and inefficiently administered regulations can impose unnecessary burdens on businesses and consumers in terms of foregone jobs, investment and productivity growth.

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. On the other hand, regulation can also impose costs on government, businesses, the community and the economy more broadly. This is discussed further in Chapter 3.

For example, businesses can face increased regulatory costs related to market entry 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 costly or unnecessarily burdensome. 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. Table 1.3 shows the business licensing requirements that apply in different jurisdictions for specific hypothetical businesses operating in each of SA's Growth State industries[17], using information extracted from the Australian Business Licence and Information Service (ABLIS)[18]. The table suggests that there are fewer licensing requirements in all these industries in SA than other jurisdictions except Queensland.

It is important to note that the data in Table 1.3 is limited to that which is captured in the ABLIS database, is for illustrative purposes only, and requires careful interpretation. For example, fewer business licensing requirements in one jurisdiction does not necessarily mean that the jurisdiction has a relatively lower total regulatory burden. Other factors need to be considered which will impact on regulatory burden including the level of complexity involved, actual time and resources required to comply, approval times and so on.

[17] South Australian Government, South Australian Growth State, (Web page, 25 March 2021) <https://www.growthstate.sa.gov.au/>

[18] 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/>

Table 1.3: Number of business licences by growth state industry by jurisdiction, 2021

Growth state industry	Business models	State Licences						Aust govt licences
		SA	VIC	QLD	NSW	WA	TAS	
Food, wine & agribusiness	Dairy cattle farming Grain growing and sheep or beef cattle farming Wine grape growing	53	90	42	81	57	60	37
Defence & space	Controlled weapons manufacturing Professional, scientific and technical services n.e.c. Space transport service	27	43	15	39	36	34	37
Health & medical industries	Biotechnological manufacture of pharmaceutical and medicinal products Disinfectant manufacturing Professional, scientific and technical services n.e.c.	29	56	18	39	45	39	31
Tourism	Hotel operation Tour operator service (arranging and assembling tours) Travel agency operation	31	37	38	50	39	42	23
International education	Business college and school operation Secondary school operation (combined primary/secondary school) Technical and further education college operation	25	39	14	47	34	42	25
Energy & mining	Copper ore mining Electricity distribution Gold ore roasting and flotation extraction, including metallurgical hydro-extraction	44	50	41	68	61	43	23
Hi-tech	Computer manufacturing Engineering consulting service n.e.c. Signalling equipment, electrical, manufacturing n.e.c.	27	44	18	37	30	33	22
Creative industries	Motion picture production Television broadcasting network operation Web hosting	23	35	22	43	22	28	35

Source: OSAPC based on ABLIS data, March 2021

Regulation that increases input costs may cause businesses to decide to absorb the costs, pass on the increase to consumers, or divert resources to other activities.

> *Regulation can affect either the level of productivity or economic activity or the rate of growth of productivity and economic output, or both.*[19]

Pre-pandemic estimates indicate that the regulatory burden imposed on businesses in Australia was around three per cent of 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 $1.2 – 2.4 billion (noting these estimates do not account for the efficiency costs associated with regulation or the impact on economic resilience).[20]

[19] QPC, *Improving Regulation research paper*, (March 2021), 6.
[20] QPC, *Improving Regulation research* paper, (March 2021), 14.

Economic activity in SA has been further impacted by the preventative (but necessary) regulatory measures to mitigate against the spread of the pandemic in SA. By way of example the South Australian Centre for Economic Studies (SACES) estimates that:

> *'…ongoing restrictions on the hotel industry through to the end of December resulted in lost turnover of $100 million; 12,500 fewer jobs, up to $30 million of lost sales for food and produce suppliers, and reduction in payments to tradespeople of up to $15 million'.*[21]

Different approaches have been used to attempt 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[22] 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[23]), 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; whether they felt there was appropriate stakeholder engagement; their views on the performance of regulators and suggestions for improvements. Of the 74 industry stakeholders contacted the Commission received 19 responses. One of these was a nil response and another was deemed to be out of scope as it dealt exclusively with SA Government procurement policies and procedures.

Challenges raised by industry included:

- 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.

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. 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 protection and growth without onerous regulation.

Suggestions for reform were mostly quite specific to the industry concerned. More generic ideas included clearer responsibilities between regulators, creation of a one stop shop, pooling of compliance resources across regulators, automatic licence recognition and stopping duplication of information requests.

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[21] South Australian Centre for Economic Studies (SACES), *Greater covid-19 consultation needed to avoid economic losses*', (Web Page, 24 March 2021) <https://www.adelaide.edu.au/saces>

[22] NZIER, *Assessing the stock of regulation – a tool for regulatory stewards*, (Working paper, 2016-01), 6

[23] ABS, *Gross State Product,* (June 2020). Based on GSP $110.63 billion at June 2020 (pre-COVID-19)

The Commission is interested in gathering more evidence from businesses and other stakeholders in order to make meaningful recommendations aimed at improving SA's regulatory framework so that it reflects modern practices, identifies and removes regulatory barriers and unnecessary red tape[24], and encourages innovation and investment without compromising public interests. For this purpose, the Commission is conducting a short survey of a wide cross section of businesses in SA, which will further inform our final report.

1.6 Economy-wide impacts of regulation

As discussed earlier, 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, an ineffective regulatory framework may contain poorly designed and inefficiently administered regulation that can 'both fail to achieve its safety, environmental or consumer protection objectives and have unintended effects on prices, competition and business flexibility'.[25] An ineffective regulatory framework can unnecessarily impede business investment and innovation and hinder the government's capacity to respond to unforeseen or uncontrolled events.

A regulatory framework that imposes rigid and prescriptive rules can affect a government's capacity to adopt innovative forms of regulation, such as approaches grounded in new regulatory technology, 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.

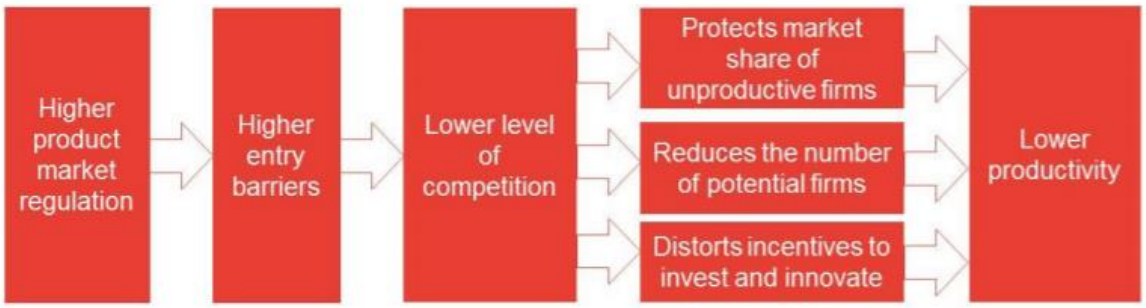
Regulation can operate in a way that restricts competition and limits incentives to invest in new technologies. A United Kingdom (UK) study concluded that increases in the volume of product market regulation[26] can discourage business start-ups, reduce competition between existing businesses, distort prices, and diminish a business's incentive to innovate and invest. Figure 1.3 illustrates this relationship.

[24] *Reducing Red Tape for Business in South Australia* (2013). (n5) "*The time and money spent by business to understand and comply with unnecessary or overly cumbersome government regulations, and related processes, and that are above and beyond the daily costs of running a business."*

[25] Queensland Productivity Commission (QPC), *Improving regulation research paper*, March 2021, 2.

[26] 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.

Figure 1.3: 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.[27] 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.[28]

1.7 Recent regulatory reform in SA

Regulatory reform initiatives include those that aim to improve the design and making of regulations, the implementation of regulations or those that target the stock of regulation.

Cabinet office in the Department of the Premier and Cabinet (DPC) requires agencies to include a summary of the estimated impacts likely to arise from the implementation of new or amended regulation.[29]

In 2010 SA Cabinet approved the *Better Regulation Handbook*, as part of a national reform, to introduce the regulatory impact assessment (RIA) process discussed earlier. Cabinet Office is responsible for the whole-of-government implementation of the RIA process and is required to confirm that a RIS submitted for consideration meets the requirements set out in the handbook. Cabinet Office also provides advice to agencies on whether a proposal reaches the threshold that would require a RIS to be prepared to support a proposed regulation. Adherence to the RIA process is mandatory for all SA Government agencies.[30] Chapter 2 provides further information on RIA and its relevance today.

SA Governments have used several initiatives to reduce the overall regulatory burden imposed in the state. 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.

[27] James Broughel and Robert W. Hahn, *The Impact of Economic Regulation on Growth,* December 2020, 32.
[28] fDi Markets Cross Border Investment Monitor, *Trends report*, (April 2021).
[29] DPC website viewed 16 February 2021, Regulatory impacts | Department of the Premier and Cabinet
[30] Better Regulation Handbook, 5

In 2006, the initial Red Tape Reduction (RTR) Program to cut red tape and unnecessary regulations was launched. There were two 'rounds' of the RTR program with the first round operating from 2006 to 2008, and following its success, a second round was implemented 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.[31] 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.

From 2016 - 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 the public, industry associations and business 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.[32]

The regulatory reforms implemented via Simplify Day impacted on a wide range of industries including transport licensing and registration, 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.[33]

Regulations are not in place indefinitely. Changes to economic and social structures, community opinions and technology may reduce the effectiveness of regulation. Outdated regulation may require amending to consider emerging issues such as climate change and population growth or may no longer be appropriate or effective due to structural changes in the economy.

The 'sunsetting' of regulations in South Australia takes place according to the Regulation Expiry Program (REP) carried out by Cabinet Office. The REP is required under part 3A of the *Subordinate Legislation Act 1978*, which prescribes the mandatory expiry of regulations and how expiry might be postponed. Nothing in the Act prevents an instrument, such as a regulation, from being either revoked or remade before it is due to expire.

The purpose of the sunsetting requirement is to seek opportunities to reduce regulatory burden, promote stakeholder consultation and highlight any trade-offs between achieving burden reduction and other policy outcomes.

[31] *Reducing Red Tape for Business in South Australia* (2013). (n13)
[32] <https://yoursay.sa.gov.au/simplify-day-2017-red-tape-reduction-and-regulatory-reform/news_feed/update-3>
[33] *Report on Jurisdictional Approaches to Regulatory Reform* (2017) (n6).

The REP Program and other initiatives to manage the stock of regulation are further explored in Chapter 4.

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. While 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 will also explore opportunities to support and accelerate the state's economic recovery from the pandemic in the shorter term.

More specifically, the inquiry aims to identify reforms to:

- institutionalise ongoing improvement and good practice by the state's 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 when proposing new, amending or sunsetting regulations and reform systems and processes for developing and managing the stock of regulations; and
- establish a clear, fit for purpose and an across government accountability framework for ongoing improvement to the state-wide system of regulation.

The Commission's approach to the inquiry includes consideration of:

- regulation that is primarily directed at, or principally affects, businesses, with a focus on start-up, expansion, and entry into interstate or overseas markets;
- regulators and regulations impacting on those businesses across the whole economy or businesses involved in the South Australian Growth State plan industries; and
- better practice regulatory systems, drawing on the work of the OECD, reforms in SA and other jurisdictions and the evaluation of those systems and reforms where possible.

The scope of this inquiry is limited to SA Government regulation including regulations and by-laws where local government is authorised by state legislation to act as a regulator on behalf of the government. The Commission is interested to hear of instances of significant regulatory overlap, duplication or inconsistency, not only between regulators within the state, but also between SA and other jurisdictions. The terms of reference for the inquiry are at Appendix 1.

The Commission received twenty three submissions (20 public and three confidential submissions) in response to the issues paper. A list of submissions is in Appendix 2, while a summary of the key issues raised in these submissions is in Appendix 3. 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 three 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 has been commissioned in three areas to obtain data and build the evidence base for the inquiry. Further case studies of specific aspects of regulator practice will identify areas of good practice as well as opportunities for improvement. A business survey will help the Commission to understand how government regulations and regulator behaviour affect SA business activities and decisions, while a survey of major regulatory areas will provide a deeper understanding of regulator practices in SA. The results of these research projects will inform the final report.

The Commission seeks a further round of consultation with stakeholders on this draft report to test and substantiate its understanding of the issues as well as its conclusions and draft recommendations. Stakeholder feedback on this report is critical input to the final report on modernising SA's regulatory framework.

This draft report is structured as follows:

Chapter 1: discusses the importance and economic impacts of regulations and introduces some key concepts used in subsequent chapters;

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 and the importance of this management to the performance of the state's regulatory framework;

Chapter 5: discusses the importance of technology and opportunities for regulators to innovated and better respond to market disruptions; and

Chapter 6: draws conclusions from earlier chapters and examines the role of state wide architecture in the efficient effective management of the regulatory life cycle.

2. Developing regulation

2.1 Introduction

In this chapter, the Commission is focused on the efficiency of the processes for the development phase of the regulation life cycle in South Australia (SA) and the effectiveness with which these processes contribute to the realisation of regulatory objectives. The Commission is not concerned here with assessing the strategic objectives of regulation. These are policy decisions on the part of government.

The efficiency and effectiveness of regulation is affected by three main factors – whether it effectively resolves a problem; the instruments applied; and the practices of regulators. One factor is whether process of designing regulation is supported by a thorough assessment of the desirability of explicit regulation (relative to quasi-regulation or self-regulation) and the likely social, environmental and economic impacts of the proposed regulation.

Another factor is the appropriateness of the instruments with which regulators undertake their key functions, particularly the powers and responsibilities conferred in primary and subordinate legislation, other statutory instruments or quasi-legislative schemes. The third factor is the contribution made by regulators' practices, examined in Chapter 3, which is also related to the process by which regulation is developed (the topic of this chapter) and reviewed (the topic of Chapter 4).

The chapter contributes to the Commission's overall task by examining a number of interconnected factors that have a bearing on the way in which regulation is developed in South Australia:

- the institutional and statutory framework within which regulations and other statutory instruments are developed and made, including the fitness-for-purpose of the instruments with which SA agencies undertake their key regulatory functions; the nature of executive law-making; and the role of parliamentary oversight, including through the Legislative Review Committee (LRC);
- the current whole-of-government regulation impact assessment (RIA) framework that contributes to the way that regulation is developed in SA, including better practice principles developed in other Australian jurisdictions and by the Organisation for Economic Development and Cooperation (OECD); and
- lessons for the development of regulation that can be drawn from responses to the COVID-19 pandemic, both in SA and in other jurisdictions, including reforms to the way in which regulation is made and scrutinised.

2.2 Institutional and statutory landscape

2.2.1 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.

All regulatory requirements implemented through subordinate legislation receive their authorising power from a piece of primary legislation (the parent or enabling Act). For instance, the *Environment Protection Regulations 2009*, which support the effective operation of the *Environment Protection Act 1993* (Environment Protection Act), are authorised by s140 of the Environment Protection Act, and must be made in accordance with the requirements laid out in that section and the relevant sections of the Subordinate Legislation Act (other statutes and case law could also affect the way in which a regulation is made).

The Subordinate Legislation Act develops a circumscribed definition of the instruments that fall within the scope of the provisions that apply to making subordinate legislation in SA. While the Acts Interpretation Act construes statutory instruments relatively broadly, including any instrument of a legislative character[34], only three instruments constitute regulation for the purposes of the Subordinate Legislation Act: "any regulation, rule or by-law made under an Act".[35] All forms of subordinate legislation, including statutory instruments that do not fall under the Subordinate Legislation Act, differ from the administrative actions taken by government because they determine the law or alter its content: they create law, as opposed to applying the law in particular instances. The provisions that apply to the making, review and expiry of subordinate legislation under the Subordinate Legislation Act are generally only applied to regulations, rules and by-laws. That said, an instrument's enabling legislation can deem the Subordinate Legislation Act to be applicable to any statutory instrument of a legislative character, which has the potential to bring other instruments within the scope of the Subordinate Legislation Act.

Governments can also impose regulatory requirements on businesses by using other types of statutory instruments, some of which are specific to a particular regulatory system, such as the Planning and Design Code (the Code). The Code is a statutory instrument within the meaning of the Acts Interpretation Act and is made pursuant to the *Planning, Development and Infrastructure Act 2016*, but is not subordinate legislation for the purposes of the Subordinate Legislation Act.

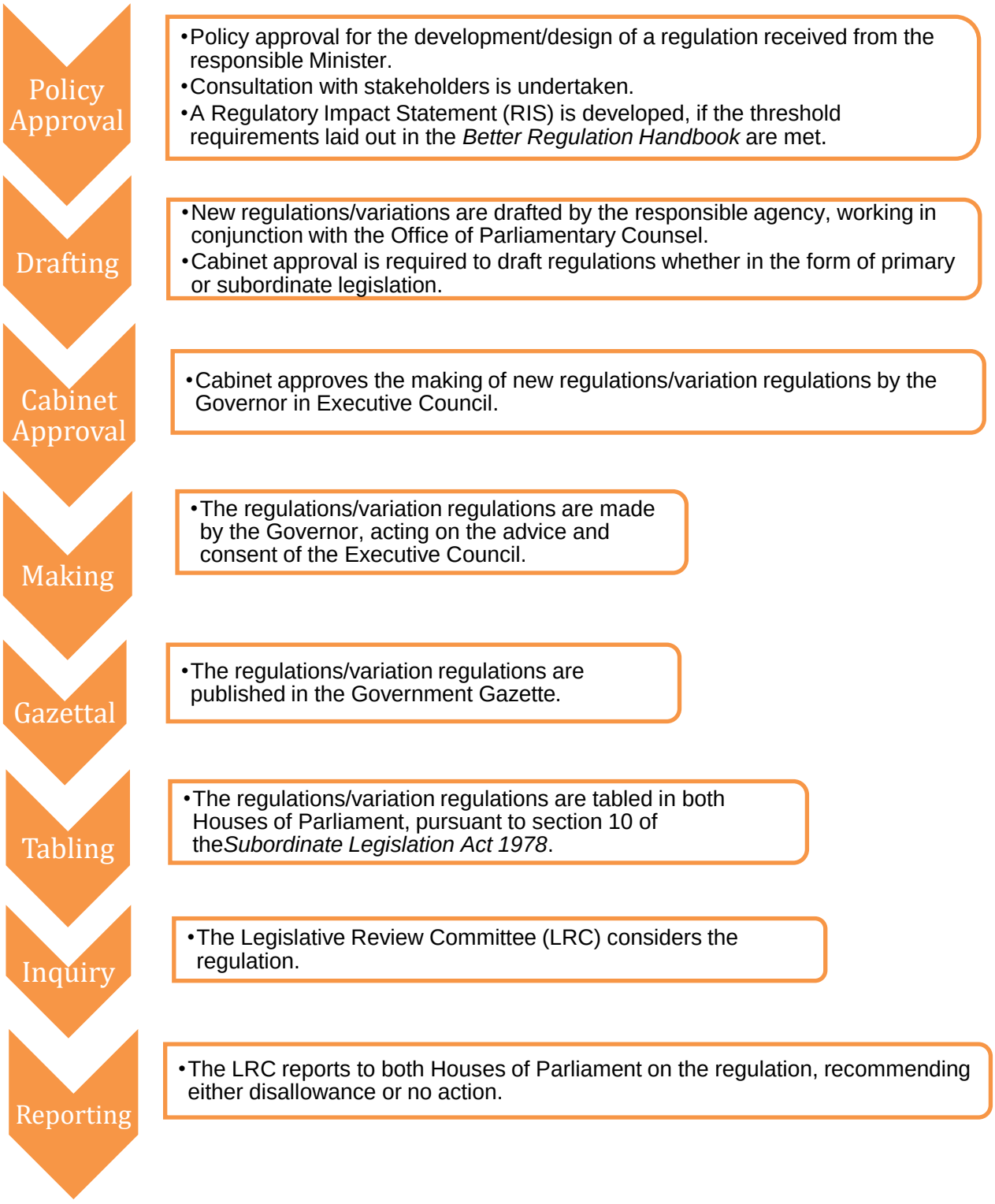
Other significant examples of regulatory instruments that are not made pursuant to the Subordinate Legislation Act include Environment Protection Policies (EPPs) made under the Environment Protection Act. These regulate several areas that fall under the Environment Protection Act, such as water quality protection and noise pollution reduction. EPPs are statutory instruments used to achieve a regulatory outcome but are not subordinate legislation

[34] *Acts Interpretation Act 1915*, s 4.
[35] *Subordinate Legislation Act 1978*, s 4.

for the narrower purposes of the Subordinate Legislation Act. The process by which they are made, reviewed and disallowed is also specific to their enabling statute.

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

Figure 2.1: The process for making regulations



Source: SAPC, based on information presented in Legislative Review Committee Information Guide.

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. That said, most regulators are likely to rely on a combination of instruments, ranging from legally enforceable obligations to a mixture of instruments and approaches, including 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 subject to the regulator's oversight.

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.*[36]

Regulators' capacity to implement better practice principles, including innovative regulatory models, can be affected by the content and the form of the regulatory provisions at their disposal. Some regulatory requirements might be more effectively implemented through primary legislation, especially if a high degree of prescriptiveness is necessary, such as the criteria that must be satisfied before a merits review of a regulator's decision can be undertaken.

The Commission has not been able to determine whether regulatory requirements affecting businesses are primarily contained in primary legislation, subordinate legislation or other types of instruments. The Commission understands that subordinate legislation in SA, principally in the form of regulations, generally contains a range of relatively minor and ancillary provisions, such as prescribed forms and fees. Substantive regulatory provisions are more likely to be contained in a regulation's enabling act. There are a few exceptions to this tendency, however, notably in respect of planning regulation.

Some stakeholders have expressed the view that SA places the majority of business-focussed regulation in primary legislation, rather than subordinate legislation within the meaning of the Subordinate Legislation Act or in other types of statutory instruments. Nonetheless, the Commission notes that SA and other Westminster jurisdictions have experienced a significant increase in executive law-making over the last two decades. This shift resulted in 88 per cent of all new laws created in SA in 2020 using subordinate legislation.[37] Over the last three years, subordinate legislation accounted for almost 70 per cent of the total number of pages of legislative text in South Australia.[38]

The Commission notes the view in parts of the academic literature and within segments of the regulator community that regulatory requirements in primary legislation are often abstract, overly complicated and less capable of responding nimbly to shifting priorities. This is seen as

[36] NSW Government, *NSW Regulatory Policy Framework Independent Review* (Final Report, 2017), 35.
[37] Associate Professor Lorne Neudorf, DR1, 2.
[38] Ibid.

limiting their use as regulatory tools and could make it more difficult to maintain their fitness-for-purpose. Regulatory practice that is dependent on provisions in primary legislation could also hamper 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 can be explained by the greater prescriptiveness required in statutes (if only to avoid statutory ambiguity) and the relatively lengthy timeframe (compared to subordinate legislation) required to develop legislation and shepherd Bills through Parliament.

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. Regulations 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 Department of Primary Industries and Regions SA (PIRSA), have highlighted the importance of deploying different regulatory approaches to respond to the complexities that affect different industries and businesses. 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, have expressed the view 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:

> *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.

It is unclear whether a simple count of enactments, or categorising regulation by the type of instrument through which it is enacted, can reveal whether regulators' practice is enhanced or hindered by the instruments at their disposal. In practice, the way that regulatory obligations are enacted is less significant than the quality of the policy development and impact assessment processes that support the creation or amendment of 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 is administered by the EPA on behalf of the Minister for Environment and Water and 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, which 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 and Protection Act 1982.

The reforms enacted through the Radiation Protection Act 2021 are designed to equip the EPA with a suite of regulatory tools that are appropriate for, and aligned with, better practice principles and expectations. This will reduce the overall administrative burden on regulated parties and enhance the EPA's capacity to undertake regulatory enforcement that is risk-based and outcomes-focussed. The benefits of the new regulatory provisions are largely unrelated to the way in which they were enacted. The new statute creates a more responsive and efficient regulatory framework, notwithstanding the fact that many of its central features are contained in primary legislation, rather than in a nominally more flexible instrument like regulations. Despite the new Act being considerably longer than its predecessor, the new provisions are designed to reduce administrative burden and simplify enforcement options.

The Commission notes that, in general, the most salient consideration in determining the effectiveness of regulatory frameworks is whether they are based on a combination of effective policy development and thorough impact assessment, including both *ex ante* and *ex post* evaluation. The form of enactment, while legally significant, arguably makes a less decisive contribution to the effectiveness and efficiency of regulation.

Box 2.1: Case Study – Modernising primary legislation to improve regulatory practice and reduce regulatory burden.

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 seven separate licence categories down to two 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 practise expectations.

Source: Environment Protection Authority

2.2.2 Parliamentary scrutiny

SA's institutional framework for making regulations is necessarily centred on the executive branch of government, with the authority to make statutory instruments delegated by Parliament. That said, parliamentary oversight plays an integral role in the state's broader framework for developing, reviewing and possibly disallowing regulations.

In SA, the Parliament's responsibility to scrutinise the government's delegated law-making activity has been devolved to the Legislative Review Committee (LRC). This is like the arrangements in place in other Australian jurisdictions, which have parliamentary committees that exercise broadly comparable functions. The LRC is one of Parliament's joint standing committees, established under part 4 of the Parliamentary Committees Act. It has six members drawn equally from the House of Assembly and the Legislative Council, with the committee's chair required to be a member of the upper house. Ministers are ineligible for membership of the LRC, which is supported by two parliamentary staff, including a committee secretary who answers to the committee's chair and a research officer.

The LRC, among other functions, is responsible for considering all statutory instruments required to be referred to it by force of section 10A(1) of the Subordinate Legislation Act. The LRC has the power to recommend the disallowance of any regulation that it deems to be in breach of its scrutiny principles. Either house of Parliament can disallow a regulation, and a notice of a motion to disallow an instrument can be brought by any member of Parliament, irrespective of whether disallowance was recommended by the LRC.

The scrutiny principles applied by the committee are essentially legal and technical in scope and character. The economic effect of an instrument is largely subsumed under a consideration of its strict legality, constitutionality and its effect on common law rights, interests and freedoms. For each statutory instrument referred to it, the LRC will scrutinise whether:

- it is in accordance with its enabling act and otherwise complies with all legislative requirements;
- it is constitutionally valid;
- it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;
- those likely to be affected by the instrument were adequately consulted in relation to it;
- its drafting is defective or unclear;
- it, and any documents it incorporates, may be freely accessed and used;
- the accompanying explanatory material provides enough information to gain a clear understanding of the instrument;
- it trespasses unduly on personal rights and liberties;
- it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
- it contains matters more appropriate for parliamentary enactment; and
- it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.[39]

[39] Parliament of South Australia, *Legislative Review Committee Information Guide: Report of the Legislative Review Committee* (2020), 7.

The broader economic impact of regulation – such as its potential to affect business investment – is likely to be considered by the LRC as a subset of the assessment principles outlined above. This is largely because regulatory impact assessments in South Australia are not required under the Subordinate Legislation Act (although they are, as noted above, required under *Treasurer's Instruction 17*, which is a statutory instrument made under the Public Finance and Audit Act).

Some equivalent parliamentary committees in other Australian jurisdictions must ensure that the effect of a proposed regulatory action is not unduly burdensome on businesses or the wider community and that all statutory requirements that pertain to impact assessment have been met. The Legislative Review Committee in NSW, for example, is empowered under the *Subordinate Legislation Act 1989* (NSW) to examine whether the potential regulatory impact of a proposed statutory instrument has been correctly identified and effectively mitigated by the responsible minister and agency.

Several stakeholders, especially regulators, maintain that the current framework for scrutinising subordinate legislation strikes an appropriate balance between parliamentary accountability and government's ability to respond swiftly to changing circumstances through subordinate legislation. Importantly, subordinate legislation usually only supports regulatory requirements already enacted through primary legislation. This means that regulations will usually contain provisions that support the efficient operation of the enabling act and must be within the regulation making power delegated in the Act.

Several government stakeholders, including some regulators, maintain that LRC's current powers of scrutiny and disallowance are sufficient. Any increase, they argue, would allow a policy decision enacted through primary legislation to be 're-litigated' by the committee after being passed by Parliament. That said, the scrutiny principles applied by the LRC are technical in character and are designed to assess the quality of law enacted through subordinate legislation. The committee's remit does not extend to examining the policy implications of executive law-making. This serves to limit the possibility that broadening the LRC's scrutiny powers could result in the substantive 'reassessment' of government policy already enacted through primary legislation.

Dr Lorne Neudorf argues that the state's institutional framework for developing regulation is undermined by the way that subordinate legislation is currently scrutinised. He suggests that these 'structural' failings have the potential to lower the quality of law-making and introduce legal uncertainty into the regulatory environment. This is likely to have an adverse effect on businesses:

> *…greater executive discretion is liable to generate more legal uncertainty and unpredictability, which is bad for business. The current framework for making delegated legislation under the Subordinate Legislation Act 1978 allows delegated laws to be made quickly, come into force immediately on the same day they are announced, and fails to impose any requirements for consultation. This means that delegated laws can change suddenly and without warning, creating uncertainty for businesses as to what the law might be tomorrow*.[40]

In 2020, Parliament passed a total of 45 Acts, totalling 346 pages of legislation. During the same period, 185 regulations were made by the executive branch of government (excluding those setting fees), totalling 1055 pages of legislation.[41] Dr Neudorf's concerns about the current framework for developing and making regulation are partly focussed on the adequacy of the Subordinate Legislation Act, especially when compared with the legislation in place in

[40] Associate Professor Lorne Neudorf, DR1, 7.
[41] Ibid, 2.

other Australian jurisdictions, such as the Commonwealth *Legislation Act 2003* (Legislation Act).

At present, the Subordinate Legislation Act defines regulations in a heavily circumscribed way, recognising only regulations, rules and by-laws as subordinate legislation. As a result, statutory instruments that are not subordinate legislation for the purposes of the Subordinate Legislation Act are not scrutinised by the LRC. The Commission has not been able to determine whether instruments that fall outside the scope of the Subordinate Legislation Act, such as environment protection policies under the Environment Protection Act, constitute a significant part of the state's regulatory landscape. The available anecdotal evidence, however, suggests that regulations constitute the single largest category of subordinate legislation in SA.

The Commonwealth Legislation Act differs substantially from the state's Subordinate Legislation Act by defining a legislative instrument (the equivalent of subordinate legislation) with reference to whether it determines or alters the law. This ensures that the test of whether an instrument is subject to the requirements of the Legislation Act is based on its legislative character. A legislative instrument is thereby defined by what it does, rather than by what it is (as is the case under the Subordinate Legislation Act).

The capacity of the Commonwealth's scrutiny framework to enhance the quality of law-making is also strengthened, Dr Neudorf argues, by the way that the Senate's Standing Committee for Scrutiny of Delegated Legislation assesses the legislative instruments made by the Australian Government:

> *…the Senate Standing Committee for the Scrutiny of Delegated Legislation examines each new instrument of a legislative character against a range of technical scrutiny principles. It is well-resourced in terms of staff and engages a legal advisor to assist it in its work. The Committee meets regularly, even when Parliament is not sitting. It frequently publishes detailed reports on its work, including the Delegated Legislation Monitor, a Disallowance Alert, an Index of Instruments, a listing of COVID-19 instruments, and annual reports that summarise its work over the past year. These publications disclose concerns that the Committee raised with ministers, departments and agencies about delegated legislation and what was done to resolve these concerns. The Committee's correspondence with ministers is also published. (Associate Professor Lorne Neudorf, DR1, p.5)*

The role of the Senate's Scrutiny of Bills Committee is complemented by the closely related Senate Standing Committee on the Scrutiny of Bills, which assesses, among other scrutiny responsibilities, whether the delegation of legislative power contemplated in a Bill before Parliament is appropriate. According to Dr Neudorf, these two committees produce a scrutiny and accountability framework that, when combined with the provisions in the Legislation Act, help to ensure the legal quality and effectiveness of subordinate legislation.

The high volume of subordinate legislation made on an annual basis creates a correspondingly high workload for the LRC. This is heightened by the fact that the committee's scrutiny principles demand a high-level of detailed and legally challenging assessment within a comparatively short timeframe. The quality and timeliness of the information provided to the LRC by government agencies can also affect the committee's ability to scrutinise the instruments that are referred to it within the required statutory timeframe.

Business SA has argued in favour of expanding the LRC's responsibilities to allow it to recommend the disallowance of an instrument that has the potential to affect businesses adversely. This would bring the LRC into line with some of its interstate counterparts, including NSW's Legislation Review Committee, which has the authority under its enabling legislation,

the *Legislation Review Act 1987* (NSW), to recommend the disallowance of a statutory instrument on the grounds of its impact on the business community:

> *Further, Business SA would welcome the functions of the Legislative Review Committee to include a similar authority to that of its equivalent in NSW to "recommend the disallowance of a statutory instrument on the grounds that it adversely affects the business community". This would provide a relatively independent oversight of proposed legislation to ensure it encourages business growth rather than hinders it (Business SA, DR3, p.3).*

Increasing the scope of the LRC's remit, subject to adequate resourcing, would allow the committee to assess a range of issues associated with the instruments that are referred to it, including the possible impact on business. This could, however, potentially prejudice its role as a technical committee of Parliament and might negatively affect its ability to function as a bipartisan scrutiny committee whose primary responsibility is to probe the legal quality of executive law making. In addition, the Commission notes that the recent Greiner Review concluded that the LRC in NSW had largely failed to assess the effects of regulation on the business sector. The review recommended that the LRC should no longer exercise statutory responsibility for assessing whether regulatory impact assessment requirements have been met.[42]

The high volume of instruments requiring the LRC's scrutiny is exacerbated by the secretariat's comparatively limited staffing resources, currently confined to the committee's secretary and a research officer. Staffing resources in other jurisdictions vary considerably, with the equivalent Senate committee possessing a secretariat of four staff (in addition to a dedicated legal adviser). The LRC's current resources appear to be out of step with the volume of subordinate legislation dealt with by the committee, and this could negatively affect a key element of the state's framework for developing regulation.

There is considerable variation in the way that Australian parliaments define, delegate and scrutinise the executive's law-making powers. As Dr Neudorf observes, the statutory and parliamentary framework at the Commonwealth level includes a range of provisions that move significantly beyond the equivalent provisions in this state. Some of these differences flow from the way that legislative instruments are defined in the Legislation Act, while others are related to the structure of the Senate's committee system. The Commission also notes that some state jurisdictions define and scrutinise subordinate legislation differently than South Australia. Victoria, for instance, brings both statutory rules and legislative instruments under the *Subordinate Legislation Act 1994* (Vic) and embeds greater public consultation requirements in the Act.

That said, the Commission has not been able to identify any significant evidence that adopting statutory requirements in place in other jurisdictions, such as the provisions contained in the Legislation Act, will *necessarily* enhance the effectiveness of the South Australian regulatory framework. In addition, there are significant differences between the markets and industries that are regulated by the Australian Government and the regulatory responsibilities that fall to state and territory governments. In addition, there are similarly significant differences in the way that the Commonwealth Parliament makes law, including the way that Commonwealth legislation is drafted, and the way that the South Australian Parliament chooses to exercise its role as the state's chief law-maker.

Reforms to the structure and processes that underlie the state's regulatory framework ought to address agencies' capacity to develop robust and proportionate regulatory proposals. Overall. the Commission concludes that this is the area in greatest need of reform to improve the

[42] NSW Government, *NSW Regulatory Policy Framework Independent Review,* Final Report, (2017) 55.

quality of regulatory proposals put to Cabinet and to the Parliament. The quality of the policy development process, which needs to include thorough regulatory impact assessment, is central to the development of effective, efficient and high quality regulation. Anecdotally the Commission has heard from parts of the SA public sector that there has been a decline in 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. Enhancements to the policy process that improve the quality of regulatory proposals contained in subordinate legislation will also enhance the LRC's capacity to deal with the volume of instruments referred to it. The efficiency and effectiveness of the current framework for developing regulation – including Parliament's role to scrutinise executive law-making – is thereby closely linked to the quality of the policy development process.

2.2.3 Cross border issues

South Australia's systems and processes for designing, making, reviewing and sunsetting of regulations currently do not specifically address cross-border regulatory inconsistency between Australian jurisdictions.

While inter-jurisdictional differences adversely affect the efficiency of the Australian and South Australian economies, their effects are most directly observed in their impact on regional economies and border communities.

The Victorian Cross Border Commissioner observed:

> *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.*[43]

The SA border communities facing New South Wales (NSW) and Victoria are part of significant cross-state economies that can incur adverse impacts from inconsistent regulatory approaches between the three states. These issues flow both ways across borders, with the proximity of key infrastructure and public services being a major factor. For example, high quality SA medical services are closer to some border communities in NSW (e.g. Broken Hill, Mildura) and Victoria (e.g. Portland, Nhill, Edenhope) than Sydney or Melbourne.

The differences are compounded to some extent by state regulations and policies that can be metropolitan-centric (variously Sydney, Melbourne and Adelaide) in their design and application.

The Commission's views on the cross-border issue are based on consultations with the Limestone Coast Local Government Association, Murraylands and Riverland Local Government Association and the Department of Primary Industries and Regions SA (PIRSA). The Commission also held meetings with the NSW and Victorian Cross Border Commissioners (NSWCBC and VCBC, respectively) and received a submission from the

[43] Correspondence received from the Victorian Cross Border Commission.

VCBC. Both the NSWCBC and VCBC identified issues their border communities had with SA regulations.

The preliminary assessment is that cross-border issues for SA border communities are mainly with Victoria and NSW, ranging from Renmark to Mount Gambier. There are some issues for NSW further north at Broken Hill (but none apparently from the SA side of the border in that area). One area, incorporating Renmark (SA), Wentworth (NSW) and Mildura (Victoria), involves all three states.

The Commission's summary of the specific issues is:

- Different locally applied policies and standards for licensing occupations and businesses, and regulations governing operations (such as workplace health and safety) affect businesses in a range of industries including building, construction and public transport. The adoption of national legislation for occupational licencing has the potential to remove some of these differences.
- Biosecurity, especially in the Murraylands and Riverland region where major fruit fly infestations can occur, is regarded as a major issue. Local government consider this to be the most significant economic issue of all matters raised in consultation.
- Road safety and public transport rules have different standards for bus safety, restrictions on approved routes and different rules on picking up passengers across state borders.
- Emergency planning and communications need further improvement and are being addressed through a zone emergency management committee. While there are arrangements in place for emergency services to operate across the border with insurance coverage, emergency providers like local government (in SA) are not covered if they cross the border for purposes such as emergency traffic management.
- Cross border freight movements are made more complex where freight needs to travel on local (council) roads. This is said to affect SA more than other states.
- Differences between Victorian and SA regulations and standards were identified as a barrier to optimising the scale of material recycling infrastructure.

The Commission notes that current automatic mutual recognition (AMR) reform will assist with occupational licensing in cross-border communities once implemented. Regulatory harmonisation, to the extent it can be achieved, will also assist, although this has been a long and difficult path in the areas where this has been pursued.

Current processes for developing legislation and regulation do not require consideration of the implications of cross-border inconsistencies when assessing the impact of those measures. Agencies might be expected to respond to matters as are raised with them, such as by affected communities and the two Cross-Border Commissioners. The Commission is not aware of the extent to which SA agencies address these issues, nor of any changes that have resulted from such representations and seeks advice from agencies on these matters.

Draft Recommendation 2.1: Cross border issues

To ensure that cross-border issues between SA and other Australian jurisdictions are appropriately identified and addressed in the development of South Australian regulation, the Commission recommends that the SA Government amend the *Better Regulation Handbook* to require agencies to consider equivalent regulatory settings in other jurisdictions when undertaking regulation impact assessment.

2.3 Regulation impact assessment

2.3.1 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 British Government.[44]

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.[45] 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.[46]

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 – 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

[44] 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).*
[45] See, for example, Australian Government, *Australian Government Guide to Regulatory Impact Analysis* (2020).
[46] For further details, see Australian Government, *Regulation*, <https://pmc.gov.au/regulation>

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.[47] 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.

The guide includes specified circumstances where exemptions to RIA requirements may be granted.

Other major Australian jurisdictions, including Victoria and Queensland, utilise 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 feature several requirements that are specific to each jurisdiction. Queensland's RIA framework applies to all government agencies, including statutory authorities, and requires agencies to make use of the framework for all regulatory proposals that require either agency or ministerial approval.

Their current RIA framework involves a suite of interrelated requirements:

- a preliminary impact assessment must be undertaken to assess the significance of the impacts (if not significant, then no further RIA is required, and the RIA results are included in the Cabinet submission);

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

- for significant impact proposals, a RIS must be drafted and publicly released allowing a minimum 28 days for stakeholders to respond;

- following consultation, a 'Decision RIS' is prepared and submitted to the Office of Better Practice Regulation (OBPR) which may request amendments to the RIS and draft a letter of advice;

- the Decision RIS and OBPR letter of advice are provided with the submission to Cabinet;

- Cabinet may require the Decision RIS and OBPR letter of advice to be published following their decision; and

- Cabinet may require a post implementation review to be undertaken within 2 to 3 years of the regulation's enactment.

All Queensland Government agencies are encouraged, but are not formally required, to seek advice from OBPR in the early stages of the regulation development process.

The Victorian Government's RIA framework makes impact assessment mandatory for any regulatory proposal that is likely to impose a significant social or economic burden on an industry or on the broader public.[48] Assessment using a RIS is necessary regardless of whether regulatory obligations will be introduced in primary or subordinate legislation.

Regulatory impact statements (RIS) are applied to regulatory proposals that may result in, or substantively amend, statutory rules and legislative instruments. Legislative Impact Assessments are used to assess the likely impact of regulatory obligations that will be introduced in primary legislation. Proportionality is one of the central principles embedded in Victoria's RIA framework. Any impact assessment should have proportionate scope and depth of analysis. Agencies are required to assess regulatory proposals against a set of seven key questions, which are designed to address many of the same key considerations that underlie other jurisdictions' RIA frameworks:

- Why is the government considering action? (problem analysis);
- Which outcomes are the government aiming to achieve? (objectives for action);
- What are the possible different courses of action that could be taken? (identify feasible options);
- What are the expected impacts (benefits and costs) of options and what is the preferred option? (impact analysis);
- What are the characteristics of the preferred option, including small business and competition impacts? (summarise the preferred option);
- How will the preferred option be put into place? (implementation plan);
- When (and how) will the government evaluate the effectiveness of the preferred option in meeting the objectives? (evaluation strategy).[49]

A review of regulatory obligations can be instigated via an internal or public government review or through a review undertaken by an independent statutory officer, including the Ombudsman.

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

[48] For further information, see Victorian Government, *How to Prepare Regulatory Impact* Assessments, <https://www.vic.gov.au/how-to-prepare-regulatory-impact-assessments#the-seven-key-questions>
[49] Ibid.

critically assesses the costs and benefits of policy options, including both regulatory and non-regulatory approaches.[50]

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".[51] 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.[52]

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.[53]

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).

Effective regulation presupposes that regulators 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.[54] 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 (OECD 2020a).[55] The OECD has developed comprehensive principles and guidance on how to effectively undertake RIA.

An effective RIA process must always:

- occur at the inception phase of the regulation development process;

[50] See, for example, NSW Government, *NSW Regulatory Policy Framework: Independent Review – Final Report* (August 2017), 42.
[51] Ibid, 42.
[52] Ibid, 44.
[53] OECD, *Recommendation of the Council on Regulatory Policy and Governance* (2012), 22 < https://www.oecd.org/gov/regulatory-policy/49990817.pdf >

[54] OECD, *OECD Regulatory Policy Outlook 2018* (2018), 29. < OECD iLibrary | Home (oecd-ilibrary.org)>
[55] *OECD Best Practice Principles for Regulatory Policy (2020a).*

- 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.[56]

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.[57] These requirements are fundamental to a successful whole-of-government implementation of effective RIA processes.

2.3.2 South Australian regulatory impact assessment (RIA) framework

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 formally administered by the Cabinet Office in the Department of Premier and Cabinet (DPC), with the framework's policy rationale and mandatory requirements laid out in the *Better Regulation Handbook*.[58]

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 annually in the 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 based on a Cabinet decision, rather than on a statutory footing, and adherence to its requirements was made mandatory for all government agencies. This includes those established under their own enabling legislation, such as the Environment Protection Agency (EPA), along with agencies established administratively.

Agencies are required to undertake a 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 RIS 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 a RIS.

The *Better Regulation Handbook*, however, includes three exceptions to the general obligation on agencies to undertake a formal RIS:

- the proposed regulation or amended regulation is likely to have no, or only a minor, impacts;

[56] OECD, *Regulatory Impact Assessment, OECD Best Practice Principles for Regulatory Policy* (2020a) <https://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm >

[57] Ibid, 7.

[58] 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>.

- the proposal is subject to an exemption; and
- 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 is also required to provide advice to agencies on whether a RIS is required to support a proposed regulatory action.

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 'gatekeeper' 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 SA RIA framework, such as the requirement for proponent agencies to seek advice from specialist referral agencies, are now undertaken.

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.

Data provided by DPC for the period between January 2019 and April 2021 suggests that most SA Cabinet submissions proposing regulatory action received a formal RIA assessment or were backed by extensive consultation with affected sectors. This includes both submissions seeking approval for the introduction of new regulatory requirements and submissions proposing regulatory amendments.

During the period, a total of 366 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 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.

Between January 2019 and April 2021, 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 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 a 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: Proposals triggering a Regulatory Impact Statement, SA (January 2019 – April 2021)

Better Regulation Handbook Criteria	Proposals 2019	Proposals 2020-2021
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 Approved	**136**	**230**

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

While a total of 14 submissions met the threshold for a full RIS assessment between January 2019 and April 2021, only 5 RIS assessments were undertaken. The Commission understands from Cabinet Office that the remaining submissions, which covered a diverse range of regulatory areas were supported by stakeholder engagement and impact analysis methods that stand outside the formal RIS framework. The Commission was advised that, in place of a full RIS assessment, agencies undertook extensive stakeholder consultation, commissioned reviews from external experts, and made use of alternative impact assessment methods, such as taskforces comprised of government and business representatives, to determine the likely regulatory impact on businesses.

It is unclear to the Commission whether the combination of alternative assessment methods used by agencies met the requirements laid out in the *Better Regulation Handbook*. Given that agencies' assessment procedures departed from the principles and processes developed in the *Better Regulation Handbook*, it is also unclear to what extent Cabinet Office was able to assess, and provide effective advice to Cabinet on, the regulatory impact of the proposals. The Commission notes that completed regulatory impact assessments (whether full RIS assessments or alternative approaches) have not been published on agencies' websites, as required under the current RIA framework.

The Commission also notes Cabinet Office's view that the data shows that the current RIS arrangements are operating largely as intended. Cabinet Offices also maintains 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 not had access to completed regulatory impact assessments, and therefore cannot form a view on whether Cabinet's decision-making was effectively supported by agencies' impact assessments (whether undertaken as part of a RIS or using a different methodology). Nonetheless, the data makes clear that a significant number of major regulatory proposals were subjected to ad hoc assessment outside of the RIS framework, despite not falling into an exemption category, and the conclusions of those assessments were not made public on agencies' websites. When taken together, this suggests that the current system does not consistently fulfil the requirements of a fully effective RIA process as defined by the OECD and laid out in the *Better Regulation Handbook*.

Draft Recommendation 2.2: Developing regulatory proposals for Cabinet

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

- commit 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 regulation justify the costs and that distributional effects are considered in order to maximise the net benefits of regulation;
- strengthen the gatekeeper role of Cabinet Office, in respect of its quality assurance responsibilities regarding regulatory proposals to Cabinet;
- incorporate contemporary OECD better practice principles into the requirements laid out in the *Better Regulation Handbook*;
- increase agency adherence to the *Better Regulation Handbook* through provision of improved guidance material and coordination of RIA training by Cabinet Office;
- establish a central agency support and advisory function, either in DPC or DTF, to enhance agencies', especially smaller agencies', capacity to undertake effective policy development and regulatory impact assessment;
- develop and implement a strategy to build public sector expertise in policy development and review, including through training and establishment of communities of practice for policy makers;
- enhance transparency as well as RIS capabilities through publication of RIS's; and
- subject the RIA process to monitoring, regular evaluation and continuous improvement.

2.4 COVID-19 responses – South Australia and other jurisdictions

The emergence of the COVID-19 pandemic in early 2020 caused almost unprecedented disruption to social, political and economic life throughout the world. The need to respond to a rapidly evolving pandemic also created a raft of significant regulatory challenges, including in SA. All Australian jurisdictions responded to the pandemic with a broad spectrum of support measures, many of which were introduced through time-limited legislative changes. Some of these responses included major, albeit time-limited, amendments to the regulatory framework in several industries, such as amendments to commercial and residential tenancies regulation to halt evictions for the non-payment of rent.

All Australian jurisdictions also 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.

In SA, for example, the *South Australian Public Health Act 2011* (SA) (Public Health Act) allows the Chief Executive of the Department for Health and Wellbeing, with the approval of the minister, to declare an emergency to be a public health emergency. Under the *Emergency Management Act 2004* (SA) (Emergency Management Act), the State Coordinator, currently

the Police Commissioner, can make a declaration if it appears that a major incident or emergency has occurred or is about to occur. Once a major incident or emergency has been declared, the Emergency Management Act gives the State Coordinator, or an authorised officer, a range of broad powers, including the ability to make directions to do whatever is necessary to address the emergency. Similar powers and directions are available under equivalent legislation in other states and territories. Directions made pursuant to the Emergency Management Act are not disallowable by Parliament.

In SA, the powers under the both the Public Health Act and the Emergency Management Act were complemented by provisions introduced through the COVID-19 Emergency Response Act. Some of the most significant provisions in the Act include:

- Preventing landlords from acting against tenants (increasing rent, evictions, etc) that are suffering financial hardship or as a result of COVID-19, including for failure to pay rent or not opening during required business hours.
- Allowing the Governor to extend or postpone time limits for things to be done under any Act, law or instrument by regulation.
- Allowing the Governor to extend or postpone terms of appointment by regulation to allow courts, tribunals, boards and regulatory bodies to continue operating.
- Allowing the Governor, by regulation, to suspend or modify requirements under any Act, law or instrument relating to the preparation, signing, witnessing, attestation, certification, stamping or other treatment, to support compliance with social distancing restrictions.
- Allowing meetings or transactions under any Act or law that require two or more people to be physically present to be satisfied if they occur via audio-visual or other means;
- Reducing the time that a local council must provide a report to the Development Assessment Commission (DAC) regarding the application process for a development in a council area (relating to Crown development and public infrastructure).
- Increasing the threshold value of construction work completed from $4m to $10m above which the DAC must publicly advertise and invite interested persons to make a submission and give due consideration to the submissions.
- Allowing for the suspension of the requirement for major Government infrastructure projects to wait for a Public Works Committee report to help support local jobs by minimising delays in starting major works.[59]

Many of the statutory and regulatory responses to the pandemic involved the use of significant emergency powers, many of which were not subject to the usual forms of parliamentary oversight like disallowance. The Senate's Scrutiny of Bills Committee has highlighted the extent to which the Commonwealth Parliament's response to the pandemic modified the usual standards of law-making. This was particularly true of provisions (including regulation) enacted through subordinate legislation. The committee raised concerns about:

- the inclusion of Henry VIII clauses to modify primary legislation using delegated legislation, and thereby avoiding the usual parliamentary scrutiny that applies to amendments to primary legislation;

[59] For additional details, see *COVID-19 Emergency Response Act 2020* (SA), <https://www.legislation.sa.gov.au/LZ/C/A/COVID-19%20EMERGENCY%20RESPONSE%20ACT%202020.aspx>

- the use of framework legislation which contains only the broad principles of a legislative scheme and relies heavily on delegated legislation to determine the scope and operation of the scheme;
- provisions which allow for the inclusion of significant matters, such as the circumstances in which significant amounts of public money may be spent, in delegated legislation; and
- provisions which allow for delegated legislation to make exemptions to the operation of primary legislation.[60]

Other jurisdictions' responses to the pandemic were based on similar changes to the law-making process, especially in relation to subordinate legislation. In SA, for instance, the *COVID-19 Emergency Response (Section 16) Regulations 2020*, made under the COVID-19 Emergency Response Act, also include provisions that allow relevant primary legislation to be amended by regulation:

- suspend requirements under the *Real Property Act 1886* (SA) that corresponding mortgages need to be executed by both the mortgagor and mortgagee;

- include that requirements to produce a logbook under the *Motor Vehicles Act 1959* (SA) will be satisfied if an electronic copy is provided.

That said, most jurisdictions, including SA, have included a variety of safeguards in their respective statutory responses to ensure that COVID-19 reforms are subject to appropriate oversight. This is true of measures enacted through both primary and subordinate legislation and includes 'sandboxing' some provisions by placing a time-limit on their operation. As a recent report by the Senate's Committee for the Scrutiny of Delegated Legislation makes clear:

> Parliaments in other jurisdictions mandated a range of different safeguards to retain oversight of the exercise of these delegated legislation making powers. For example, in NSW broad Henry VIII powers (enabling delegated legislation to modify the operation of primary legislation) may only be exercised if the NSW Parliament is not currently sitting and is not likely to sit within two weeks after the day on which the regulations are made. In Victoria, delegated legislation made pursuant to the modification powers of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) are time-limited to a period of six months and are subject to disallowance.[61]

The Attorney-General recently introduced legislation into the House of Assembly to make permanent a range of legislative amendments that were introduced on a time-limited basis to assist in the state's response to the pandemic. The proposed 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) Bill 2021*, if passed, 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. Other significant measures include amendments to the Emergency Management Act so that no civil or criminal liability attaches to any person acting in good faith in respect of a power or function under the COVID-19 Emergency Response Act, the South Australian Public Health Act or any prescribed act in relation to the pandemic.

[60] See, for example, Senate Standing Committee for the Scrutiny of Bill, *Scrutiny Digest 6 of 2020*, 9-10.
[61] Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight – Interim Report* (December 2020), 28.

Australian jurisdictions' responses to the COVID-19 pandemic have taken a number of forms, ranging from direct fiscal support to time-limited regulatory reforms to shield communities from the economic consequences of the pandemic. Most measures, including in SA, were introduced using a range of statutory mechanisms, including powers under emergency management statutes. In some jurisdictions, including the Australian Government, the emergency necessitated a range of changes to the way in which laws are made and scrutinised, especially in respect of subordinate legislation. That said, none of the reforms introduced to address the pandemic, at least in SA, have led to any permanent 'structural' changes to the way in which regulation is developed and scrutinised.

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 institutionalise 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, both in terms their implications for regulator efficiency and effectiveness, and as part of developing the Commission's methodology for examining current regulator practice in SA. The chapter is structured as follows:

- Section 3.1 highlights the importance of regulator conduct in as part of the broader regulatory framework, and briefly describes key principles underpinning good regulator practice.
- Section 3.2 reviews established policy frameworks for regulator performance monitoring and continuous improvement, used in other jurisdictions and internationally, and identifies key lessons for SA.
- Section 3.3 outlines our methodology for assessing current regulator practices and provides some initial observations on SA regulators.

The Commission is continuing to gather information and evidence on the current practices of SA regulators to inform this inquiry. In the final report, a more comprehensive assessment of current practices will be provided, drawing from further consultations, a survey of selected regulators, and case study examples.

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.[62]

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.[63] Their practices impact on the efficacy of regulatory law in two ways.[64] 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

[62] 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 >

[63] 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 >

[64] 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 >

enforce regulation itself has a direct effect on the costs and benefits of regulation to businesses, consumers, and the broader community.

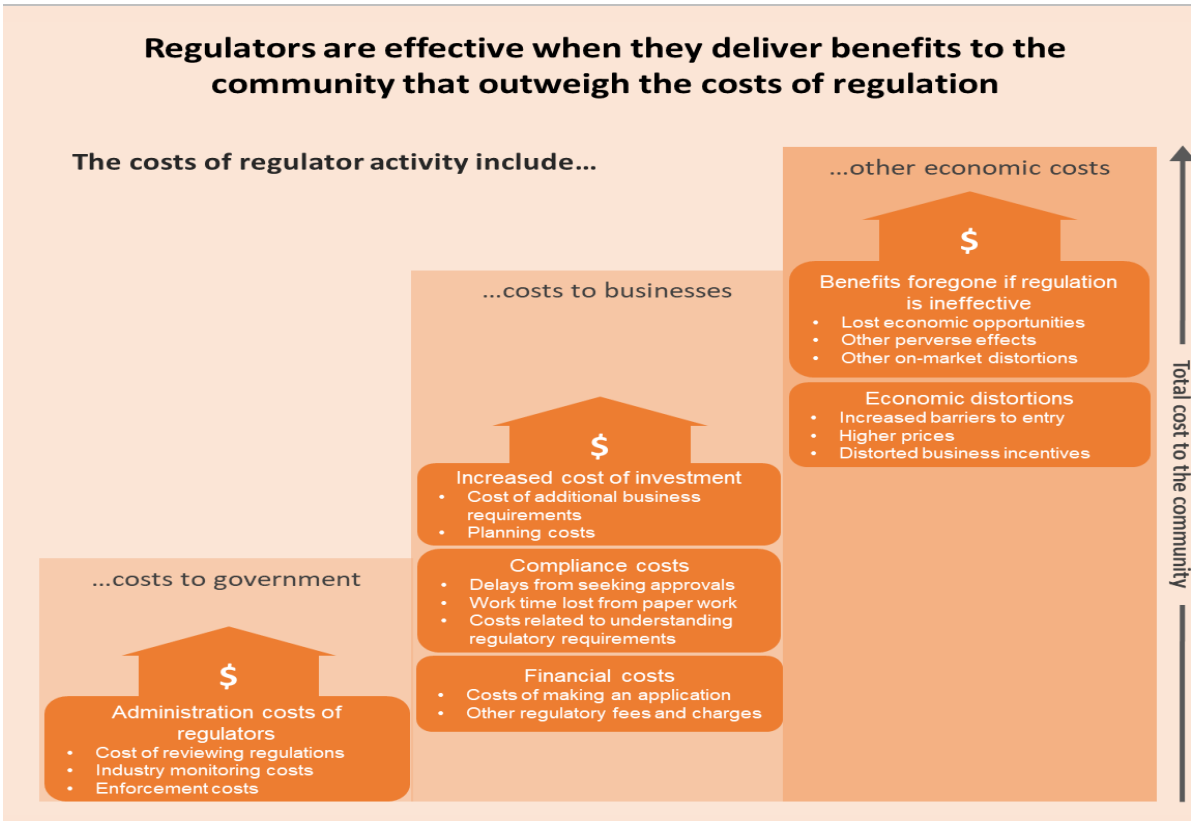
Regulatory authorities may carry out a range of activities that impact on how markets function, including:

- economic regulation (e.g. price setting, monitoring access to essential facilities, and setting standards for the quality of services provided to consumers);
- approving registrations, licencing and business activities (e.g. receiving an application, assessing compliance against requirements, decision-making and recovering regulatory costs);
- setting standards and codes of practice (e.g. engagement with stakeholders on the development of standards, publishing standards, and assessing industry compliance with standards);
- monitoring (e.g. developing a monitoring strategy, implementing the strategy, and evaluating the strategy);
- encouraging compliance (e.g. educating entities on regulations, providing information and advice on how to comply, and monitoring an entity's return to compliance); and,
- responding to adverse events, non-compliance or regulatory failure (e.g. event notification or identification, understanding risks, response management and enforcement and post-event evaluation).[65]

Regulators are most effective when they deliver benefits to the community that justify the costs of regulation. The benefits of regulation include: more productive and efficient markets and economic activity; public health and safety; environmental protection; more equitable social outcomes; greater access to essential services (e.g. water and telecommunications infrastructure); and better information for businesses and consumers on services and products. On the other hand, regulation can also incur costs to government, businesses, the community and the economy more broadly (Figure 3.1). For example, businesses can face increased regulatory costs related to market entry and new investment, or as part of ongoing operations. Specific costs include direct payments to government (e.g. application and licencing fees) and the costs of complying with regulations (e.g. time and money spent on paper work 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.

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

Figure 3.1: Costs of regulator activity



Source: Adapted from Productivity Commission (Cth), Identifying and Evaluating Regulation Reforms: Research Report (Commonwealth of Australia, 2011), 12; Marneffe, W & Vereek, 'The Meaning of Regulatory Costs', European Journal of Economics (2011) (32), 341.

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 draft 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 (6) conducting formal evaluations of the regulator's performance.[66]

[66] 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) >

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 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. The same principles that represent good regulatory systems also apply to regulators themselves, with the literature pointing to a wide range of common principles and standards of conduct, namely:

- 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 regulatory 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 regulatory 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.[67]

The commonalities in principles and practice standards are evident across various established regulator performance frameworks, adopted in other Australian jurisdictions and internationally (Box 3.3). These are discussed more thoroughly in section 3.2. As an example, the *RegX Atoms of Excellence* framework, developed by the Alberta Energy Regulator (Canada) under the auspices the University of Pennsylvania, distils the essence of 'regulatory excellence' into three core attributes:

- Utmost integrity: this relates to the regulator's commitment to serving the public interest, respecting the law, and to working with elected representatives.
- Empathetic engagement: this relates to transparency and public engagement, and to how respectfully the regulator and its personnel treat regulated entities and other stakeholders.
- Stellar competence: this is about the actual delivery of outcomes that maximise public value, and the regulator's technical capacities and actions to achieve a high performance.

Sitting beneath these core attributes, are nine 'tenets' of regulatory excellence, which together describe 'best in class' regulator capabilities and behaviour (Box 3.2). It is worth noting that these tenets are aspirational in nature, encouraging incremental improvement, and are meant

[67] Australian Government (C[th]), *Regulator Performance Framework* (Commonwealth of Australia, 2014); (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 (C[th]), Regulator Audit Framework (Productivity Commission, 2014); (7) Coglianese, C., *Listening, Learning and Leading: A Framework for Regulatory Excellence* (University of Pennsylvania Law School, 2015).

to inform a scoping exercise to help regulators identify opportunities and actions to embed excellence into institutional culture, priorities and practices.

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 in independent regulators. • Accountability and transparency • Engagement • Funding • Performance evaluation *iREG Score* • Regulatory impact assessment • Stakeholder engagement • Ex-post evaluation
UK Hampton Implementation Reviews [(5)]	***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 for several reasons. Firstly, regulators are not a homogenous group, and differ in size, structure and function, making it difficult to benchmark and compare regulator 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 avoidance of harm.

Nevertheless, other jurisdictions in Australia and internationally have developed policies, models and frameworks to assess regulator performance and foster continuous improvement. In many cases, there is substantial flexibility to tailor regulator practice assessment strategies in line with the regulator's specific characteristics and responsibilities. This reduces administrative requirements on regulators while increasing accountability and transparency, and promoting improvement. SA's policy framework for regulator improvement appears under-developed in comparison. In conducting our own assessment of SA regulator practice, the Commission draws on some of these established regulator performance frameworks to inform our methodology.

3.2.1 Australian jurisdictions

The Commission has identified four 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 of regulators and methods of continuous review. These are primarily self-assessment models, with the purpose being that regulators evaluate their own performance regularly, 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 centralised function in the Department of the Prime Minister and Cabinet (PM&C) to drive accountability for regulator performance, build regulator capability, share best practice, and support a culture of excellence among regulators. This includes overseeing the Government's new regulator performance framework – set out in the *Regulator Performance Guide*. The framework articulates the Australian Government's expectations for regulator performance in three 'principles of best practice', with regulators required demonstrate their progress in operationalising these. 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[68].

The Commonwealth's reformed regulator performance framework 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 will be allowed to include this reporting as part of their corporate plan and annual report, which is an existing requirement under the *Public Governance, Performance and Accountability Act 2013*. 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'[69]. Secondly, the framework makes regulators' commitments toward good practice clearer and more transparent through a *Statement of Expectations* process[70], whereby regulators will report against their performance and deliverables set by the relevant Minister (Box 3.4). The regulator then issues a Statement of Intent describing how it will deliver on the Minister's expectations and against the framework's best practice principles.

The framework is supplemented by other initiatives under the regulator performance program to embed good practice, including piloting a regulator training program and establishing a Regulator Leadership cohort of Secretaries of regulatory agencies to bring expertise together to support improved regulatory performance. (Box 3.3)

Box 3.3: Lessons from the Australian Government: Promoting regulator performance improvement

The Australian Government has had a regulator performance improvement policy since 2013, although it has been recently reformed. Under previous arrangements, Commonwealth regulators that administer, monitor or enforce regulations reported annually on the quality of their practice under the *Australian Government Regulatory Performance Framework*. A central element of the framework was a requirement for regulators to measure, monitor and report their performance against six Key Performance Indicators (KPIs) that the government has identified as characteristic of good regulator conduct. It was primarily a self-assessment framework, with the intention being that regulators evaluate their own performance regularly, so that they can identify and implement improvements to practice over time. Regulators were also required to employ a process for external validation of these self-assessments, for example, by engaging external assessors, peer reviewers or industry bodies.

The Australian Government's new regulator performance framework replaces the old regime. It makes regulators' commitments toward good practice clearer and more transparent through a *Statement of Expectations* process, whereby regulators will report against their performance and deliverables set by the relevant Minister. The regulator then 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:

- consideration of the economic and social environment in which the regulator operates, and the Government's policy objectives and priorities, including the Deregulation Agenda
- 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

[68] Australian Government (Cth), Regulator Performance Guide (Commonwealth of Australia, 2021) < https://protect-au.mimecast.com/s/urnuCP7yDXIvQEDBtzOYfS?domain=deregulation.pmc.gov.au>
[69] Ibid., 10.
[70] This was modelled on the *Statement of Expectations* framework already established in Victoria (discussed later in this section).

- the expectation that regulators act in accordance with best practice, embedding the Government's principles of regulator best practice currently being developed, and striving 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)*), and are to be made publicly available on regulator websites and on transparency.gov.au. The new framework therefore 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 to promote improvement in regulator practice, including:

- piloting a benchmarking project, which will leverage from 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. Cohort members will 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.
- 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:

- assisting regulatory agencies with the design, application and administration of regulation and opportunities for improving the quality of regulation;
- overseeing Regulatory Impact Assessments (RIA) and Legislation Impact Assessments;
- maintaining good relationships with 70 Victorian regulators, providing training and facilitating regulator forums; and
- liaising with stakeholders to monitor regulatory issues, including running a Red Tape Hotline for businesses.

BRV's *Better Approvals* initiative is a pragmatic example of regulator improvement in action. It is currently working with regulators to identify and implement solutions that will streamline and fast track approvals processes. BRV has led initiatives in regulator performance improvements, conducting Regulator Health Checks involving brief assessments on the quality of regulator's practices. BRV is currently undertaking a new program of review of nine selected Victorian regulators that have a significant impact on the state economy. Its approach is 'hands-on' and highly collaborative, with the Better Regulation Commissioner working closely with regulators to identify and implement improvements to practice.

More broadly, the Victorian Government has a well-established *Statement of Expectations* (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.[71] Responsible Ministers issue a letter outlining the SoE to regulators 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.[72]

Policy departments are also required to conduct post-implementation evaluations of regulator performance, with findings used to improve the design and development of the regulator's next SoE. Regulators must report against three 'elements' of good regulatory practice identified as mandatory under the SoE Framework. These are:

- Timeliness: e.g. processes/systems are in place to make it as easy as possible for businesses to complete forms; the regulator provides clarity about the timing and scope of regulatory processes.
- Risk-based regulation: e.g. the regulator has an established approach to risk assessment; requests for data from regulated parties are proportionate to risk.
- Compliance-related assistance and advice: particularly relating to small business e.g. the regulator provides assistance and advice to secure compliance; regulatory advice is easily available.[73]

The minimum standards of practice set out under each element of the SoE framework are outlined in Box 3.5. 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

[71] 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 >

[72] Ibid., 3.
[73] Ibid., 11-12.

consistency in performance reporting, enabling benchmarking and comparisons between regulators, as well as the ability to monitor progress over time.[74] There were mixed views in submissions to this inquiry on whether a SoE framework like that implemented in Victoria and by the Commonwealth should be implemented in SA (Box. 3.4)

Box 3.4: Victorian Statement of Expectations Framework for Business Regulators.

[74] In addition to the three mandatory standards, the SoE framework sets out one *recommended* best practice element (incentive-based regulation) and four *suggested* best practice elements (role clarity, cooperation amongst regulators, stakeholder engagement, accountability and transparency, and clear and consistent activities). These apply to higher-volume and higher-impact 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 requests from other regulators.
	d)	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 (for example, accessible in appropriate formats); accurate; easy to understand (i.e. written in plain English); comprehensive (e.g. include illustrative examples); timely (e.g. provided in time for individuals and businesses to adjust to changes in regulation); 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. Examples may include: rewarding a track record of compliance with a less frequent, and in turn less burdensome, 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/agencies 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 (for example, 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 (for example, 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

Since May 2019, the Office of Best Practice Regulation (OBPR) within the Queensland Productivity Commission (QPC) has overseen regulator performance reporting under the State's *Regulator Performance Framework.*[75] 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.[76]

Under the framework, government regulators whose activities impact businesses, particularly small businesses, are required to publicly report annually on their regulatory performance against the 'model practices'. However, 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 the reporting they provide, having regard to the relative size and reach of their activities and the nature of their stakeholders. This is to help 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. They have the option of providing a reporting as a standalone performance report, or as part of an existing report if appropriate, such as the agency's annual report. Each regulator is required to publish their annual performance report on their own website. All regulator performance reports, or links to them, are collectively published on the OBPR website. The OBPR is required to undertake a review and evaluation of the framework's effectiveness in 2021, in consultation with the Queensland Government Treasury.

3.2.2 International models of regulator performance assessment

The Commission has reviewed several existing international models of regulator assessment for the purpose of informing a methodology for this review. These models have been developed for the purpose of external audit, avoiding potential problems around bias that can arise from regulator self-assessment models. An independent third party collects a range of evidence to make an objective assessment of regulator's performance, either 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.

OECD's iREG score

[75] 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'.

[76] 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>

The iREG score is the OECD's composite measure to assess the performance of regulatory regimes across OECD countries. While it does not focus on individual regulators per se, it includes questions on the conduct of regulators. The more regulatory practices a country has implemented, the higher its iREG score. The iREG comprises indicators across three categories of performance — stakeholder engagement, regulatory impact assessment (RIA) and ex post evaluation — while assessment under each category focuses on four equally weighted sub-categories:

- regulatory methodology;
- oversight and quality control;
- systematic adoption; and
- transparency. (Box 3.5).

The OECD collects country data from regulatory indicator surveys posing detailed questions under each performance category and subcategory. The iREG survey is comprehensive (contains over 150 items) and is publicly available. The Commission chose not to adopt the iREG score to examine regulator performance for this inquiry because, while the measure is comprehensive, its focus on just three areas of regulator practice is limiting. Nevertheless, it serves as a useful example of a quantitative measure for assessing the maturity of regulatory systems.

Box 3.5: OECD composite indicators: summary of categories and sub-categories

	Regulatory impact assessment (RIA)	**Stakeholder engagement**	**Ex post evaluation**
Methodology	Assessment of wider cost (e.g. macroeconomic costs) Assessment of budget and public sector impacts Assessment of competition impacts Assessment of distributional effects Assessment of environmental impacts Assessment of other economic impacts Assessment of other social impacts Benefits identified for specific groups Consideration of issues of compliance and enforcement Costs identified for specific groups Requirement to identify process of assessing progress in achieving regulation's goals Requirement to qualitatively assess benefits Requirement to quantify benefits Requirement to quantify costs Risk assessment Types of costs quantified	Consultation open to general public – during early stages of developing regulations Consultation open to general public during later stages of developing regulations Guidance Methods of stakeholder engagement adopted in early stages of developing regulations Methods of stakeholder engagement adopted in later stages of developing regulations Minimum periods Use of interactive websites at early stage consultation Use of interactive websites at later stage consultation	Assessment of consistency with other regulations Assessment of costs and benefits Assessment of impacts Assessment of achievement of goals Established methodologies and guidance
Oversight and quality control	Oversight Publicly available evaluation of stakeholder engagement Quality control	Oversight and quality control function Publicly available evaluation of stakeholder engagement	Oversight and quality control function Publicly available evaluation of ex post analysis

	Regulatory impact assessment (RIA)	Stakeholder engagement	Ex post evaluation
Systematic adoption	Formal requirements Proportionality RIA conducted in practice	Formal requirements Stakeholder engagement conducted in practice in early stages of developing regulations Stakeholder engagement conducted in practice in later stages of developing regulations	Ex post evaluations conducted in practice Formal requirements In-depth reviews Presence of standing body Proportionality Use of mechanisms for review including ad-hoc reviews
Transparency	Responsibility and transparency Transparency of process	Availability of information Consideration and response to stakeholder comments Consultations are made open to the general public Transparency of process	Ongoing stakeholder engagement Transparency of process

Source: OECD, *OECD Regulatory Indicators of Regulatory Policy and Governance: Design, Methodology and Key Results,* OECD Regulatory Policy Working Papers No. 1. (OECD Publishing, 2015b).

UK Hampton Implementation Reviews

The Hampton Implementation Reviews began as a 2006 UK Government initiative to conduct a structured check on regulator performance through a series of external reviews.[77] The Hampton Implementation Reviews were based on the principles of:

- Risk-based regulation: regulators, and the regulatory system, should use comprehensive risk assessment to concentrate resources on the areas that need them most. The review team considered the extent to which the regulator is risk-based in its approach to regulatory activity and resource distribution.

- Transparency and accountability: Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take. Regulators should publish an enforcement policy. Regulators should justify their choice of enforcement actions year on year to stakeholders, Ministers and Parliament. Regulators should enforce in a transparent manner. The review team considered the extent to which the regulator is transparent and accountable in its enforcement activity.

- Economic progress: Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection. The review team considered the extent to which the regulator balances achievement of its desired regulatory outcomes with encouragement of economic progress, within the context of its statutory duties.

The Hampton Implementation Reviews were designed to be flexible in recognition of the large variety of sizes, structures and functions of regulators. They took the form of structured case studies of regulators rather than 'tick-box' exercises, allowing review teams to recognise the differences between regulators and to give credit for different forms of good practice[78]. The process was highly resource and time intensive. Small teams of four staff conducted in-depth investigations using a case study design and a flexible assessment framework (Box 3.6). It was not possible for the Commission to replicate a Hampton-like review across all SA regulators, but our methodology (discussed in the last section of this chapter) integrates a case study method focusing on a few areas of regulator practice.

[77] National Audit Office (UK), *Hampton Implementation Reviews* (UK Government, 2007) < https://www.nao.org.uk/wp-content/uploads/2008/03/HIR_Guidance.pdf >

[78] Ibid., 2.

Box 3:6: Hampton Implementation Review Framework - selected best practice indicators.

Design of regulations	
HAMPTON-LIKE SYMPTOMS	**NON-HAMPTON-LIKE SYMPTOMS**
• Regulations are proportionate and not unnecessarily burdensome (justified by robust cost-benefit analysis) • Regulation has a clearly-defined purpose, in terms of achieving regulatory outcomes • The regulator considers possible unintended consequences of a proposed regulation • The regulator considers the cost burdens of implementation and enforcement when developing new regulations • The time allowed for consultation is proportionate to the complexity of the regulations • Regulatory impact assessments are carried out	• Uncertainty is created by lack of clarity about the objectives or status of regulations • Stakeholders' views are unknown or largely ignored • Stakeholders are not given adequate time to respond to consultation • Enforcement staff, including local authorities, are not consulted • Businesses are not informed of changes to implementation dates • Regulations are not clearly worded and/or use jargon • Implementation is not accompanied by on-going advice • Licensing regimes are complicated or burdensome
Advice and guidance	
HAMPTON-LIKE SYMPTOMS	**NON-HAMPTON-LIKE SYMPTOMS**
• Advice and guidance are accessible and accessed – high levels of market penetration are achieved • The majority of businesses benefit from advice and guidance • The regulator is aware of businesses' preferred information sources (e.g. direct from each regulator, from trade associations, or from the Small Business Service) and a strategy for disseminating / marketing guidance which takes into account these preferences is in place. • The marketing strategy is regularly reviewed and updated in light of feedback • Advice and guidance materials are written in plain English • Advice services address the full range of business requirements; where appropriate, advice is tailored to the needs of SMEs, large business, sectors, etc.	The regulator does not consult when writing advice and guidance • Guidance is inaccurate / out of date • Guidance is not updated regularly • Advice and guidance are not comprehensive • Advice and guidance are unnecessarily prescriptive • Guidance is produced as regulations are implemented or not at all (i.e. too late for the needs of businesses and others) • Advice and guidance are not written in plain English or available in an accessible format • There is no or little access to informal advice for businesses • Too much information is available without structure • There is no dialogue between the regulator and businesses
Inspections	
HAMPTON-LIKE SYMPTOMS	**NON-HAMPTON-LIKE SYMPTOMS**
• The regulator focuses its greatest inspection effort on businesses where risk assessment shows that both: - there is a likelihood of non-compliance by businesses; and - the potential impact of non-compliance is high • Inspections are targeted on high-risk areas of operation • Low-risk (low-impact / low-likelihood) businesses are not typically inspected • Compliance records / good performance are taken into account, with good performers visited less frequently • Inspectors are adequately trained in order to undertake inspection effectively	• There is no explicit consideration of risk – no risk assessment methodology is in place • A significant proportion of inspections are undertaken on a random or routine basis • Inspections duplicate or overlap with those of other regulators • Businesses do not know what inspectors require of them • Business do not understand why they are inspected • Significant numbers of low-risk businesses are inspected • Inspections are unnecessarily long, burdensome or 'heavy-handed' • Businesses tend to feel resentful or unfairly treated.

Source: National Audit Office (UK), *Hampton Implementation Reviews* (UK Government, 2007).

Box 3:6: Hampton Implementation Review Framework - selected best practice indicators (cont'd)

Data requests	
HAMPTON-LIKE SYMPTOMS	**NON-HAMPTON-LIKE SYMPTOMS**
• Businesses are aware of the purpose(s) for which the regulator collects data • The regulator seeks to address any legislative constraints regarding the sharing of information between regulators, e.g. data protection laws • The regulator shows optimum levels of data-sharing with other organisations through established gateways. • The process for design of forms and data collection is based on cost-benefit analysis, internal challenge (e.g. a gatekeeper) and consultation with businesses • Forms / data requests are clear and targeted, and risk-assessment determines the information required • Businesses are asked to update information as infrequently as possible • There is high take-up of e-enabled submission systems (pre-populated, intelligent e-forms).	• The relevance of the data requested to improving compliance is not clear • Forms are complicated, long and difficult to navigate • There is duplication of data requests in the regulator's forms • There are no central processes for design and approval of data requests • Data requests are not targeted using risk-assessment • The regulator does not consider data-sharing in many cases or has not explored how to facilitate data-sharing • Non-essential information is requested from businesses • The regulator makes limited use of IT solutions in data-collection and provides few alternatives to paper forms
Sanctions	
HAMPTON-LIKE SYMPTOMS	**NON-HAMPTON-LIKE SYMPTOMS**
• Where appropriate, businesses are given time to comply • Where appropriate, businesses are given the opportunity to respond to and suggest alternatives to proposed enforcement action (other than urgent cases) • The regulator's enforcement policy is easily available, in plain English, and well signposted / disseminated • Enforcement actions are proportionate to the seriousness or persistence of, and potential commercial gain from, the compliance breach • Alternatives to sanctions are considered based on risk • Enforcement actions are followed up to ensure businesses know what is expected of them and to establish the desired change in behaviour • Regular offenders are identified quickly • Businesses know why enforcement actions occur • Regular evaluation of the outcomes of sanctioning	• Sanctioning policies are not published / not transparent • Businesses do not understand the purposes of sanctions • Enforcement actions are not followed up • Penalties are not proportionate to the seriousness or persistence of the compliance breach • Businesses typically choose to 'take the hit' and continue not complying • The regulator has little evidence of the effectiveness of its sanctioning regime (outcomes are not measured) • Little evidence exists of sanctions changing behaviour • Regulatory actions of front-line staff are often not in line with the stated enforcement policy (there are frequent inconsistent approaches in handling similar types of regulatory breaches) • Sanctioning regimes create unintended consequences
Focus on outcomes	
HAMPTON-LIKE SYMPTOMS	**NON-HAMPTON-LIKE SYMPTOMS**
• The regulator has clear outcome-focused objectives and targets which are understood throughout the organisation and relate to its statutory objectives / overall aim • The regulator publishes performance on its achievement of regulatory outcomes, the cost to regulated entities, and business / stakeholder perceptions of the efficiency and effectiveness of regulation • Performance information is easily accessed and understood by stakeholders • Performance information is used to inform the regulatory approach • The regulator monitors for unintended consequences	• No or insufficient outcome-focused measures exist • Performance measures drive inappropriate behaviour / unintended consequences – e.g. a focus on delivering inspections / other processes – or encourages 'gaming' • There are too many targets – leading to a lack of focus on regulatory outcomes • The regulator's targets and guidance incentivise local authorities to deliver unnecessary outputs and constrain local flexibility • Outcome measures are not communicated throughout the organisation, including to front-line enforcers • Performance is not prominently published • Targets and measures do not give a sense of how the regulator is performing against desired outcomes

Source: National Audit Office (UK), *Hampton Implementation Reviews* (UK Government, 2007).

3.2.3 Lessons and opportunities for SA

Currently, there is no state-wide 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 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. 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 KPIs that relate to desired outcomes. While there is no stated requirement, chief executives may select KPIs for regulatory functions residing in their departments. As a guide to an across agency reporting, 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.

While the Commission is continuing to collect evidence from regulators, our consultations with regulators to date indicate that only some regulatory entities have mature systems of performance monitoring and improvement. These are usually the larger agencies that are more well-resourced, but there 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 (Box 3.7).

Box 3.7: Views from submissions on regulator performance frameworks in other jurisdictions

DairySafe (DR7 pp. 7-8**)**

"Dairysafe is aware of jurisdictions that have adopted statements prescribing government's expectations of the regulator. These Statements of Expectation (SOE's) are aimed at fostering better practice in regulation and reducing regulatory burden. For example, Agriculture Victoria applies a 'Ministerial Statement of Expectations' (SOE's) to each of the respective food safety regulatory agencies reporting to the Minister, to which the agencies must respond.

The SOE's focus on key elements of good regulatory practice:

- *risk-based strategies,*
- *role clarity,*
- *timeliness,*
- *compliance-related assistance and advice,*
- *small business regulatory burden,*
- *clear and consistent regulatory activities,*
- *stakeholder consultation and engagement,*
- *accountability and transparency, and*

- *reporting.*

The SOE's are subject to an evaluation process carried out by the Department to assess performance and stimulate continuous improvement. Dairysafe is not aware of administrative instruments, such as SOE's, 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."

South Australian Freight Council (SAFC) Inc. (DR19 pp. 3-4**)**

"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."

Source: SAPC, drawn from submissions to the inquiry issues paper

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. Namely:

Flexibility is key

As regulators are not a homogenous group, it is difficult to benchmark and compare regulator performance. They 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's preliminary observation of regulators' performance review activities is that it is difficult to obtain a view on how effectively they deliver on their outcomes. This is, in part, because of the complexity of regulator's work and the broadness of their objectives, such as improving social, economic and market conditions, risk reduction, and the avoidance of harm. Nevertheless, it is essential that regulators' resources and efforts are oriented toward delivering good outcomes to the community and the public, including economic outcomes, and that value and net benefit is demonstrable. 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 level of scale and resourcing as their counterparts in other jurisdictions to individually implement practice improvement strategies. Victoria appears to be the national leader in implementing a regulator performance framework that is both mature and comprehensive, and balances both increased performance reporting requirements with assistance provided by a central unit that works closely with regulatory agencies to improve practice. Some practical strategies to improve regulator performance include, for example, establishing regulator practice forums (for practitioners and/or leadership), 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). Cross-government regulator improvement strategies may deliver greater efficiencies because individual regulators would not need to develop or duplicate such programs themselves.

Regulator self-assessment should be supplemented by external review

While regulator practice self-assessment frameworks have the benefit of flexibility, they should be supplemented by some form of external review. As the Australian Productivity Commission 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 the impetus required to lift regulator practice. For example, A 2018 evaluation and 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 workplace health and safety legislation in SA (Box 3.8). A targeted program of external reviews would provide an independent perspective on regulator performance and give a substantial incentive for regulators to improve their practices.

Box 3.8: SafeWork SA's renewed approach to risk-based monitoring and enforcement

A 2018 evaluation and 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 WHS legislation in South Australia. The ICAC report raised several major concerns about SafeWork SA's overall 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.

SafeWork SA's approach to implementing ICAC's major recommendations involved a structured change management process underpinned by a strong human-resources focus. This included restructuring the organisation and the workforce to break down silos between teams, implementing a wide range of business process improvements, developing a new organisational training framework, including dedicated training for staff involved in implementing and monitoring compliance and enforcement.

One recommendation was that SafeWork SA ensures its proactive inspection activities be driven by intelligence, assessment of risks, and research on how to assist workplaces in adhering to WHS laws (rec. 17). In response, SafeWork SA developed a Proactive Compliance Campaigns program. Priority areas are identified based on analysis of historic injury risk using claims data from agencies such as RTWSA and Safe Work Australia, as well as internal information such as data on notifiable incidents. The aim of proactive compliance campaigns is to achieve a reduction in work-related injuries, illnesses and fatalities, and to reduce the incidence of non-compliance with work, health and safety 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 and populated into a compliance campaign calendar, 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 proactive compliance campaign, SafeWork SA publicises its intention to undertake these campaigns 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 relating to: Respirable Crystalline Silica, Elevating Work Platforms (EWPs) Audit Report and Safe Work Method Statement in high-risk construction.

Source: Information provided by SafeWork SA

Draft Recommendation 3.1: Performance measurement and reporting

To increase the transparency and accountability of SA regulators, the Commission recommends that the SA Government establish an across government policy framework to guide measurement, monitoring and assessment of performance by regulators, in line with good practice principles. This framework would include the following characteristics:

- be flexible enough to recognise that regulators are a heterogeneous group with different legislative obligations, roles, structures and functions; and
- not be overly burdensome but be integrated into each regulator's performance monitoring and review cycle.

Draft recommendation 3.2: Statement of expectations

To provide greater clarity about government objectives, policies and deliverables relevant to each regulator, the Commission recommends that the SA Government provide statements of expectations (SOE) to all state business regulators. These SOEs would include a requirement to foster economic growth and specify key performance indicators (KPI) that regulators will be assessed against and require that regulators:

- are timely, outcome focused and proportionate in managing risks;
- are open, transparent and efficient in their dealings with regulated entities;
- pursue continuous improvement and apply innovative processes to reduce regulatory burden; and
- report annually on achievement of their KPIs, based upon self-assessment and stakeholder feedback on performance.

Draft Recommendation 3.3 continuous improvement of practice

To promote and support the improvement of regulatory practice among SA regulators, the Commission recommends that the SA Government establish an across government improvement strategy that:

- requires regulators to develop, implement and report publicly on improvement strategies with a strong outcomes focus;
- establishes a community of practice among SA regulators and policy agencies to build capability and to share data, management systems and best practice in development, operations and stewardship. The community of practice could also provide a resource for smaller regulators to access specialist skills and expertise for RIA assessment and performance review ;
- includes other initiatives to improve the 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;
- is complemented by a program of external audit of selected priority regulatory agencies to examine the extent to which individual regulators deliver on their objectives and implement good practice. This could be undertaken by the SA Auditor General.

3.3 Commission's methodology for assessing SA regulator practice

The Commission has developed its own framework for assessing SA regulator practice drawing on the best practice guidance and frameworks used in other Australian jurisdictions and internationally (described above). The framework has specifically been tailored to seek the breadth and depth of information on regulator practice required to address the Terms of Reference for this inquiry. The Commissions' framework draws mostly from the Australian and Victorian Governments' regulator performance frameworks, and those developed by the OECD and used in the UK for the Hampton Implementation Reviews.

The SAPC framework encompasses eight areas of practice which the body of literature identifies as 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 has sought to identify areas of good practice and lessons that could be applied more broadly across SA's regulatory agencies, while also seeking regulator's views on opportunities for improvement.

The following describes the areas of practice that the Commission has chosen to focus on for this inquiry, including some initial observations on each area. In our final report, the Commission will present a more comprehensive assessment of SA regulators, drawing from further consultations, a survey of selected regulators, and some additional case studies.

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.

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 (OECD 2020a). It improves regulation design and sets the benchmark for later review (see Chapter 2).

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.

Many examples were raised with the Commission in submissions and in our consultations with stakeholders on regulations that were either irrelevant or not fit for purpose. These are discussed further in Chapter 4.

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.

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.

The Commission's consultations with regulators to date suggest that stakeholder engagement is a key feature of current practice among some SA regulators (boxes 3.10 and 3.11).

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, assisting 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. The use of technology is discussed further in Chapter 5.

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.

Next steps

The Commission is continuing to gather information and evidence on the current practices of SA regulators to inform this inquiry. In our final report, the Commission will provide a more comprehensive assessment of current practices drawing from further consultations, a survey of selected regulators, and case study examples. The Commission is also seeking stakeholder views on its proposed regulator performance framework and areas where regulatory practice should improve among SA regulators.

Information request 3.1: Assessing SA regulator practices

a) Does the SAPC's regulator performance framework sufficiently cover key aspects of good regulator practice?

b) What are some specific examples of good and poor regulator practice in SA?

c) Are there any other issues around specific regulator practices that the Commission should look at more closely?

Box 3.10: Case study: ESCOSA's tailored approach to stakeholder engagement for the 2020 SA Water Regulatory Determination process

Stakeholder engagement is part of ESOCSA's core business; it has published *a Charter of Consultation and Regulatory* Practice, and a Consumer Advisory Committee (CAC), established under the *Essential Services Commission Act 2002*. Stakeholder engagement is also an important aspect of ESCOSA's Water Regulatory Determination function, which is a regular revenue and pricing review of water infrastructure services provided by public monopoly, SA Water. Each revenue reset involves a complex analysis of many aspects of SA Water's business (e.g. operating costs, proposed investments, the cost of capital, service standards and the requirements of other regulators). Ultimately, any revenue determination process seeks to reach an appropriate balance of the legitimate interests of the regulated business and those of consumers and other stakeholders across a range of dimensions.

In completing the *2020 Water Regulatory Determination*, ESCOSA moved beyond its established stakeholder framework to build a more bespoke approach. It took more structured process 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:

- A 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.
- A Consumer Experts Panel (CEP) – which was effectively joint sittings of ESCOSA's and SA Water's CACs. The Panel provided feedback and advice to ESCOSA during the review process 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.
- A Regulators Working Group – this was established to provide a forum for the various regulators of SA Water to coordinate their efforts for achieving positive outcomes for the South Australian 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 demand-side stakeholders (consumers) were better supported to put their perspective and evidence to the regulator, while being empowered to engage directly with the supply-side (SA Water) through a structured negotiation process (the Negotiation Forum). The new approach also improved the transparency of the Determination process, for example, by using multiple engagement forums and channels, and through the publication of key outputs from these forums. Ultimately, better engagement by key stakeholder groups enhances the legitimacy of the final outcomes of the regulatory process. Subsequently, 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-year regulatory determination for SA Water.

Source: Information provided by ESCOSA

Box 3.11: Case study: Environment Protection Agency's approach to stakeholder engagement

The broad nature of EPA's regulatory activities means a diverse set of stakeholders are often involved, including regulated businesses, government and nongovernment 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. It's approach on these issues is dictated by a combination of statutory requirements, corporate policy and the specific circumstances surrounding particular issues (such as the nature of proposed activities and the characteristics of affected local communities).

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 8 weeks, and prescribed bodies that must be consulted with when developing the legislation. Where there is specific interest from the community, the EPA will exceed these legislative consultation requirements.

The EPA has also recently implemented new corporate policies relating to public engagement designed to lift the overall quality of engagement, recognising the consultation approach will 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 when it comes to public engagement. This means that when the EPA has information which affects individual residents and householders, it will engage with, and listen to, those people 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 on a regular basis. All community interactions are recorded with 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, key issues and themes 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 EngagementHQ software to complement traditional engagement methods with a digital community engagement platform. This enables members of the community who wish to participate in a consultation, but do not have the time or desire to engage with the EPA in person, or via email or phone, to do so 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, 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 upload photos, drop pins and make comments about a location.

Source: Information provided by the EPA

4. Managing the stock of regulation

4.1 Introduction

Managing the stock of regulation refers to a process aimed at ensuring that regulation remains fit for purpose, relevant, and efficiently achieves its stated objectives over time. This involves the use of policies, systems, processes and tools that are applied at an across government and/or individual agency level.

Managing the stock of regulation is much more than reducing unnecessary red tape – although that is an important element. It also requires the identification of leading practices and appropriate comparisons with existing practices, identifying reform opportunities, and providing the evidence, capability and capacity to improve regulatory design (refer Chapter 2) and practice (refer Chapter 3). This requires leadership and long term commitment to building a culture that supports continuous improvement and a strategic framework to help identify and implement regulatory review priorities and opportunities.

This chapter discusses leading practice approaches to managing the regulation stock, provides an overview of current approaches both in South Australia (SA) and interstate and identifies potential opportunities to reform management of the stock of regulation in SA to improve the quality of regulation.

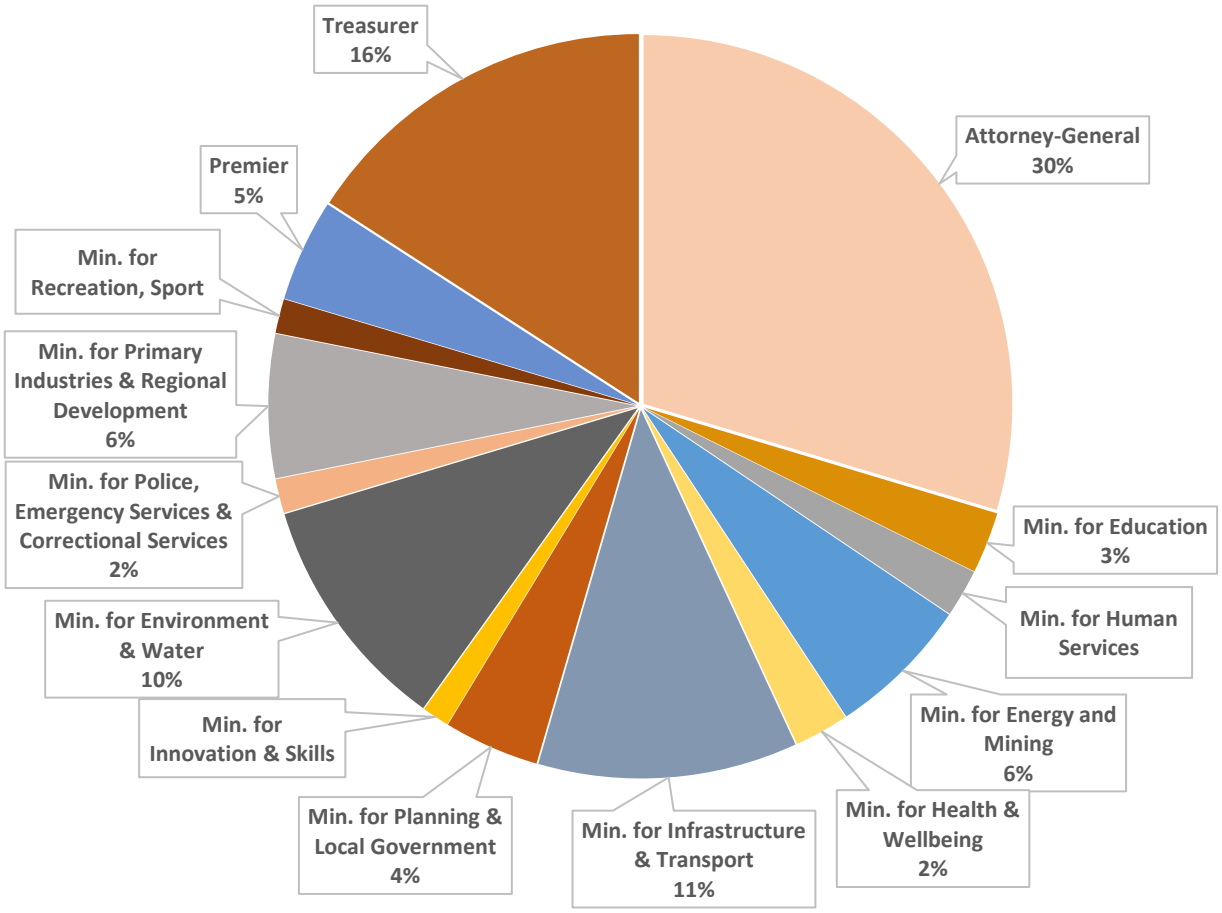
4.2 The size of the task

4.2.1 Regulation stock in South Australia

The inquiry terms of reference require the Commission to '*consider regulations that are principally directed at, or principally affect, businesses*'.[79] Given this scope, the Commission undertook a desktop review to identify which of the list of Acts of Parliament that are committed to Ministers and published on the SA Legislation website in accordance with section 5 of the *Administrative Arrangements Act 1994* (SA) [80] are more likely to incorporate requirements that would impact on businesses. Regulatory requirements may include obligations imposed on businesses regarding licensing, business reporting, application of standards, permits and so on. The review indicated that, as at March 2021, around 334 of the 539 listed Acts may impact on businesses and Figure 4.1 illustrates the proportion of those 334 Acts by minister. As indicated, the Attorney General has the largest proportion of Acts likely to have a business impact with 31 per cent, followed by the Treasurer (16 per cent), then the Minister for Infrastructure and Transport (12 per cent). This is as expected given the portfolios of those ministers and the associated regulators in those portfolios.

[79] SAPC, *Inquiry into SA's Regulatory Framework – terms of reference*, January 2021, 2
[80] Legislation SA, *Acts committed to Ministers as at 24 March 2021* (Web Page, June 2021) <https://legislation.sa.gov.au/Web/Information/Acts%20committed%20to%20Ministers/ActsCommittedToMinisters.pdf>

Figure 4.1: Acts that may impact on business by responsible minister, March 2021



Source: SAPC based on Legislation SA at www.legislation.sa.gov.au at March 2021

The Commission acknowledges the limitations of the above assessment; that it is based on a desktop review only, and does not account for the relative size, complexity and significance of each act. However, in the absence of relevant and readily obtainable data, it provides a rudimentary indication of the relative size of the business regulation management task for each minister (and the associated agencies).

4.2.2 Growth in regulation stock

Consistent with jurisdictions around the world, the stock of regulation in Australia has grown at an increasing rate over recent decades despite the application of initiatives that aim to try and curb the flow of new regulation. Growth in the stock of regulation includes both increases in different forms of regulation over time (Acts of Parliament, delegated regulation and quasi regulation) as well as increasing word counts per legislative instrument.

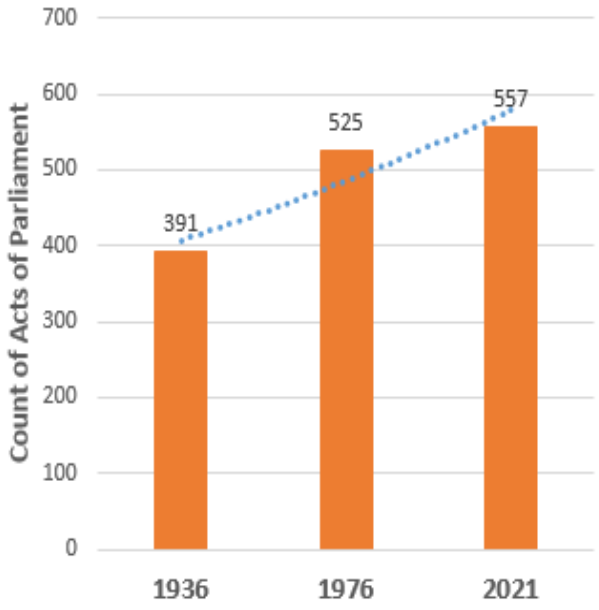
Much of this growth has been in response to the needs and demands of an increasingly affluent society, increases in population[81], revised attitudes to risk, cultural changes and increasing globalisation.[82] More recently, the COVID-19 pandemic has required governments to respond with additional regulatory obligations in order to protect and support community health and business continuity.

[81] P McLaughlin, O Sherouse, J Potts, *RegData: Australia Working Paper*, (2019), 27.
[82] Australian Productivity Commission, *Identifying and evaluating regulation reforms*, (December 2011)

A study that applied a machine learning regulatory tool called 'RegData' to the Australian Government's register of legislation found that the volume of regulatory restrictions grew by 80 per cent from 2005 to 2019 (representing an annual growth rate of 5.5 per cent).[83] This compares with Australia's annual population growth rate of around 1.6 per cent, and annual economic growth rate of around 2.5 per cent over the same period.[84] While the Commission believes this study has limitations due to the method of defining restrictions based upon the use of certain words like 'must', it nevertheless suggests there has been growth in the stock of regulations nationally.

The Commission was not able to access a machine learning regulatory tool that could be applied in SA without considerable development costs, nor to any register listing all SA regulation (primary and delegated) in a format that can be readily analysed. Two sets of historical consolidated Acts of SA Parliament in force are available on the Legislation SA website: a 1936 set of Acts in force on 1 April 1937; and a 1975 set of Acts in force on 3 February 1976. These were compared to all Acts in force as at 11 June 2021. Based on the available information, Figure 4.2 indicates there has been a growth in the number of Acts enacted over time.[85] Although Figure 4.2 indicates a drop off in growth over recent years, the data does not include growth in delegated legislation as this information was not available. The Commission notes that growth in regulation via delegated legislation has significantly exceeded growth in primary regulation[86] (refer to Chapter 2 for further discussion on this).

Figure 4.2: Number of SA Government Acts of Parliament in force - 1936, 1976 and 2021



SA Government Acts explanatory note:	
1936	all Acts in force on 1 April 1937
1976	all Acts in force on 3 February 1976
2021	all Acts in force on 11 June 2021

Source: Legislation SA at www.legislation.sa.gov.au

[83] D Wild, C Hussey, IPA, *The Growth of Regulation in Australia*, (2020) 5.
[84] Ibid, 6
[85] 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>
[86] D Wild, C Hussey, IPA, *The Growth of Regulation in Australia*, (2020) 10.

4.3 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.*'[87]

Governments in Australia and overseas have generally focussed their attention on initiatives aimed at managing the flow of new regulation, rather than the stock of existing regulation. The exceptions have included initiatives aimed at reducing red tape and expiry programs for existing regulation. In SA, such initiatives have included the Regulation Expiry Program (REP), and various red tape reduction initiatives including Simplify Day and Red Tape Reduction Target programs. However, it appears that the level of attention and effort focussed on effectively managing the stock of existing regulation has not been commensurate with the exponential growth in the regulation stock over time.

> *'…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'.*[88]

Ongoing and unchecked growth in the stock of regulation over time can increase the risk of:[89]

- multiple regulatory obligations being applied by different regulators (from within or across jurisdictions) resulting in duplicate or conflicting compliance requirements and increasing the potential for non-compliance;
- redundant, irrelevant and/or out of date regulation that is inconsistent with technology, community expectations and priorities that change over time;
- excessive regulatory coverage where the overall actual impact unnecessarily exceeds the original objective of the individual regulation;
- unnecessary and excessive compliance and administrative costs due to increasing interactions between different forms of regulation;
- a disconnect between what regulation was designed to do and what the actual outcome is following implementation; [90]
- unintended market distortions arising from cumulative impacts on investment, innovation and pricing behaviours and decisions; and
- unanticipated and adverse environmental and social costs that may require significant resources to address.

> '*All regulatory changes have the nature of an experiment, as it is usually uncertain how the patterns of actual behaviour will evolve over time*'.[91]

Several factors can influence the need for effective management of existing regulation. The following paragraphs summarise those factors that are considered to be particularly relevant for SA.

[87] OECD, *Best Practice Principles for Regulatory Policy: Reviewing the Stock of Regulation*, (2020), 8
[88] OECD, *Best Practice Principles for Regulatory Policy: Reviewing the Stock of Regulation,* (2020), 3
[89] Australian Productivity Commission, *Identifying and evaluating regulation reforms*, (December 2011), 14
[90] NZIER, *Regulatory Management* Toolkit, (Working Paper, December 2019), 4
[91] NZIER, *Regulatory Management* Toolkit, (Working Paper, December 2019), 11

Shortcomings in the development of regulation

The adequacy of approval and consultation processes applied to new or amended regulation can vary in accordance with the type of regulation and the circumstances that led to its introduction (refer Chapter 2) and have consequences for the quality of the stock. For example:

- unforeseen circumstances (e.g. COVID 19 pandemic) resulting in an urgent need to introduce new regulatory requirements;
- insufficient capability, capacity, or commitment by regulatory authorities to the regulatory impact assessment (RIA) process; and
- allowable impact assessment and consultation exemptions and exclusions such as:
    - regulation that meets the exemption criteria for RIA[92]; and
    - delegated legislation created under the *Subordinate Legislation Act 1978* whereby '*the executive is not required to publish a statement to explain the purpose of the new law, or even explain why a change to the law is desirable'*.[93]

Consequently, a case may be made to review existing regulation that was not subject to appropriate impact assessment and/or stakeholder consultation before or on its approval.

Changes over time

Over time, changes to technology, market structures, cultural norms and attitudes are inevitable. Most regulation will be in place for a relatively long period of time. It is important that the regulation remains relevant and reflects modern business practices and expectations so that it can continue to achieve its stated objectives. This factor can be further compounded if the regulation includes very specific and prescriptive language that contains terminology or technology specific to a time period. For example, references to specific types of communication technology (e.g. facsimile machine), or language that does not meet cultural expectations (e.g. reference to specific types of relationships or pronouns etc). It is noted that this can be a factor even where the regulation has been well designed and subject to comprehensive impact assessment on its introduction.

Regulatory interactions and insufficient coordination across government

Growth in the volume of regulation itself increases the likelihood of interactions with other regulation that was unforeseen and unplanned, resulting in additional compliance and administrative costs and increasing the risk of unintended outcomes. Additional regulations can be introduced over time without enough regard for the impact on, and interactions with, existing regulation.[94] The risk of regulatory duplication and inconsistency is increased, particularly if the regulation is administered by different regulators who are not cognisant of each other. Less certainty over regulatory obligations now and into the future will impact on business investment decisions.

Transparency, accountability and public confidence

Regulation works well when it influences and changes behaviour and decisions in ways that it was designed to do. It is therefore important that public confidence in the need for, and application of regulation is upheld and maintained. Public confidence in regulation is supported

[92] Department of the Premier and Cabinet (SA), *Better Regulation Handbook*, (January 2011) 6
[93] Associate Professor Lorne Neudorf, DR1, 2
[94] Queensland Productivity Commission, *Improving* regulation, (Research paper, March 2021) 22

by the government providing assurance, and evidence, that the existing regulatory framework is supported by capable regulators, and there is a strong commitment to ensure regulation remains fit for purpose, efficient and effective over time. Such assurances and evidence inspire confidence in the system, improves compliance, and encourages investment in the future.

Economy-wide benefits

Given the overarching reach and impact of regulation, the application of techniques and tools to proactively manage the existing stock of regulation across government can provide significant benefits to the state economy. For example, the implementation of the Australian Government's competition policy reform agenda in the 1980s and 1990s is estimated to have resulted in gains to the economy of 5 per cent of GDP.[95]

Proactive management of regulation includes:

- ongoing continuous improvement via the review of existing regulation where issues and opportunities can be fed back to policy makers to determine appropriate action;
- across government initiatives that improve the quality of the stock of regulation; and
- removal or reduction of unnecessary red tape and/or regulatory barriers that create or influence market efficiencies.

A well-functioning and effective regulatory framework can help mitigate against the likelihood and impact of economic contractions and unforeseen external shocks.[96]

4.4 Leading practice

4.4.1 Principles and features

Leading practice principles for managing the stock of regulation are provided by both the OECD and the Australian Productivity Commission. The Commission considers that these can provide useful guidance to identify gaps in SA's regulatory management approach and prioritise potential reforms that are relevant and appropriate for our state.

OECD best practice principles

In 2012 the OECD published its best practice principles for regulatory policy and included that member countries should '*conduct systemic reviews…to ensure that regulations remain…cost effective and consistent, and deliver the intended policy objectives*'.[97] In 2020 the OECD published best practice principles for review of the stock of regulation[98] as summarised in box 4.1 below. The OECD advises that the principles:

- are designed so that they may be relevant and useful for all member countries;
- are provided for guidance purposes only and are intentionally aspirational (it is not anticipated that a country could meet all of them);
- may not all apply to all jurisdictions - some will be more relevant than others given the nature and design of regulatory frameworks in each jurisdiction;

[95] OECD, *Reviewing the Stock of Regulation*, (Report, 2020) 14
[96] Queensland Productivity Commission, *Improving* regulation, Research paper, (March 2021) 22
[97] OECD, *Reviewing the stock of regulation,* (Policy, 2012), 10
[98] Refer to OECD, *Reviewing the Stock of Regulation,* (2020), 10-13

- focus on the post implementation review of regulation with reference to other framework elements including consultation, prioritisation, leadership and capability; and
- are designed to be a tool to help identify where improvements may be necessary for a jurisdiction – including whether alternative objectives or regulatory approaches are needed.

Box 4.1: OECD best practice principles for post implementation review (PIR) of existing regulation

There are **three central principles** that apply across regulatory management systems:

1. PIRs should be an integral and permanent part of the regulatory cycle

2. PIR processes should be comprehensive

3. PIRs should include an evidence-based assessment of the actual outcomes from regulatory action and contain recommendations to address deficiencies.

In addition to the above central principles, the following apply to **eight areas within regulatory systems:**

1. Governance

Includes effective oversight and accountability mechanisms, pre and post review processes included in institutional arrangements, relevant stakeholders provided with advance notice of forthcoming reviews, proportionality applied to individual reviews to ensure cost effectiveness, transparency of reviews is critical, and the more sensitive the regulation area – the more important it is for the review authority to be independent of enforcement.

2. Portfolio of approaches

A combination of review approaches is required as certain types of review are suitable depending on timing, complexity, nature, resourcing etc. Refer to table 4.2.

3. Essential questions

Certain essential questions must be included in a PIR on appropriateness, effectiveness, efficiency, and reforms.

4. Methodology for evaluation

Apply a method that enables the costs and benefits to be identified, measured and compared. Ensure the method also considers the 'do nothing' scenario and that the method applied is commensurate with the significance of the regulation.

5. Consultations

Coverage and length of consultation must be proportionate to the regulation's significance, impact and public interest. Ensure consultations are as accessible as possible.

6. Prioritisation and sequencing

Required given scarce resources, and to maximise reform benefits. Assign a high priority to review regulations with wide coverage, significant impacts, and where there

is clear evidence of a problem. Sequencing provides opportunities to review interacting regulations and assists with coordination.

7. ***Acquire in-house evaluation capability***

   Improving capability via training etc enables internal reviews to be conducted, and effective oversight where contracted out.

8. ***Committed leadership***

   Fundamental to ensure there are effective PIR systems. Includes both political and senior executive commitment.

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

Australian Productivity Commission 'good design' features

In 2011, the Australian Productivity Commission developed lists of 'good design features' and 'principles' that may be applied to various mechanisms used to manage and review the existing stock of regulation.[99] Common features or principles (in no order) were:

- adequate planning prior to the review commencement – particularly about timeframes and the sequencing of reviews and reforms;
- consolidating reviews where the regulations overlap and/or address the same issues;
- an effective triage process that can screen regulations to help prioritise if a review is required, and if so, what type, when and how to evaluate the impacts;
- effective engagement with relevant stakeholders which requires forward planning, coordination and adequate time to consult;
- adequate planning and management of data requirements that identify what data is required, how to record, collect, consolidate and store the data, analysis of the data and sharing data where able (noting privacy issues);
- review and evaluation include consideration of possible alternatives to regulation;
- governance arrangements at the individual review and across government levels to support transparency (level of review independence, reporting and publications), approvals, and consultation requirements; and
- appropriate leadership commitment and support is crucial in order to secure appropriate resourcing and develop recommendations in the knowledge that they will be seriously considered for implementation.

The principles or features above apply whether considering at the micro level (of individual regulations and/or agencies) or at the macro level (regulations applying to an industry, across government etc).

4.4.2 Review approaches

One of the most important elements of a leading practice approach to managing the stock of regulation is the application of review mechanisms. The Commission considers that a leading

[99] Australian Productivity Commission, *Identifying and evaluating regulatory reforms,* (December 2011).

practice approach to determine the most appropriate type, timing and depth of review will include consideration of:

- the stage at which the regulation is in the regulatory life cycle;
- the significance of the regulation and the potential impact on and across the local economy;
- the level, quality and type of resources available (including technology, human resources, time requirements, costs) to undertake the review;
- support available via existing structures for governance, transparency and accountability;
- regulatory authorities' culture and commitment to regulatory review;
- government priorities; and
- current and forecast economic conditions.

Table 4.2 provides an overview of different forms of regulation review and their potential uses and challenges. The table is based on information provided by the Australian Productivity Commission and other government jurisdictions.[100]

Table 4.2: Identified review approaches to manage regulation stock

Type & description	Used for	Challenges
Programmed reviews:		
Sunsetting provisions:		
Statutory requirement for delegated legislation to expire after a certain period (normally 10 years).	Mitigating the risk that regulation continues beyond its usefulness.	Limited legislative application. Needs careful planning and commitment. Focus on timing not significance – not seen as a valuable method.
Statutory reviews:		
Review requirement is embedded in the legislative statute.	Providing assurance where there's uncertainty on the potential long-term impacts of regulation.	Limited application based on legislation. Can require reasonable resourcing. May be limited to less significant parts of the legislation.
Post-implementation reviews:		
Review undertaken within 1-2 years of legislation being implemented.	Where regulation was not subject to RIA when introduced or the RIA was inadequate.	May be resource intensive. Needs forward planning to collect appropriate data. Narrow focus if interacting regulation not included.
Regulatory impact assessment (RIA) reviews:		
RIA undertaken for in scope regulatory amendments (requiring cabinet approval).	Where regulation was not subject to RIA when introduced or the RIA was inadequate.	Requires skilled application and resources. Need to minimise exemptions.
Ad Hoc Reviews:		
Public stocktake reviews:		
Businesses / regulated entities provide feedback on regulatory issues and reform opportunities.	Identifying areas for regulatory reform including cumulative burdens from interacting regulation.	Requires access to appropriate data and tools (e.g. RegTech) or very resource intensive. Relies on coordinated business input.
Principles based reviews:		

[100] Australian Productivity Commission, *Identifying and Evaluation Regulation Reforms*, (December 2011) 14-44

Type & description	Used for	Challenges
Principles applied based on a specific reform agenda to screen regulation and identify areas of reform.	Identifying reforms relevant to a priority or reform agenda (e.g. competition policy).	Very resource intensive and can be very complex. May take years to implement and reap benefits.
Benchmarking reviews:		
Identify and measure regulatory performance within or across jurisdictions.	Providing information on comparative performance, leading practice and models for reform.	May be difficult to determine what 'leading' practice is and what is appropriate for jurisdiction – especially where data is limited.
In-depth reviews:		
Assess the appropriateness, effectiveness and efficiency of regulation within a 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.
Stock Management Initiatives:		
Red tape reduction (RTR) reviews:		
Identify and implement reforms to reduce unnecessary red tape.	Focusing attention on reducing red tape, provides measurable outcomes.	May be resource intensive. Requires strong leadership commitment, transparency and coordination. May be difficult to 'measure' results.
Regulator strategy reviews:		
Reviews 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: SAPC based on Australian Productivity Commission, Identifying and Evaluating Regulation Reforms, Research Report, Australian Government, 2011.

4.4.3 Regulatory stewardship

Recently, there has been growing interest by governments in 'regulatory stewardship'. One definition states that a regulatory stewardship approach is '*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*.'[101]

Regulatory stewardship is often referred to as a 'virtue' whereby trust is placed on the stewards to care for the regulation in the interests of current and future generations, and as a 'mechanism' that requires stewards to act in a manner that is accountable, transparent, and mitigates risks both now and into the future.[102]

Regulatory stewardship requires government authorities to take a proactive, collaborative approach to monitor and care for the regulations for which they are responsible and have a longer-term outlook that enables agencies to anticipate and respond to change over time.

Specific responsibilities can include working collaboratively to:

[101] Ministry of Justice (NZ), *What is regulatory stewardship?*, (Web page, June 2021) <Regulatory stewardship | New Zealand Ministry of Justice>

[102] Prof J van der Heijden, *Regulatory stewardship: virtue, mechanism or both?*, ANZSOG opinion, (2020).

- monitor, review and report on existing regulation and supporting systems;
- analyse and implement support for changes following impact and risk assessment; and
- provide good regulatory practice including accessible and timely information and support to educate and inform regulated entities and build capability within their agency.

A regulatory stewardship approach supports effective regulation stock management as:

- regulation stewards are required to plan, coordinate, and undertake reviews and reform on an individual regulation and/or regulatory system basis; and
- central oversight and/or coordination is a key element to enable the whole-of-system approach.

A regulatory stewardship approach to managing their stock of regulation has been adopted by the New Zealand (NZ) Government in response to the growth in regulation and the business and government costs associated with that growth (refer to section 4.5.2).[103]

4.5 Approaches to managing the stock of regulation

Governments apply a range of methods and tools to manage their stock of regulation. These vary from routine and ongoing tasks performed as part of the regulatory life cycle, to in-depth reviews of existing regulation, to developing the appropriate structures to support governance, transparency and accountability.

4.5.1 South Australia

The Commission notes the following mechanisms are currently applied to manage the stock of SA Government regulation:

- the Regulation Expiry Program (REP) prescribing the expiry of regulations in accordance with part 3A of the *Subordinate Legislation Act 1978* (see section 4.6);
- statutory reviews where the conduct and scope of the review is prescribed in a specific Act (or associated regulation);
- temporary (select) or standing committee reviews as established by the SA Parliament to investigate issues concerning specific legislation;
- ad hoc reviews of regulation, regulated sectors and/or entities;
- scheduled reviews of regulation, or regulatory requirements as determined through internal business planning by regulators; and
- regulatory impact assessment (RIA) for regulatory proposals that amend existing regulation (and new regulation) and require Cabinet consideration (as per the *Better Regulation Handbook*).[104]

In addition, the SA Government has implemented regulatory reform initiatives aimed at reducing red tape and improving the competitiveness of the business environment in SA. They have included:

[103] NZIER, *Assessing the stock of regulation – a tool for regulatory stewards*, (Working paper, 2016-01) 6
[104] Department of the Premier and Cabinet (SA), *Better Regulation Handbook*, (January 2011) 10

- the Red Tape Reduction Programs (2008 and 2009) under the auspices of the Competitiveness Council;
- the annual Simplify Day program and associated reform initiatives in 2016 to 2018; and
- across government digital and ICT initiatives aimed at transitioning to online services and streamlining processes.

The Commission notes that, in SA:

- responsibility for varying and remaking regulation rests with individual ministers and the agencies within their portfolio;
- reviews of regulation may be via self-assessment or by a third party engaged to undertake the review (internal or external to government); and
- apart from Cabinet office's role to coordinate the REP and Cabinet submissions, there is no overarching authority or unit to oversee the regulatory stock or framework in SA.

Review of SA's stock of regulation

The inquiry issues paper noted the lack of data and information indicating the level and type of review activity that exists across government.[105] This is exacerbated by the lack of a central unit or authority with any across government responsibility for oversight and data on the regulatory framework.

The Commission has been provided with some examples of reviews undertaken on SA Government regulation including:

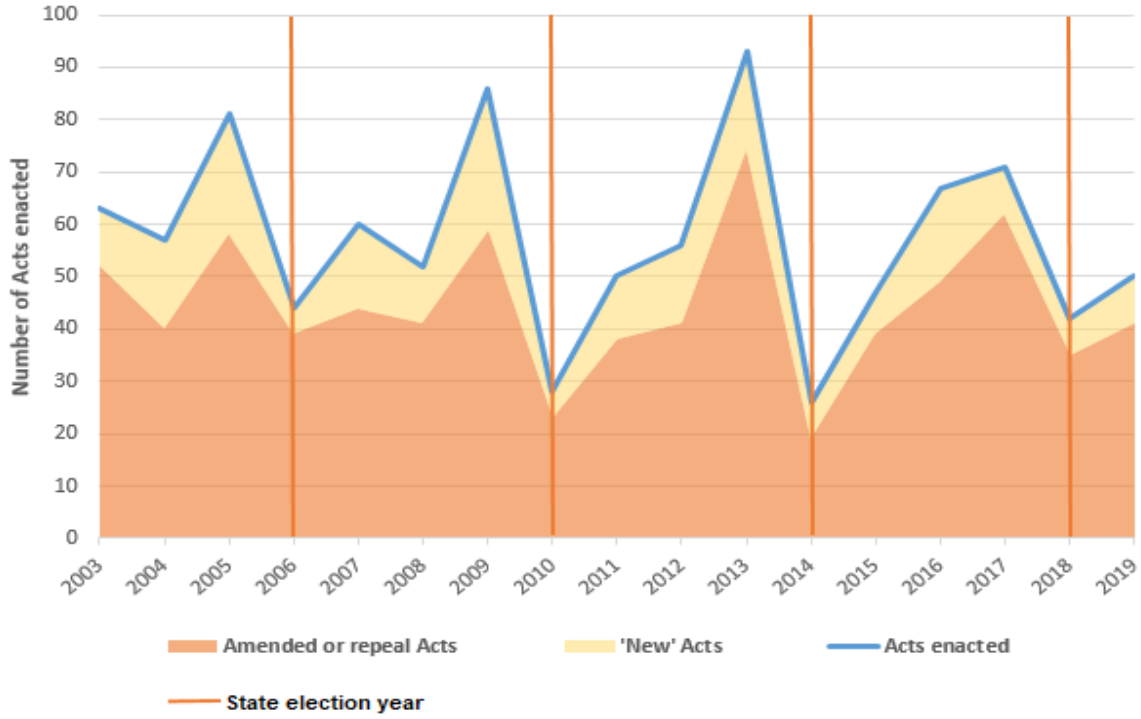
- five yearly reviews conducted by ESCOSA into the various transport related Acts of Parliament[106]; and
- ongoing review of the conduct rules governing legal practitioner professional obligations to ensure that they '*respond to and reflect the expectations of the profession and the community, and technological change*'.[107]

Given there is no central register or database that lists previous, current, and/or forecast regulatory reviews of regulation, the Commission sought to gain an understanding of the level of regulatory review activity across the SA Government via information available on the Legislation SA website. The website provides online pages that list Acts of Parliament that were enacted for each year since 2003. In order to be enacted, the Commission assumed that some form assessment or review of the regulation would have been undertaken. Based on that assumption, the Commission proposes that the data provides a very simple but limited indication of the level of regulatory review activity per annum.

The resulting Figure 4.3 illustrates the total number of Acts enacted each year and whether the Acts enacted were new Acts or were amended Acts (including repeals). According to the data, most Acts enacted from 2003 to 2019 were amended Acts (82 per cent). Vertical lines are included in the figure to indicate those years in which state elections were held.

[105] South Australian Productivity Commission, *Inquiry into reform of South Australia's regulatory framework,* (Issues Paper, 31 March 2021) 22
[106] South Australian Freight Council, DR19
[107] Law Society of SA, DR20, 5

Figure 4.3: Number of SA Government Acts of Parliament enacted per annum, 2003-2019



Source: SAPC – derived from data on www.legislation.sa.gov.au

Data and information on regulation

Information on current, and to a limited extent, previous SA Government regulation is published online at the Legislation SA website in accordance with the object set out in the *Legislation Revision and Publication Act 2002*. Current and previous versions of the following can be downloaded and published (or read online):

- Acts of the Parliament of SA;
- subordinate legislation under Acts of Parliament (including regulations, rules, proclamations and notices made by the Governor of SA, and policies under the *Aquaculture Act 2001* (SA) and the *Environment Protection Act 1993* (SA); and
- Bills introduced, revived or archived.

A search function enables users to undertake a word search of the website. The Commission notes that additional information and assistance may be obtained via:

- the functionality of the ABLIS website which includes across government regulatory requirements for SA and other Australian jurisdictions (if all regulation has been uploaded and linked and the website is kept up to date); and
- business advocacy and representative organisations including the Small Business Commissioner and the Office of the Industry Advocate.

4.5.2 New Zealand (NZ)

As noted earlier, the NZ Government has recently adopted the 'regulatory stewardship' approach to manage their regulations. Proactive promotion of stewardship is included as one of the principles in their *Public Service Act 2020 (NZ)*, and agency chief executives are responsible for supporting their Minister(s) by becoming the stewards of the regulation that is administered by their agency.

The key drivers leading to the introduction of regulatory stewardship by the NZ Government[108] were:

- ongoing growth in the stock of regulation and associated increases in business and government administration and compliance costs; and
- ensuring that regulation reflects changing business behaviours and practices arising from technological, cultural and other changes over time.

The NZ Government's stewardship approach includes the following significant features:

- regulatory stewardship extends beyond specific pieces of legislation (statute, regulation or instrument) to the regulatory system within which the legislation exists (the policies, institutions, processes and tools used to administer, develop, implement, monitor and review the legislation);
- an across the government publication of expectations for regulatory stewardship by government agencies which sets out the regulatory stewardship responsibilities;
- regular reporting and publication on regulatory stewardship strategies and progress; and
- mechanisms to better keep legislation up to date including statutes to repeal Bills (to repeal legislation that is no longer required and/or redundant), and regulatory systems Bills (to make minor amendments).

Box 4.2 provides an overview of the regulatory stewardship approach applied by one of NZ's largest regulators – the Ministry of Business, Innovation and Employment.[109]

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

MBIE is one of the largest regulators in the NZ Government with responsibility for stewardship of 112 statutes and around 75 per cent of their work related to designing and delivering regulatory systems.

MBIE is steward of 17 regulatory systems, requiring them to have a whole of system view and adopt a proactive and collaborative approach. A whole of system view means that MBIE must consider how all the regulatory functions in a system work together to achieve a good regulatory outcome. Regulatory functions include policy advice, service delivery, compliance and enforcement, monitoring and evaluation, dispute resolution etc.

[108] NZIER, *Assessing the stock of regulation – a tool for regulatory stewards*, (Working paper, 2016-01) 6
[109] Ministry of Business, Innovation and Employment (NZ), *Regulatory* Stewardship, (Web Page, June 2021) < https://www.mbie.govt.nz/cross-government-functions/regulatory-stewardship/>

In most cases, several agencies will be involved in delivering different aspects of a regulatory system – however MBIE is the is the steward of the system. This requires transparency to ensure information is provided as needed to the right areas, and proactive collaboration.

Key measures adopted by MBIE to fulfil their regulatory stewardship obligations include:

- in the process of developing a set of standards to define what best regulatory practice is and measure their progress against the standards;
- develop and contribute to omnibus amendment bills to maintain and continuously improve regulation
- undertake a program of assessments on regulatory systems involving a team of staff from an area not directly involved in the system (including secondees from other agencies), conducting interviews and workshops with people involved in all parts of the system at all levels, comparing feedback against a set of assessment criteria based on good regulatory practice and lessons learnt, and publishing a summary of the assessment;
- develop, maintain and publish regulatory charters to help manage and monitor the performance of the regulatory systems they oversee; and
- facilitate cooperation with international regulatory organisations and institutions in order to share information, make common laws and set up joint agencies.

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

Regulatory stewardship in SA

The Commission notes that there are some early indications that some leading practice regulators in SA are adopting elements of the regulatory stewardship approach – including the Environment Protection Authority. However, application is limited and there is no clear understanding of how 'regulatory stewardship' is defined and applied within the context of SA's regulatory framework.

Information request 4.1: Practicing regulatory stewardship in SA

In order to further develop the inquiry draft recommendations, the Commission is interested to learn from regulatory authorities about the different approaches, experiences and insights on regulatory stewardship where it has been applied.

4.5.3 Other Australian jurisdictions

The following table provides an overview on methods applied by some other Australian jurisdictions to manage their stock of regulation.

Table 4.3: 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 proposals that: have substantial impacts; granted an exemption from the RIS requirements by the Prime Minister; and were introduced despite having a non-compliant RIS. The PIR must be completed within 2 years of implementation for proposals granted an exemption or non-compliant and within 5 years for proposals with 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 • Reviews undertaken by parliamentary committees (e.g. senate standing committee for the scrutiny of delegated legislation) • Other ex post reviews as committed to by Government.
Victoria	Office for the Commissioner for Better Regulation (OCBR) monitors, supports and reports on the implementation of evaluation strategies[110], provides support and guidance. RIA must include evaluation requirements for post implementation – can involve a mid-term evaluation (3-5 years from initial implementation) if: • 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 the mid-term evaluation coincides with the sun-set date for the regulations, then it can form part of the RIS to remake regulations.
New South Wales	Regulatory Improvement Branch at NSW Treasury provides assistance and support for RIA. Statutory rules require subordinate legislation to be reviewed every five years under the Subordinate Legislation Act 1989 (NSW) – like sun-set program. Nil published reference found to post implementation review requirements.
Queensland	Office of Best Practice Regulation (OBPR) oversees and supports agencies for PIRs and sunset reviews: • PIR is normally required where regulatory proposal was 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 Post Implementation Reviews (PIR). A PIR is required to be completed within three years of implementation if an exemption to undertake a regulatory impact assessment was granted.

Source: SAPC – derived from relevant jurisdictional government websites

[110] Commissioner for Better Regulation, *Victorian Guide to Regulation*, (2016) 59.

Drawing on Table 4.2, the key differences between other Australian jurisdictions and SA are:

- all the selected jurisdictions have some type of central authority or unit that provides governance, support and oversight of the regulatory framework to varying degrees; and
- except for NSW, all require some form of post implementation review to be undertaken within a certain time after implementation of new or revised regulation.

None of the above jurisdictions has indicated that they currently use the regulatory stewardship approach although it appears that many have adopted elements, including arrangements that encourage collaboration and a whole-of-system focus.

Data and information on regulation (other jurisdictions)

Most interstate jurisdictions manage a legislation website like SA's discussed earlier – although most are easier to use (and are probably better resourced) than that in SA. It is therefore much easier to navigate and obtain relevant information from those websites – even with minimal knowledge of their regulation.

Table 4.4: Legislation websites in selected government jurisdictions

Jurisdiction	Legislation website
Australian Government	Publishes an online Federal Register of Legislation – an across government website for Commonwealth legislation and related documents. Also contains the full text and details of the life cycle of individual laws and relationships between them. Managed by the Office of Parliamentary Counsel in accordance with the Legislation Act 2003. Search function enables searches based on Acts, legislative instruments, notifiable instruments, Bills, Gazettes and information. Various filters can be applied to assist searches including portfolio, title, year, registration date etc. Also provides information / guidance on the legislation including sun setting, Gazette notices etc.
NSW Government	Legislation website managed by the Parliamentary Counsel's Office. Provides easy to access lists of the most popular titles searched, COVID-19 legislation information, ability to save favourites, new updates published in a list weekly. Provides a search function that is like that for Legislation SA.
Victorian Government	Legislation website includes legislation in force (current and superseded Acts and statutory rules incorporating any amendments), legislation as made (as originally enacted or made), Bills, repealed or revoked legislation, and information / guidance. Searches can be undertaken via different methods: Word searches of the title, or content, or both title and content of the legislation. The search results are sorted in order of relevance.
Queensland Government	Legislation website provides access to legislation and related information – Bills introduced, Acts as passed, subordinate legislation as made, point-in-time reprints (consolidations) of Acts and subordinate legislation. Managed by the Office of the Queensland Parliamentary Counsel. It provides a range of publications, how-to videos and FAQs for those unfamiliar with the website or legislation. This includes the 'BrowseAloud' function to assist those requiring reading and translation support.

Jurisdiction	Legislation website
	Provides an upfront list of 'what's new' (re legislation) as well as the most common titles accessed. Other information includes repealed legislation going back to 1860. Search function enables basic, advanced and menu assisted searches of titles and/or content.

Source: SAPC based on relevant jurisdiction websites

The Commission notes with respect to the SA legislation website that:

- those familiar with SA Government regulation, who have some proficiency in interpreting legislation, will find that the website provides an extremely valuable and comprehensive resource;
- those unfamiliar with regulation and its interpretation, including some businesses, are likely to be challenged when they navigate the website to find and interpret the information they require;
- regulators may be able to assist inform regulated entities; however, their advice is likely to be limited to the regulator's sphere of responsibility and consequently, it may be difficult for a business to readily obtain a comprehensive understanding of all its regulatory obligations; and
- the Commission has had to manually download, copy, paste, clean, consolidate, make assumptions (when determining whether an Act has a business impact) and analyse information from the website in order the develop findings, tables or charts that can be used in this draft report.

The ease with which government and non-government organisations can access, obtain and understand the relevant SA regulatory obligations must impact on agencies' ability to develop and review regulation as well as business compliance levels and ongoing engagement.

Draft recommendation 4.1: Register of regulation

To improve knowledge and understanding of the existing stock of regulation by government agencies and businesses, the Commission recommends that the SA Government create, or build on an existing, online regulation register that lists all current SA Government regulation (primary and delegated legislation) in a format that can be readily navigated and searched and information exported to enable review.

4.6 Regulation Expiry Programs

4.6.1 South Australia's Regulation Expiry Program (REP)

The inquiry terms of reference require the Commission to make recommendations that '*improve the architecture, including systems and processes for designing, making, reviewing and sunsetting of regulations*'.[111]

In SA, the mechanism to 'sun-set' regulation is the 'Regulation Expiry Program' or 'REP'. The REP is an annual program managed by Cabinet Office in the SA Department of the Premier and Cabinet (DPC) in consultation with the Office of Parliamentary Counsel (OPC). Part 3A of the *Subordinate Legislation Act 1978* (the Act) prescribes that regulations will expire on '*1*

[111] SAPC, *South Australia's Regulatory Framework Notice of Inquiry and Terms of Reference*, (January 2021) 2

September of the year following the year in which the tenth anniversary of the day on which they were made falls".[112] The Act allows for the mandatory expiry of regulations to be postponed for a total of four years although each postponement period cannot exceed two years. Thus, subordinate regulation subject to the REP can continue for up to 14 years, after which it must either expire, or be remade.

Section 16A of the Act lists the conditions under which subordinate regulation can be excluded from the REP. They include regulations that are not required to be laid before Parliament (i.e. Acts of Parliament), regulations amending an Act, and regulations that were made pursuant to an agreement for uniform legislation between states and/or the Australian Government.

According to the Legislation SA website, the REP is designed '*to ensure that regulations are reviewed regularly and remade in a form that is appropriate to their current context'.*[113]

Table 4.5 is derived from the list of current regulations that are subject to the REP published on the Legislation SA website. In the absence of readily available information and data on business impacts, the Commission undertook a desktop review of this list to identify those regulations that may potentially impact on businesses. For example, those that include requirements relating to licensing, standards, reporting requirements and restrictions applying to business operations. As indicated, an estimated 65 per cent of the listed regulations were identified as potentially having a business impact.

Table 4.5: SA regulation expiry program at 7 June 2021

Total number of regulations listed	**103**
Regulations that may be postponed on 1 Sept 2021 (number)	91
Regulations due to expire on 1 Sept 2021 (number)	12
Estimated proportion of regulations that may have a business impact* (%)	65
Estimated proportion of regulations due to expire that may have a business impact *(%)	67

*Source: SAPC based on REP at www.legislation.sa.gov.au | * based on desktop review*

Cabinet office provided some information on the REP which indicates 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 be repealed before their expiration.[114]

4.6.2 REP in other jurisdictions

Overall, most Australian jurisdictions have very similar regulation expiry programs (or sunsetting provisions) in terms of the obligations imposed and the purpose of the program. The main differences relate to how the program is administered and supported.

Many interstate jurisdictions will provide additional support, guidance and assistance to agencies who are required to comply with their equivalent program. For example, many publish guidance documents on the program and agency requirements – including how to review the

[112] *Subordinate Legislation Act 1978,* s 16B(g).
[113] Legislation SA, *Expiry Program Information*, (Web Page, June 2021) < https://www.legislation.sa.gov.au/Web/Help/Expiry%20program/ExpiryProgram.aspx>
[114] Department of the Premier and Cabinet (SA), provided June 2021

regulations and assess whether it is still fit for purpose and/or any amendments that may be required. For example:

- Australian Government publishes both a guidance note on sunsetting legislative instruments[115] as well as a 55 page guide to managing sunsetting of legislative instruments[116] which includes templates to apply for reviews and exemptions;
- Queensland Government's guidance on review of expiring legislation (sunset reviews)[117] plus information contained in general guidance on regulatory assessments; and
- Victorian Government's published 'hints and tips for preparing a regulatory impact statement for sunsetting regulations'.[118]

In addition to the above, many jurisdictions have a central coordinating authority which can proactively assist an agency planning for and participating in their sunsetting program.

4.6.3 Feedback on the REP in SA

As part of the inquiry process, the Commission consulted with stakeholders on the stated purpose and their experiences with the REP process. The Commission heard that:

- agencies will normally automatically postpone regulations without review until that option is no longer available;
- in most cases agencies will remake the regulations without amendment following an internal review that does not usually involve external stakeholder engagement;
- most regulations subject to REP are considered to contain administrative matters that support the operation of their authorising Act and therefore have very minor impacts that do not justify review;
- DPC Cabinet office's role in the REP is limited to providing reminders to agencies on their obligations under the REP and coordinating responses;
- requiring reviews based on timeframes only is not best practice and does include any consideration of the significance of the regulation (or insignificance);
- agencies tend to lack the capability and resources to adequately plan for, and undertake, reviews of regulation subject to the REP;
- most agencies view the REP as an unnecessary administrative imposition that has little to no impact on the quality of the stock of regulation; and
- undertaking a review of regulation, a decade after coming into force is inadequate and too late given the harm that may have already been caused by poor regulation.

> *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*

[115] Department of the Prime Minister and Cabinet, Office of Best Practice Regulation, *Sunsetting Legislative Instruments,* (Guidance note, March 2020)
[116] Attorney-General's Department (Commonwealth), *Guide to managing the sunsetting of legislative instruments*, (July 2020)
[117] Queensland Productivity Commission, *Review of expiring legislation (sunset reviews),* (Version 1.0, February 2018)
[118] Commissioner for Better Regulation Victoria, *Hints and tips for preparing a Regulatory Impact Statement for sunsetting regulations*, (undated).

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

4.6.4 REP challenges and potential reform

As noted, the intent of the REP is to ensure regulations are regularly reviewed and are fit for purpose. The Commission considers that the following factors impact on the achievement of that objective:

- scope limitations as determined by legislation (including allowable exemptions);
- significance (or not) of the in-scope regulation – the obligations included in the regulation and the impact of those obligations;
- quality of the planning undertaken and whether enough resources are set aside;
- timing of the expiry (including significant events such as the COVID-19 pandemic) and election years;
- capability and capacity of agencies to undertake any kind of impact assessment;
- level of commitment to the REP and its objectives – ministerial and senior executive; and
- the level and type of available support, information and advice on the REP for agencies.

With respect to support and advice for agencies, the Commission notes that minimal information or guidance is published on the REP. Cabinet office informs relevant Ministers of their obligations and refers them to the Better Regulation Handbook for further guidance. The Commission notes that the handbook only provides a brief mention of the REP in one paragraph[119] – there is no further specific guidance on how an agency should plan for, review and complete the REP requirements. Furthermore, the Commission has found that it is extremely difficult to obtain information on whether any review is undertaken on regulations in the REP – let alone whether a review resulted in any changes or reforms. It is difficult for the Commission to comment on whether the REP is working in accordance with its purpose (*that regulations are reviewed regularly and remade in a form that is appropriate to their current context'*[120]) in the absence of reporting and transparency.

Proposals to reform REP put to the Commission during consultations included:

- reduce the expiry timeframe from 10 to 5 years;
- mandate regulatory impact assessment to ensure justification is provided where expiry is to be postponed or the regulation to be remade;
- widen the scope of the REP to include other regulation beyond its current legislated scope;
- include 'significance' of the regulation as a prompt to review the regulation and the depth of the review (not just timing as is currently the case with the REP);
- improve reporting requirements to assist with transparency and accountability; and

[119] Department of the Premier and Cabinet (SA), *Better Regulation* Handbook, (January 2011), 27.
[120] Legislation SA, *Expiry Program Information*, (Web Page, June 2021) < https://www.legislation.sa.gov.au/Web/Help/Expiry%20program/ExpiryProgram.aspx>

- provide more guidance, information and/or tools to help agencies, encourage assessment and review, and enhance transparency.

The Commission recognises that the additional administrative costs to implement most of the above proposals are likely to outweigh any potential benefits. That said, given the issues identified and the feedback provided, the Commission proposes the following draft recommendation. While it is intentionally specific to the REP, as the state's only state-wide initiative for managing the stock of regulations, the recommendation complements the direction of reform reflected in other draft recommendations.

Draft recommendation 4.2: SA's Regulation Expiry Program (REP)

To support the REP to achieve its stated purpose that '*regulations are reviewed regularly and remade in a form that is appropriate to their current context'*[121], the Commission recommends that the SA Government provides:

- guidance material to inform and guide agencies on the purpose, requirements and processes of the REP;
- tools to complement the REP guidance material and assist agencies (including templates, case study examples, FAQs etc);
- training and education that references the REP (including online options);
- a mechanism to improve coordination of the REP across agencies and enable agencies to share and report on REP activity including regulatory reviews (previous, current and planned); and
- improved REP governance arrangements to better support the objectives and reaffirm commitment to the REP, enhance transparency and strengthen accountability through better coordination and reporting.

Any new guidance material, tools, mechanisms and education programs be developed in consultation with agencies.

4.7 Challenges and opportunities for reform

A leading practice approach to managing the stock of regulation incorporates the structures, systems and processes that can support the effective and proportionate review of regulation so that it remains fit for purpose and to remove unnecessary regulatory burdens. In practice, the Commission notes that most jurisdictions (including SA) face ongoing significant challenges in effectively managing their regulation stock. The OECD concluded:

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

  '…some form of ex post evaluation was recorded as obligatory by only 60% of member countries, compared to around 90% for ex ante assessment' [122]

[121] Legislation SA, *Expiry Program Information*, (Web Page, June 2021) < https://www.legislation.sa.gov.au/Web/Help/Expiry%20program/ExpiryProgram.aspx>
[122] OECD, *Reviewing the Stock of Regulation*, (Report, 2020) 16

- 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'* [123].

The Commission considers that appropriate leading practice principles and features can be applied in order to assist SA to identify current challenges and issues and to guide the development of reforms that are relevant and applicable to SA. Consequently, the Commission has organised the challenges, issues and proposed reforms associated with effectively managing the stock of regulation into broad themes that align with the leading practice principles and features discussed section 4.4. The identified themes may apply at the individual organisation level, or to a range of organisations across and/or external to government.

4.7.1 Governance

The two main governance elements most relevant to managing the regulation stock are:

- the structures setting out roles, responsibilities and associated approval mechanisms; and
- leadership commitment and support.

Structure

The quality and type of regulatory review of existing regulation can be impacted by the type of governance structure that is in place. The Commission notes that:

- most government jurisdictions across Australia have a central unit or authority which oversees regulatory review and reform, provides information on review activity (previous, current or planned), and advice, training and support to agencies and ministers on regulatory review and reform;
- in general, most of these central units or authorities do not operate as 'gatekeeping' authorities (i.e. cannot stop a regulatory proposal from being approved) as their role focusses more on providing information and advice; and
- the central unit is generally located in a central government agency with clear lines of communication to ministers and/or Cabinet.

Consultation with other jurisdictions indicates that they view some form of centralised oversight as a key mechanism by which they can provide consistent, high quality, across government policy advice, information and support for agencies and ministers responsible for managing the regulation stock that reflects government priorities.

Central oversight can be in the form of a specific independent authority, or a specific section within a central agency to government.

To facilitate leading practice regulation stock management, its roles and responsibilities may include:

- monitoring overall performance;

[123] OECD, *Recommendation of the Council on Regulatory Policy and Governance,* (2016), 234

- identifying major, an across government regulation challenges and investment opportunities;
- scanning for emerging long term issues that affect the regulatory system (such as climate change and the implications for the regulatory framework);
- providing guidance and assistance to lift agency capability and capacity across the regulatory lifecycle agencies;
- identifying across government opportunities to reduce regulatory burden (internal and external to government) and streamline processes; and
- providing and/or facilitating mechanisms that enable appropriate sharing of information, data and capabilities across government and throughout the regulatory life cycle.

The issue of central oversight is discussed further in Chapter 6.

Leadership commitment and support

The level of senior executive and ministerial commitment to regulatory review and reform influences:

- the overall culture and attitude towards regulatory reform in agencies;
- the quality and level of resources allocated to regulatory review and reform; and
- governance and accountability arrangements – particularly with respect to delegations and approvals.

The Commission has heard from industry that, in their experience, it can be easier to gain commitment from ministerial and senior government executives for additional financial support than it can be to obtain commitment to regulatory reform. Often this is the case where the reform relates to existing regulation and the change is incremental (not major).

Several factors can influence senior executive or ministerial the degree of support for regulatory review and reform of existing regulation including:

- new regulation can be perceived as being different and innovative, and may engender a sense of urgency that is not perceived as applying to existing regulation;
- larger projects involving new or existing regulation can have more visible outcomes and create a bigger, more obvious impact that incremental regulatory change;
- governments perceive the approval of new regulation as listening and being proactive;
- reforms may have negative budget impacts, including implementation costs and a loss of revenue to government; and
- governments may not want to highlight regulation that has not worked as planned or had unintended consequences.

  '…*governments may be fearful a review finds that a regulation has not helped to solve the problem that it was designed to fix*.'[124]

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

On the other hand, significant potential benefits may flow from even a relatively small regulatory change, particularly where it is in response to changes in market structures, technology or business practices.

The Commission notes that, except for the REP, there is no overarching policy program or strategic priority that commits government to encourage and proactively manage and review the existing stock of regulation in SA. Senior executive and ministerial support and commitment is a necessary and crucial element of the regulatory framework – particularly given the potential costs and benefits.

The Commission considers that a stronger commitment from senior levels of the SA Government to proactively managing the stock of regulation, via review and other mechanisms, is important to the maintenance of a modern, fit-for-purpose regulatory framework conducive to investment and growth.

4.7.2 Consultation and engagement

A significant volume of published literature on leading practice regulatory management and feedback provided to the Commission referred to the importance of effective and appropriate consultation with stakeholders on managing regulation. A robust assessment of existing regulation requires effective consultation and engagement with those stakeholders who have been, or may be, impacted by the regulation (and any amendments).

The Commission heard from industry stakeholders that their experiences with regulator and agency consultation and engagement varied, ranging from being very positive to feeling that their concerns were not being heard nor addressed.

Ongoing or ad hoc consultation

Industry associations were consulted on their experiences with raising concerns or providing ad hoc feedback to government on regulatory issues.[125] The Commission heard:

- positive feedback on the existing role and work of the Small Business Commissioner and the Industry Advocate;
- some considered they have good working relationships with regulators and ministers and can raise concerns quickly and easily;
- some considered that they do not have any kind of ongoing relationship with regulators or ministers, and that their concerns were not being heard or addressed;
- some of the mechanisms established to respond to the COVID-19 pandemic – particularly the ongoing consultations between government and industry organisations – were a positive experience in terms of being kept well informed and addressing industry wide issues; and
- many would like a mechanism, similar to that used for the COVID-19 pandemic response, that would enable them to meet with their industry counterparts and relevant senior government and ministerial executives, raise and discuss issues or concerns openly as they arise, be informed early of changes, and be able to adapt and respond to changes effectively.

The Commission notes that multiple stakeholders mentioned the previous Simplify Day initiative had a useful engagement mechanism. The Local Government Association argued that

[125] SAPC, *Request for Information from Industry Associations,* (19 responses, June 2021).

the State Local Government Red Tape Taskforce established under the Simplify Day banner provided an opportunity for state and local government to work collaboratively on identified business regulation priority areas.

Consultation for reviews

The Commission asked industry if they had been consulted for reviews of relevant regulation and their views on that consultation process.

The Commission heard:

- many felt that engagement or consultation on regulation is often sought at the end of the review process – after initial findings have already been developed – and can therefore be considered as '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*);

- a lack of consistent, ongoing consultation between industry and key government policy and decision makers and sporadic, one-way, and uncoordinated consultation:

  > *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);*

- effective engagement requires engaging with a variety of businesses within an industry given the range of views and issues (e.g. consultations regarding sustainable fishing stocks);

- most expressed a desire to have greater ownership and involvement in the management of regulations impacting on their sector; and

- consultation must be planned, coordinated and prioritised to avoid duplicating consultation and asking for feedback on regulation that has a minor impact on business.

Efficient and effective consultation and engagement can help identify issues or concerns earlier, obtain and share information and learnings, engender greater acceptance of regulation and improve compliance. The Commission heard from businesses, industry associations and local government that they would value:

- some type of forum or mechanism that enables stakeholders to have ongoing and/or semi-regular engagement with government decision makers and officers relevant to their industry on relevant current and forecast issues (including future workforce, regulatory certainty for investment, potential licensing decisions etc);

- early and proportionate engagement on regulatory reviews where they can be provided with time to respond and/or coordinate a response and so that their feedback can potentially be impactful;

- greater use of forums with representatives from government and industry, with a focus on business regulation review and reform;

- a coordinated approach to consultation that minimises the risk of it becoming an administrative burden – for example, being contacted multiple times by different

organisations (or even different units within the same organisation) over a short period of time;

- better ways to create and share information and data with stakeholders and across different regulators so that reporting and feedback addressing the same issues is only required to be provided once; and

- careful consideration of which stakeholders to consult – some report being constantly contacted while others have never been contacted (this was an issue common to multiple industries).

> '*Agencies have reported duplication of consultation effort, and difficulties in engaging business when they have recently participated in other consultations'*.[126]

When done well, consultation and engagement provide relevant and useful information which can be used to minimise the risk that regulation may be less effective or more burdensome than expected or have unintended consequences and can help improve overall acceptance and compliance with the regulation. When done poorly, consultation and engagement can create additional burdens, use up valuable resources for minimal gain, and cause disruptions and stakeholder disengagement now, and in the future.

> '*Once regulations are in place, good two-way communication can be crucial to the effective administration of regulations and to identifying ongoing refinements*'.[127]

4.7.3. Capability and capacity

The level, type and quality of resources available to undertake activities associated with managing the stock of regulation was a common theme raised by stakeholders consulted for this inquiry. Most agencies advised that a lack of adequate resourcing, appropriately skilled staff and relevant information directly impacts their ability to undertake reviews of regulation and the quality of the review (and therefore outcome).

Issues and concerns raised with the Commission on resourcing and capability included:

- a lack of experienced and capable regulatory or agency staff that have a good working knowledge of the industry, the associated legislation, and how to assess impacts – particularly an appreciation of the potential regulatory impacts on investment and productivity;

- regulation management practices would benefit greatly from improvements to data and information availability and assessment by building in appropriate data collection tools, use of machine learning technology, and greater sharing of relevant data across regulators (to reduce the burden on businesses); and

- there can be time and resource constraints that adversely impact on regulator and business ability to obtain and report information to build evidence.

Data and information on review activity

The Commission has been unable to determine the level of review activity of existing regulation that is undertaken by SA Government agencies each year due to a lack of public reporting on that activity. There is no central repository of information on current or planned regulatory review activity by agency. Given this, it is difficult for the Commission to conclude whether

[126] Australian Productivity Commission, *Identifying and evaluating regulation reforms*, (December 2011) 44
[127] Australian Productivity Commission, *Identifying and evaluating regulation reforms*, (December 2011) 44

review of existing regulation is occurring, at what level, and whether this is appropriate or sufficient.

It is the Commission's view that a lack of information and evidence indicating the level, type and outcomes of any regulatory review activity must reduce the quality of information provided to key government decision makers and ministers. This is particularly important for regulation that has a real and tangible impact on business investment and productivity. It is difficult to understand how good decisions can be made without knowing whether a regulation is working as intended, if there are any current or emerging problems and what improvements are necessary.

Publication of review activity

As discussed, the Commission found very little public information on regulatory review activity across government including reviews that are underway, planned, and outcomes of reviews. Business stakeholders have indicated that such information would be valuable for business planning and participation in such reviews. In comparison, Table 4.6 summarises review activity information published by other selected Australian jurisdictions.

Table 4.6: Publications by other jurisdictions on review outcomes

Jurisdiction	Review outcome publications
Australian Government	Publishes on the Department of the Premier and Cabinet website: • regulatory impact analysis (RIA) information, including decision regulatory impact statements (RISs); and • post implementation reviews (PIRs) including their status and compliance by agency
NSW Government	Office for the Commissioner for Productivity in NSW publishes all regulatory impact statements and better regulation statements produced by NSW Government clusters on its website. Some PIRs are published on the agency website responsible for the regulation
Victorian Government	Office for the Commissioner for Better Regulation (OCBR) monitors, supports and reports on the implementation of evaluation strategies, provides support and guidance.[128] Agencies are required to publish RIS's in the Government Gazette, and on the Better Regulation Victoria website High impact proposals (impacts are more than $8 million per annum) require evaluation 3-5 years after implementation although if it coincides with sunsetting date then it can be undertaken as part of the RIS to remake the regulations.
Queensland Government	Queensland Government requires approved RIS's, decision RISs, and Post Implementation Reviews to be published on the Office of Best Practice Regulation's website.

Source: SAPC based on relevant jurisdiction websites

Potential opportunities for reform in this area include:

- develop or build on across government communities of practice focussing on regulatory review and reform to enable officers to share learnings and information;
- investigate machine learning tools or software to undertake periodic 'stocktakes' of existing regulation, identify regulatory areas with disproportionately prescriptive

[128] Commissioner for Better Regulation, *Victorian Guide to Regulation*, (2016) 59

requirements, identify opportunities for regulatory reform, provide information to agencies involving regulation for sectors and agencies (refer Chapter 5);

- build regulatory evaluation or ex poste assessment capability in regulators and policy agencies, including the establishment of required databases, through education and training, building on existing tools and resources such as the *Better Regulation Handbook*; and
- improve awareness on the importance of 'regulatory craft' including the emergence of the ANZSOG Regulators Community of Practice129 which provides a network of public sector regulators from all three levels of government and every regulatory sector, professional background, role and level of seniority to learn from one another.

> '*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*.'[130]

4.7.4. Proportionality and risk

The Commission has heard from stakeholders that although post-implementation review is recognised as an important part of managing regulation, the type and level of review activity must be commensurate with the significance and risk of the regulation.

Industry has provided feedback to the Commission that major pieces of legislation should be subject to ongoing monitoring, appropriate review, and amended if required to ensure that they remain fit for purpose. However, regulation that has a minor impact or is fit for purpose should require less attention and review – or if required, a shortened review format.

The Commission has also heard that regulatory reviews often only focus on a specific piece of legislation and do not account for interactions with other regulations. An industry may be subject to regulations imposed by different regulators; however, a regulatory review may only focus on the regulation for which a single regulator is responsible. A narrow scope will mean that the government will not have a true understanding of the overall impact that the regulation has on business. This can have important consequences for businesses that have to comply with multiple regulatory requirements prescribed by different regulators.

> *…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)*

Review evaluation methods also need to consider the impact of the regulation on risk – particularly if the regulation was introduced in order to address a specific risk event. This includes understanding stakeholder perceptions of risk and how they can impact on the level and type of regulation imposed. For example, overestimation of relatively rare, but easily understood events (like airplane accidents) can increase community demand to regulate against such risks. Conversely, underestimation of risk because of a lack of understanding or the perceived event is far into the future can lead to under regulation.

4.7.5 Review and evaluation methodology

[129] Parliament of Australia, *Deregulation agenda-Budget Review 2020-21*, (Web page, 17 June 2021 < https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview202021/DeregulationAgenda>

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

Review method and evaluation includes both:

- the type of review method that is appropriate to the circumstances; and
- the evaluation method used to assess the regulation impacts.

Type of review

There are various types of reviews (refer table 4.2) that can be used to evaluate regulation and there are benefits and challenges associated with each type. Choice of review method will depend on:

- the capability and capacity of resources available;
- at what regulatory lifecycle stage is the review to be undertaken;
- the significance of the regulation, its complexity and interconnectedness with other regulations;
- the events or issues that may have triggered the review; and
- whether the regulation has previously been reviewed, the quality of that review, and if other reviews are currently being undertaken on that industry.

Table 4.7 provides a summary of review methods (refer to table 4.2) and the key considerations and benefits associated with each review method which can help to determine and prioritise what review method may be appropriate and when.

Table 4.7: Key review methods, associated benefits and considerations

Programmed reviews:	
Sunsetting provisions	Can help eliminate redundant regulation and ensure re-made regulation is fit for purpose but requires: • Careful management and containment of exemptions and deferrals • Significance of potential reform depends partly on what is contained in the regulations • Roles and responsibilities must be clarified • Coordination and planning are required including forewarning stakeholders.
Statutory reviews	Reviews embedded in legislation can facilitated a more targeted approach to identifying issues and implementing reforms. Requires adequate resourcing and stakeholder consultation.
Post-implementation review	Can be used as a 'fail-safe' mechanism to capture regulation that was not adequately assessed before being enacted. Implementation can provide new and relevant evidence on efficiency and effectiveness given businesses can comment on their actual experiences with the regulation. Having a PIR can identify issues more quickly than if they are left to be raised by stakeholders later. Requires suitable resourcing, capability and enough time. Unjustified exemptions or exclusions can impact on effectiveness. Requires a committed leadership.
RIA	Can be used to review existing regulation and/or amending regulation. Requirement to follow up on pre-implementation RIA review objectives.
Ad Hoc Reviews:	
Public stocktakes	Engages widely across different businesses and industries which can help identify cross jurisdictional and cumulative burdens. Given the significant resource requirements, often is undertaken periodically. Requires enough planning and time to facilitate stakeholder engagement.
Principles based review strategies	By cutting across different regulatory areas that are interconnected, can be very effective when developing across government or issue reforms.

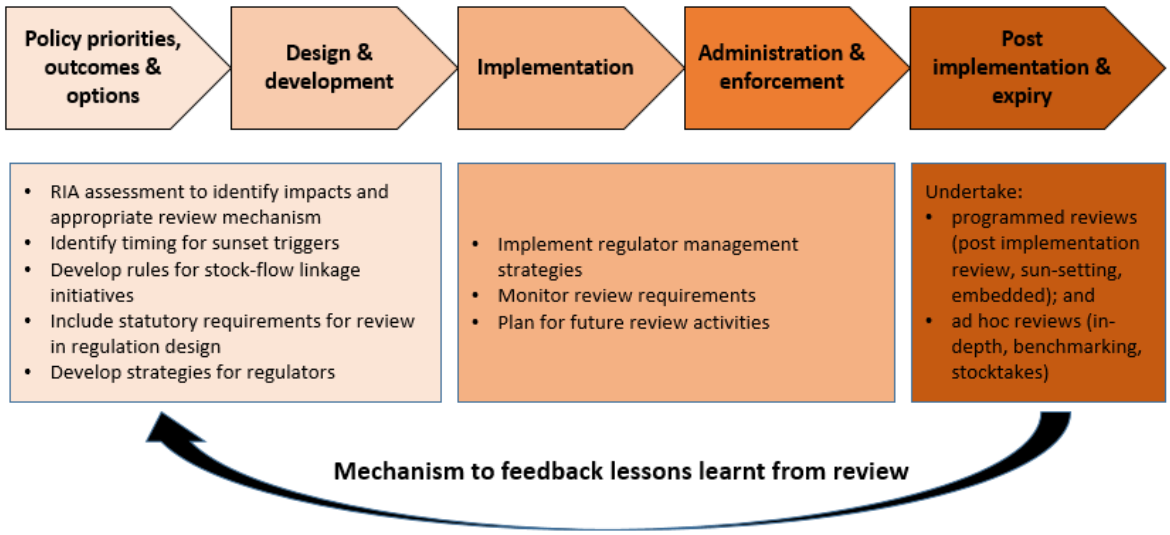
	Requires significant resourcing including staff, capabilities, and time to avoid compromising the outcomes.
Benchmarking	Best used for information purposes – to identify and compare leading practice. Important to consider the resource requirements and timing when undertaking comparisons.
In-depth reviews	Effective in identifying reform options for complex regulatory areas. Requires significant resourcing and a clear idea of when to undertake such a review (not reactionary). Ensure well planned to avoid dedicating resources to an in-depth review that is not necessarily needed.
Stock Management Initiatives:	
Red tape reduction initiatives	Can provide regulators with a mechanism by which they can identify and progress reforms (e.g. Simplify Day regulation amendments) – particularly when commencing a regulatory reform program.
Regulator strategies	Regulators can implement strategies to support more systematic consultation and feedback from regulated entities. Improvements could include implementation of risk based enforcement approaches to better target responses to regulation; and using best practice principles to support good practice regulator performance.
Stock-flow linkage rules	Australian Productivity Commission considers that such rules including 'one-in one-out' programs have more disadvantages that advantages.[131]

Source: SAPC based on Australian Productivity Commission 2011, Identifying and Evaluating Regulation Reforms, Research Report, Canberra

Timing of review

As noted, when determining the appropriateness of a review method, consideration should be given to the regulatory review lifecycle stage. Figure 4.4 provides an indication of the different review methods that may be more appropriate based on the regulatory lifecycle stage (noting that this will not be the only consideration). The figure also includes an arrow to indicate the feedback that should be captured to assist with the development of new or revised regulation.

Figure 4.4: Type of review by regulatory lifecycle stage



Source: SAPC

Frequency of review

When, and how often, reviews of regulation are undertaken was an issue raised by stakeholders during consultation. Industry advised that frequency and timing can have important consequences for stakeholder engagement and consultation, and how well

[131] Australian Productivity Commission, *Identifying and evaluating regulation reforms*, (2011) 10

businesses accept and comply with regulatory changes. This includes both where there is a perception that there has been too much review and regulatory change, and where it is perceived there has not been enough reform. For example:

- numerous reviews of the *Real Property Regulations 2009* (SA) have resulted in the regulations being made and re-made multiple times since coming into force;[132]
- insufficient review and reform of:
    - the *Food Act 2001* (SA) despite significant business and technology changes since its introduction 20 years ago;[133] and
    - certain parts of the *Local Government Act 1999* in order to update it to accommodate modern communication technologies including removal of requirement for hard copy reporting, provide for online petitions[134]; and
    - terminology and obligations in the *Security and Investigation Industry Act 1995* to reflect modern industry practices; and
    - Section 43 of the *Maritime Services (Access) Act 2000* provides a mechanism for periodic review of the South Australian port access regime, which has failed to reflect the changing structure and competitive dynamics of the market.[135]

The frequency of review and reform activity can have important consequences for business engagement, confidence, and certainty when planning future investment decisions.

Evaluation method

A review should measure the potential and actual impacts of the regulation in order to determine its performance. An evaluation method can be used to assess the regulation impacts and help determine what, if any, change is required. The type of evaluation method can therefore have important consequences for individual organisations as well as the market.

> *…whether these reviews will add value over and above the cost they impose – in other words, are they cost benefit ratio positive (SA Freight Council, DR19, 3)*.

Challenges associated with evaluation methods can include:

- ability to identify, obtain, and apply relevant information and data – particularly where a numerical value is being assigned to measure qualitative impacts;
- the level of skills and resources that are required for different evaluation methods with some requiring specialised resources that may be difficult to obtain;
- choosing and applying an evaluation method that is commensurate with the risk and significance of the regulation (particularly given the time and effort required by some methods to both measure and update estimates);

[132] Associate Professor Lorne Neudorf, DR2, 7
[133] City of Holdfast Bay, DR6, 7
[134] Port Adelaide Enfield Council, DR14, 7
[135] Qube Ports Pty Ltd, DR15, 6

- the various limitations of different evaluation methodologies including how regulatory burden is quantified (or not), whether the results are relevant over time or only to a point in time; and
- determining the scope of the impacts to measure – whether to limit to direct impacts, or measure more comprehensive impacts including market distortions.

Feedback on evaluation methods included:

- leading practice requires the use of data and information for evaluation over a period of time, rather than at a single point in time;
- business information reported should be shared by regulators (taking appropriate account of privacy considerations) to avoid duplication of effort by businesses; and
- the type of evaluation method used can have important consequences for market competition and investment.

In many cases, evaluating the impact of a regulation has been limited to measuring the costs arising from directly complying with the regulation. However, this approach ignores other elements that contribute to the overall performance of regulation:

- the regulations themselves;
- the behaviour of the regulator;
- the 'regulated' target; and
- the outcomes of the process.[136]

A comprehensive evaluation of the performance of regulations from a wider perspective may be required in order to include the impacts beyond the administrative and compliance costs. Consideration of how significantly the regulation impacts on markets and the degree of interconnectedness with other regulations or sectors of the economy can help to identify and prioritise what regulations should be reviewed, how and when.

Reforms to try and improve review or assessment evaluation methods may include consideration of:

- how to improve the government's capacity and capability to evaluate risk as it applies to regulation; and
- the regulation impacts on market competition and the potential flow on impacts on other sectors or areas of the economy.

4.7.6 Prioritising and sequencing

[136] NZIER, *Assessing the stock of regulation – a tool for regulatory stewards*, (Working paper, 2016-01) 8-11

When prioritising and sequencing reviews of regulation, consideration needs to be given to the[137]:

- type of review method that would be most appropriate given the type of regulation and the regulatory lifecycle stage;
- specific events or issues that may have triggered the need for the review (including technological or market changes);
- capability and capacity of available resources including skilled officers, information and data, and allowable time;
- previous, current or planned regulation reviews of the same regulation, or of regulation that may overlap with the target regulation (or regulation area) – including statutory review requirements;
- extent to which the regulation is compatible with government regulatory strategic priorities (e.g. small business policies etc); and
- significance of the regulation in terms of its impacts (including impact on market competition), scope (across different jurisdictions and/or different levels of government), and the potential for reform and benefits arising from review.

> *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)*

Some stakeholders provided the Commission with examples of specific regulation that they consider needs to be reviewed sooner rather than later including:

- regulation relevant to Local Government that has been rolled over and not properly reviewed in over 20 years and which '*does not enable Councils to best adapt to the changing needs of communities and business, particularly with the vast development of technologies over this time'*;[138] and
- regulatory requirements (including licence class) applying to forklift driver licences under work, health and safety regulations that are inconsistent with other jurisdictions, not risk based, and negatively impact on the freight industry's ability to attract and attain a skilled workforce.[139]

Apart from the *Better Regulation Handbook*, there is no across government statement or policy that can help guide regulatory authorities and officers on if, when, and how they should direct their efforts and resources to reviews of existing regulation. The Commission considers that a consistent policy, applied across government, would help agencies to prioritise, schedule, resource and coordinate the evaluation and review of existing regulation.

The policy would apply:

[137] Based on Queensland Productivity Commission, *Improving regulation,* (Research paper, 2021) 23
[138] Port Adelaide Enfield Council, DR14, 7
[139] SA Freight Council, DR19, 24.

- 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 4.6 and recommendation 4.2) and other types of review methods.

Draft recommendation 4.3: Review priority policy

To assist in ensuring the state's regulations remain relevant, achieve their policy objectives and deliver net benefits to SA, the Commission recommends that the SA Government develop an across government policy to guide the prioritisation of regulation reviews. The policy's principles and criteria will enable regulatory and policy agencies to:

- identify and prioritise reviews of regulations, categories of regulation or regulated industries;
- determine the most appropriate review type and evaluation methodology to apply;
- support a holistic approach to regulation review that considers associated regulatory interactions when appropriate;
- coordinate and undertake effective stakeholder engagement and communication; and
- apply a proportionate and risk-based approach to regulation review that considers the actual and potential costs and benefits of the review process and outcomes.

The Commission notes that regulatory review prioritisation reform requires senior leadership commitment, processes to obtain and assess information and data, and consideration of central oversight and/or reporting.

> *'Prioritisation requires more than a set of criteria that allow governments to identify high return reforms. It also requires a process that can gather the information, conduct and test the analysis, and deliberate to choose priorities. The regulatory system needs to support this process as well as more routine activities*.'[140]

4.7.7 Regulatory stewardship

The Commission has formed a preliminary view that the 'stewardship' approach characterises an effective and efficient way to manage the stock of regulation. 'Stewardship' involves '*managing resources that are owned by, held on behalf of, or exist for the benefit of others*'.[141]

Regulatory stewardship responsibilities include:

- monitoring, review and reporting on existing regulatory systems;
- robust analysis and implementation support for changes to regulatory systems; and
- good regulatory practice.

[140] Queensland Productivity Commission, *Improving regulation*, (Research paper, 2021) 20.
[141] Allen & Clarke Policy and Regulatory Specialists Ltd (NZ), *Guide to regulatory stewardship*, (April 2021) 2

'It involves…adopting a whole-of-system, lifecycle view of regulation, and taking a proactive, collaborative approach, to the monitoring and care of the regulatory system(s) within which they have policy or operational responsibilities'.[142]

Elements of a regulatory stewardship approach are already consistent with some existing requirements in SA – including the responsibilities of the chief executives and ministers for regulation that they administer. Other elements are less evident in SA including the:

- adoption of a whole of regulatory life-cycle approach to managing regulation;
- application of a broader perspective that considers the potential impact of the regulation on industry beyond the individual regulator's remit; and
- recognition that regulation is part of a wider regulatory system which includes not just the regulatory rules themselves, but also the institutions, people and practices that make regulation work well.

Draft recommendation 4.4: Regulatory stewardship

To establish a leading practice approach to management of the stock of regulation, the Commission recommends that the SA Government requires all state based regulators to adopt a regulatory stewardship approach that:

- confirms and publicly sets out the roles, responsibilities and associated accountabilities of regulatory agencies;
- proactively manages regulation over the regulation lifecycle, including through post-implementation evaluations;
- builds regulatory agency capacity and capability to improve the capture and sharing of data and information, and collaborative approaches that limit the impacts of regulatory interactions on industry through simplification and consolidation; and
- requires regulatory stewards to publicly report information on their regulatory review activity (current and planned) to improve stakeholder engagement.

4.8 Conclusion

In addition to providing support for the health, welfare and safety of the community and broader environment, regulation can provide benefits for the economy by creating and maintaining an environment in which businesses have the confidence, capability and capacity to maintain or grow their business. Regulation can help support employment, productivity and economic growth. However, regulation can create unintended consequences and costs and reduce the state's competitiveness for investment. The risk of these impacts increases when additional new rules are imposed without regard to the rules and regulations already in place in SA or other jurisdictions. Unchecked growth in the stock of regulation can lead to:

- a myriad of rules and regulations, creating a complex regulatory environment in and additional costs for both businesses and government;

[142] The Treasury (NZ), *Regulatory stewardship,* (Web Page, June 2021) <https://www.treasury.govt.nz/information-and-services/regulation/regulatory-stewardship>

- imposition of regulations that are not well targeted or tailored; and
- increased barriers to investment and reduced business confidence over the longer term.

When considering how to improve the efficiency and effectiveness of SA's regulatory framework, the Commission must consider not just how to lift the productivity of the flow of new regulation (see Chapter 2), but also lift the productivity of the existing stock of regulation.

The Commission does not consider that there is one single method that can be applied to manage the stock of regulation efficiently and effectively. Reforms to improve the management of the stock of SA regulation and therefore the overall quality of regulation will require a combination of the sorts of actions and initiatives discussed in this chapter, given the impacts (including costs) arising from regulation are 'multi-dimensional' and have multiple origins.

To address current and future challenges, the Commission considers that an effective and efficient approach to manage the stock of regulation requires a range of review methods and approaches across the regulatory life cycle. An overarching framework or structure is required to provide leadership, transparency, and coordination, supported by an appropriate governance structure that assigns responsibility and accountability to the stewards of that regulation.

'*Individual regulations do not operate in isolation but interact as part of a system*'.[143]

This points to the need for a regulatory framework or approach that helps to join up and manage the regulatory system with appropriate institutions, processes and tools across the regulatory cycle. This is discussed further in Chapter 6.

In closing this chapter, the Commission highlights that any regulatory reform must be considered within the context of the government's ultimate objective to safeguard and promote the wellbeing, health and safety of the community.

[143] NZIER, *Regulatory Management toolkit*, (Discussion document, 2019) 4

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. In actuality, 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 regulation 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 what is meant by Regulatory Technology (RegTech) and the ways in which RegTech can improve regulatory systems and practice.
- Section 5.3 examines how regulatory systems can adapt in more novel circumstances, for innovation and at times of economic shock.

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[144]. 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, households are now both producers and consumers in energy markets because of solar technology. 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. Information asymmetries in digital markets may also require new and different forms of regulation.
- The *enforcement* challenge — more complex and globally integrated supply chains make it difficult for regulators to identify and enforce obligations onto 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.

[144] 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 transboundary* challenges — traditional ministerial, institutional and jurisdictional boundaries are no longer adequate to address issues in tech 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.

Governments and regulators face substantial political and special interest pressures when markets are disrupted. Market incumbents may seek to maintain barriers to entry that might otherwise be challenged by digital innovations, and to the detriment of the consumer. Also, the benefits and risks associated with new market activities are not always known at the outset and governments and regulators need to balance the need for responsible consumer, environmental and social protection against a 'wait and see' approach that supports innovative market developments and market-based solutions to potential competition problems.

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[145]. Part 37N of the Act requires a ministerial review of the provisions, with the results to be reported within 3 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[146].

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'[147]. 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*

[145] The ACCC recently successfully prosecuted ticket reseller, Viagogo AG, for making false and misleading representations related to the final price of ticket resales.
[146] 'Ticket Reselling Review', Your Say – SA Government (Web Page, no date) <https://yoursay.sa.gov.au/ticket-reselling-review>
[147] Productivity Commission, *Regulatory Technology*, Information Paper, (Commonwealth of Australia, 2019), 4-5, < https://www.pc.gov.au/research/completed/regulatory-technology/regulatory-technology.pdf >

environment. RegTech solutions can be applied in any industry with regulatory and compliance requirements" [148].

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'[149]. Nevertheless, the uptake of RegTech across industries has been 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. It is essential that governments and regulators invest in RegTech in a way that delivers most 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 excellent 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 throughout 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 (Box 5.1).

Box 5.1: Participant views on better use of data and technology for regulation

South Australian Freight Council (DR19, pp.5-6)
"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."

City of Port Adelaide Enfield (DR14, p.9)
"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 KPI's which inform legislative, policy and process decision making to support economic development."

City of Charles Sturt (DR5, p.2)
"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".

Source: submissions to the SAPC

[148] Australian Communications and Media Authority (C[th]), *New Tech Applications for Regulatory Outcomes,* Occasional Paper, (Commonwealth of Australia, 2021), 5, < https://www.acma.gov.au/publications/2021-03/report/new-tech-applications-regulatory-outcomes-occasional-paper >
[149] Ibid, 7.

Finally, it is worth noting that there are barriers to regulators and regulated entities taking up RegTech. As the Australian Productivity Commission 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)."*[150]

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 and third-party RegTech providers.

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 five key areas where technology solutions are enhancing regulatory practice. These are:

- compliance;
- reporting and transaction monitoring;
- risk management; and
- identity management and control.[151]

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.[152] Another example is the use of smart

[150] Productivity Commission, *Regulatory Technology*, Information Paper, (Commonwealth of Australia, 2019), 7.
[151] Australian Communications and Media Authority (ACMA) (Cth), New Tech Applications for Regulatory Outcomes, Occasional Paper, (Commonwealth of Australia, 2021); Deloitte, *RegTech Business Cases 2021: Explore the tangible value of RegTech Solutions* (Deloitte, 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).
[152] ACMA, New Tech Applications for Regulatory Outcomes, Occasional Paper, (Commonwealth of Australia, 2021), 8.

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 minimisation strategies and responding to adverse events. The automation of compliance processes has been identified as one of the most prolific uses of RegTech.[153]

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 5.2). 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 — it allowed the OTR to provide a more rapid and agile response to AEMO's new information reporting requests.
- Reduced compliance burden — the OTR has reduced the time and effort required by electricians and contractors.
- Better targeted interventions —rich, real time data enables the OTR to take a risk-based approach to core regulatory functions, targeting high-risk areas, achieving better regulatory outcomes, and improving the allocation of resources in the OTR.

Box 5.2: Case study: The Office of the Technical Regulator's (OTR's) application of eCoC to the compilation of the DER Register and to core compliance activity

In South Australia, 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, which govern safety and technical matters in the electricity sector. The certificates are an essential tool for the technical and safety compliance regime. Traditionally, this has been done through a well-established paper-based system. An electronic certificate of compliance system (the eCoC), replaced the old 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.

New customer electricity connections to the electricity grid are also captured by the new system. This requires the completion of an eCoC and submission of this to the distribution network operator, SA Power Networks. The Department for Energy and Mining and the OTR recently collaborated with SA Power Networks to collect information via eCoC for the new national Distributed Energy Resource (DER) Register. DERs encompass small-scale electricity generation units, such as roof-top solar and home batteries in households and businesses, but also includes some larger generation types, such as co-generation plants. The rapid uptake of DERs created a challenge for the operator of the National Electricity Market (NEM), the Australian Energy Market Operator (AEMO), in terms of establishing how much there is, where it is and how to manage it, to ensure the safe and secure operation of the NEM. Consequently, AEMO has established an on-line register to hold and manage this data.

The eCoC system allowed the OTR to assist SA Power Networks to respond rapidly to this new AEMO regulatory requirement (imposed on distribution system operators) and also minimised the compliance burden for this process by reducing duplication of data entry by electricians. An easy to follow user guide was also provided by the OTR. As SA Power Networks put it: "*We are in a*

[153] Ibid. 8.

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 SA Power Networks. 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 operate 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 SA Power Networks' systems to provide more efficient ways for electricians to declare the detail of their work. Upcoming changes to OTR case management processes and systems are designed to minimise administration and provide inspectors with a broad overview of the work conducted by tradespersons across the state. 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: SAPC based on information provided by the OTR.

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. RegTech can enhance reporting by automating manual processes and applying data aggregation tools that take information from various source databases and combining these into one complete data set.[154] 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 more efficiently meet any new requirements.

Recent investments in digital technologies within CBS, together with enabling changes in legislation, are improving information exchange with regulated entities for liquor and gaming licencing. Examples of recently announced initiatives have included:

- Development of a portal through which licensees can review their new licence conditions. Licensees will also be able to contact CBS through the portal. The portal will be further developed following the initial transition phase to allow licensees to access their records, update their details, reduce hours/capacities/endorsements, make applications and pay annual fees. On the commencement of the legislation, licensees will be provided with their updated liquor licence, gaming licence, plans and necessary signage through the portal.

- A web form through which holders of special circumstances licences may seek a review of the licence category which they have been assigned. All other new liquor forms (more than 60) will be developed in iApply software to simplify and where possible, automate processes.

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

- Legislative changes that will allow licensees to display their licence digitally. Licensees will also be allowed to provide their plan to police digitally.[155]

CBS is also working with the Department of the Premier and Cabinet to use iApply to convert all 217 customer facing forms to an online format, enabling customers to complete all forms online, removing the need to print them off to sign, scan and email them back. Dynamic form development has enabled many forms to be merged to create a simpler user experience.

Risk management

Risk-based regulation recognises that the risk of non-compliance with regulatory requirements varies with the characteristics of businesses and individuals. Regulators can take these factors into account to target compliance and to determine the mix of prescriptive and outcomes-based regulation.[156] 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.[157] 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 licencing 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;
- 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: Case study: ESCOSA's use of RegTech for monitoring and licencing

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 interest of consumers. It does this through a range of regulatory activities, covering both consumer

[155] Department of Premier and Cabinet, 'Digital Initiatives' (Web Page, 2021) < https://www.dpc.sa.gov.au/responsibilities/ict-digital-cyber-security/digital-government/digital-initiatives >
[156] Productivity Commission, Regulatory Technology, Information Paper, (Commonwealth of Australia, 2019), 18.
[157] ACMA, New Tech Applications for Regulatory Outcomes, Occasional Paper, (Commonwealth of Australia, 2021), 10.

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. This is a large number of regulated entities for ESCOSA to cover.

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. This is a risk-based framework that will classify small system operators into either: (1) a "trusted" category, whereby consistently competent operatorsl 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 a CWMS sewerage service in a local government area to approximately 6,500 customers, as well as a non-drinking water service to approximately 22 customers. 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 (and their pattern over the past 5 years); pricing; financial sustainability; current and future capital expenditure; and the indicative remaining life of their water and wastewater assets. ESCOSA was also able 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 license variation.

Source: SAPC based on information provided by ESCOSA.

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[158]. 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 licencing 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.

5.2.2 Implications for South Australia

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

The Commission is continuing to collect information from regulators and industry on the use of regulatory technology in SA. While the Commission has so far uncovered some good examples of digital and technological innovations being implemented among certain SA regulators, consultations with regulators and regulated entities alike suggests that the level of digital and technology uptake among regulatory entities is currently lower than what should be expected. Some typical issues that have been raised include:

- a lack of shared data and information management systems between relevant regulatory entities, including between SA regulators, and between SA regulators and councils;
- the lack of interoperability between SA regulators' data management systems, such that data cannot be easily shared, joined and analysed; and
- continued reliance on manual and paper-based systems when dealing with regulated entities or other levels of government for certain processes, sometimes because of legacy effects of existing legislation, which could be otherwise easily replaced by electronic solutions.

Importantly, 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 Australian Productivity Commission has recently observed that even low-tech applications like shared platforms and online registers can materially improve interactions with regulators and government[159]. Such systems can also provide the basis for future development of other tools to reduce compliance burdens**.** Indeed, feedback from participants to this inquiry has suggested that immediate gains can be achieved through greater uptake of simple online digital systems to increase the effectiveness of data collection and information sharing between SA regulators and regulated entities.

In consultations with regulators, it was observed that current budget development processes led by the Department of Treasury and Finance 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 do not consider administrative savings as an offsetting cost against the initial investment. This can result in some proposals being rejected even when there is a positive net cost-benefit business case.

159 Productivity Commission, Regulatory Technology, Information Paper, (Commonwealth of Australia, 2019).

Draft recommendation 5.1: Regulator innovation and 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:

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

b) facilitate innovation in regulatory design and practice by:
   - Completing a study lead by the Department of the Premier and Cabinet, working with regulators, to identify where digital and technology solutions could be best implemented to enhance regulatory practice for individual regulators and provide the greatest benefits for the state regulatory system.
   - Revising the methodology for assessing government investments in RegTech and digital solutions to consider the broad, ongoing benefits to regulated entities and the state economy from reduced compliance costs, and not just the financial impact on government or individual regulators.
   - Committing to the use of regulatory sandboxes to test innovative concepts at smaller scale, facilitate growth of emerging industries and respond to emerging opportunities in established industries.

The SA Government has recently invested in the development of a new government services portal (Box 5.4), which is providing agencies with a single platform with which to engage with businesses and the community in the provision of government services. Using this, or a complementary strategy, for creating cross-government digital solutions for regulatory functions would be beneficial for increasing the efficiency and effectiveness of regulation and reducing compliance costs for businesses.

Box 5.4: Government services portal

The Government services portal initiative was announced in the 2020 state budget as part of the $120m 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). 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 will 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 than ever before. 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), and deliver a human-centred services design capability to design and on-board services for people and businesses as quickly as possible.

The initiative builds the foundations to deliver a broad range of benefits. 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, resulting in the delivery of an end-to-end digital service experience
- 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
- 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
- supports collaboration by providing a connection between disparate systems.

Source: SAPC base on advice from the Department of the Premier and Cabinet

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. Such an approach offers the additional benefit of identifying and utilising RegTech solutions to facilitate coordination between regulators to address their various interdependencies (refer to Chapter 6).

Draft recommendation 5.2: Investment in cross-government RegTech solutions

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

- more efficient data collection from regulated entities;
- more efficient data sharing between regulators, including regulators in other jurisdictions where appropriate; and
- improved coordination between regulators.

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 tradition 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 is new approach to regulatory development[160]. 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'[161]. The Australian Energy Market Commission 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 where they are feasible under current laws and regulation;
- a new regulatory waiver power for the Australian Energy Regulator (AER) 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[162].

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

[160] 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 >
[161] 'AEMC recommends new regulatory sandbox to support innovation', Australian Energy Market Commission (Web Page, 2019) < https://www.aemc.gov.au/news-centre/media-releases/aemc-recommends-new-regulatory-sandbox-support-innovation >
[162] 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 >

regulatory sandbox service for the energy market, providing temporary waivers from regulatory requirements to enable trials of new business models[163].

The Commission has not been advised of any similar examples specifically in SA where flexible regulatory arrangements have been implemented to support innovation. The Commission is interested to know where there are any such examples, or where there might be areas where a 'sandbox' approach would be beneficial.

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. While this was 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 earlier in this chapter).

The Commission is interested in hearing from stakeholders on how well they consider SA's regulatory system is able to respond to future 'shocks' as well as innovation and technological changes in markets, and if there any particular areas that require State government action.

Information request 5.1: Regulating during economic or other market shocks

The Commission is interested to learn about:

a) What lessons can be learned from the experience of regulation design, creation and implementation during the COVID-19 pandemic?

b) How responsive is SA's regulatory framework to market disruptions or changes in technology? Provide examples of regulatory arrangements in SA or elsewhere that support innovative approaches by regulators.

c) What opportunities for improvement to the state's regulatory framework are presented by artificial intelligence, big data, RegTech or other technological developments?

d) To what extent does SA's regulatory framework support innovation in business? Please provide specific examples of good practice.

e) What are some key areas where investment in RegTech would greatly enhance regulatory systems and practice in SA?

f) Are regulatory sandboxes a useful mechanism to support business innovation? Are there areas of opportunity where regulatory sandboxes could be used?

[163] Australian Government, *2021-22 Budget Paper 2* (Australian Government, 2021) < https://budget.gov.au/2021-22/content/bp2/download/bp2_2021-22.pdf >

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 state wide 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 also 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.

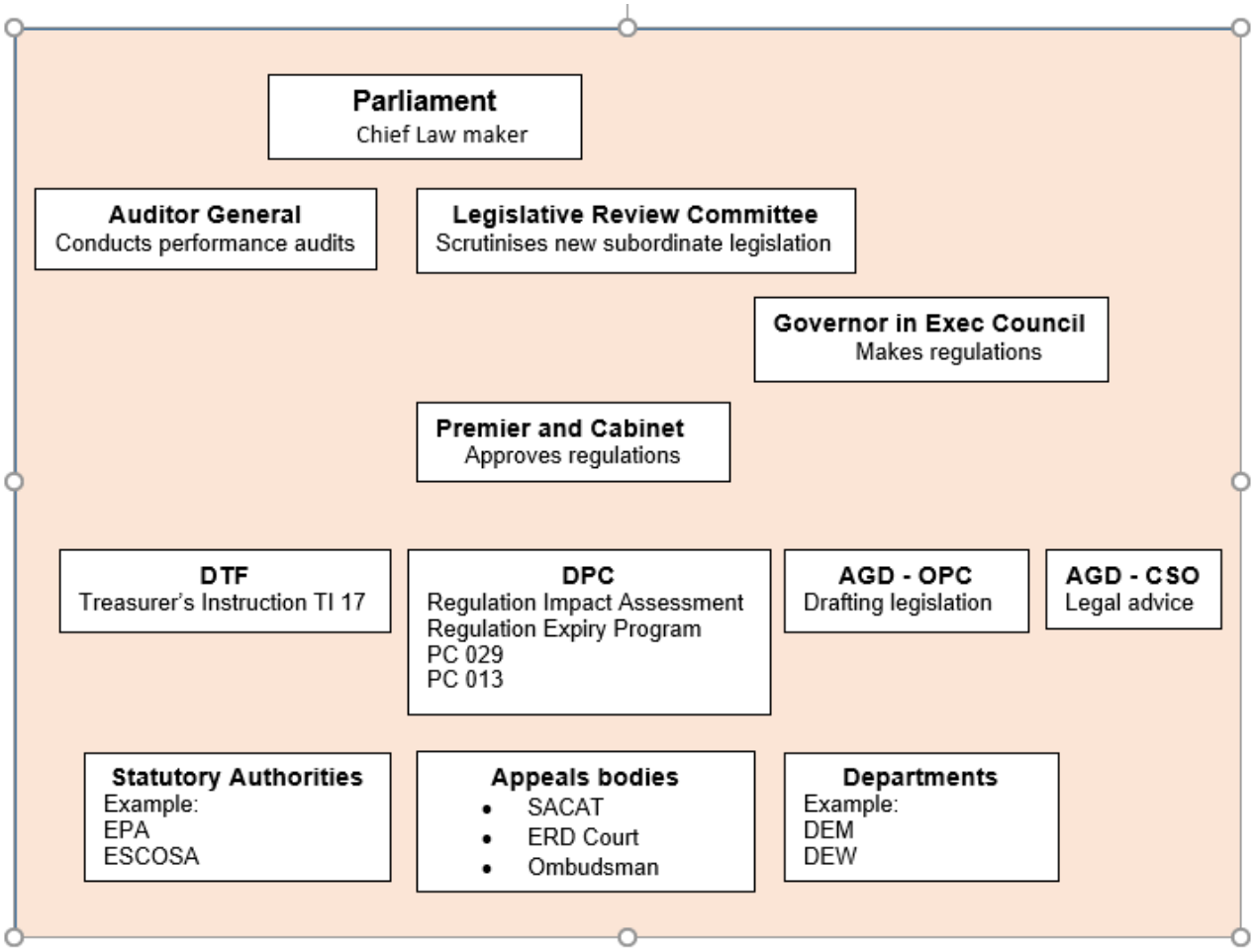
7. Develop a **consistent policy covering the role and functions of regulatory** agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence.

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.

6.3 Current system-wide architecture in SA

This section provides an overview of SA's current system-wide regulatory architecture. This is presented in Figure 6.1.

Figure 6.1: 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 statute. 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 law-maker.

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 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. That said, both Houses of Parliament 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.

In addition to the responsibilities exercised by the LRC, 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 programs also includes a range of performance audits, which are used to assess whether the functions for which public sector 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 role of the Legislative Review Committee (LRC) is separate from the functions exercised by the Auditor-General, with the former confined to scrutinising the legal implications of executive law-making.

The creation of regulation through executive law-making generally involves several government agencies, all of which exercise some responsibility for the processes that support 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.

As outlined in Chapter 2, Cabinet Office in DPC is responsible for ensuring that ex-ante assessment of regulatory impact, as outlined in the *Better Regulation Handbook*, is undertaken appropriately by public sector agencies. Ex-ante evaluation is carried out based on the Regulatory Impact Assessment (RIA) framework developed in the *Better Regulation*

Handbook, with agencies required to produce Regulatory Impact Statements (RIS) if a regulatory proposal reaches the impact threshold outlined in the handbook.

Cabinet Office also has lead responsibility for managing the Regulation Expiry Program (REP), which applies elements of ex-post evaluation to instruments that fall within the definition of regulations contained in section 16A of the Subordinate Legislation Act. As already discussed in Chapter 4, the REP is undertaken on an annual basis, with the Office of Parliamentary Counsel providing specialist legal support to Cabinet Office.

Cabinet Office's role in ensuring appropriate ex-ante evaluation of regulatory proposals 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 public sector 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, however, and does not create obligations on agencies to engage in ex-post assessment of regulation.

Apart from its role in regulating a large cross-section of South Australian businesses through Consumer and Business Services (CBS), (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 role 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 plays a role in the state's regulatory framework by drafting bills for government and private members of Parliament and takes responsibility for drafting subordinate legislation at the request of minsters and their portfolio agencies. The OPC's 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 of new regulation or the amendment of existing 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. 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 number of 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 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.

Information request 6.1: appeals processes

Are the processes for appealing decisions by SA regulators, including both internal and external appeal pathways, effective, efficient and timely?

6.4 Better practice and system-wide architecture

6.4.1 Developing regulation

Developing and managing high quality regulation requires that each phase of the regulation life cycle is managed effectively as a discrete part of a large whole. Each stage of the life cycle must be independently effective and fully integrated into a regulatory system to ensure the 'systemic' quality of regulation. As the OECD's better principles make clear, regulatory quality must be viewed from a 'whole-of-government' perspective, and governments must take "into account the interplay between the different institutions involved in the regulatory process and seek to overcome the obstacles created by the traditional compartmentalisation of policy functions"[164].

The OECD maintains that the development and management of high quality regulation presupposes that effective 'tools' are embedded within the parliamentary and executive stages of the regulatory life cycle. South Australia's current regulatory framework exhibits some of the features of better practice identified by the OECD, especially in respect of the *ex-ante* assessment obligations outlined in the *Better Regulation Handbook*. This is particularly true of the assessment and stakeholder engagement obligations contained in the handbook, although, as noted in other Chapter 2, the available data on RIS assessments suggests that not all regulators or policy agencies are consistently applying the principles and processes in the handbook.

The Commission notes that the requirements in the handbook, which was first introduced in January 2011, stand in need of review and are likely to require updating to ensure that regulatory impact assessment remains in line with contemporary better practice principles. In addition, the Commission has found no evidence that RIS assessments are regularly published on agencies' websites, as mandated by the *Better Regulation Handbook* and recommended by the OECD. However, the fact that the requirements in the *Better Regulation Handbook* have a statutory backing from the obligations contained in *TI – 17* serves to strengthen the formal framework that structures the development phase of the regulatory life cycle. These measures help to align the state's *ex-ante* assessment framework with the OECD's better practice guidelines.

[164] OECD, *Recommendation of the Council on Regulatory Policy and Governance* (2012), 22. < https://www.oecd.org/gov/regulatory-policy/49990817.pdf >

That said, the available data on RIS assessments (discussed in Chapter 2) is not sufficient to allow the Commission to form a firm conclusion on the extent to which South Australia's RIA framework is applied to support the comprehensive and effective assessment of regulatory impact across the range of regulatory activity. Moreover, the available evidence suggests that one of the key institutional elements of better practice identified by the OECD – effective whole-of-government coordination of an overarching RIA framework – is not as developed in South Australia as in other Australian jurisdictions. This is particularly pertinent when current practice in South Australia is compared with those states and territories, such as the Victorian and Australian Governments, that have established offices of best practice regulation or their functional equivalents.

Cabinet Office's current role as the 'custodian' of the RIA framework is broadly consistent with the OECD's recommendation that governments need to ensure that regulatory policy is coordinated and managed from within the centre of government. That said, the OECD's better practice principles also highlight the need for institutions, such as Cabinet Office, to *actively* manage "regulatory policy, procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality".

The Commission is of the view that the lack of a 'stewardship' approach to managing the assessment of regulatory impact highlights the need for greater whole-of-government coordination of the RIA framework. This could be achieved by enhancing Cabinet Office's role as the 'steward' of the RIA framework but could also be implemented using a range of decentralised approaches.

Chapter 2 identified potential deficiencies in adherence to the RIA process in SA, compared to leading practice, although it is difficult to be definitive about the short-comings or their causes based upon the evidence examined by the Commission.

When compared with other Australian jurisdictions, notably the Victorian and the Australian Governments, there is an absence in South Australia of centrally managed mechanisms to ensure that the RIA framework is implemented uniformly across government. The Commission is of the view that the lack of a 'stewardship' approach to managing the assessment of regulatory impact highlights the need for greater whole-of-government coordination of the RIA framework. This could be achieved by enhancing Cabinet Office's role as the 'steward' of the RIA framework but could also be implemented using a range of decentralised approaches.

The need to consider the extent to which SA's regulations differ from those in other Australian states and their implications, if any, for businesses was discussed in Chapter 2. Such differences can create barriers to entry into state markets and add to the compliance burden for businesses which operate in several states. The Commission has recommended in Chapter 2 that the *Better Regulation Handbook* be amended to require agencies to examine this issue as part of the RIA process.

6.4.2 Regulator practices

The extent to which the later stages of the regulatory life cycle in SA are supported by an effective whole-of-government framework is less clear. The Commission has not been able to find significant evidence of a comprehensive and across government framework, as envisioned by the OECD, to guide and enhance regulator practice throughout the public sector. This is particularly evident in the lack of a whole-of-government approach to developing a consistent and comprehensive policy that covers, and provides clarity on, the respective roles and functions of agencies with responsibilities for different stages of the regulatory life cycle.

Interdependencies between regulators

The efficient and effective functioning of the state regulatory system is dependent on a range of interrelated factors, including, but not limited to, the way in which regulators' core functions, powers and responsibilities are structured. In practice, regulatory quality is closely related to the application of a consistent and whole-of-government policy that determines the roles and functions of regulatory agencies. According to the OECD, role clarity for regulatory agencies is a prerequisite for ensuring that regulatory decisions are made in an impartial and evidence-based manner. This is the most effective way of ensuring that businesses can have confidence that the regulatory system is not affected by bias, conflicts of interest or improper influence.

The Commission notes that some stakeholders, including Groundwork Plus, argue that the state's regulatory system is adversely affected by inefficiencies created by regulators' overlapping responsibilities. According to Groundwork Plus, this is especially evident in the extractives industry, where the Department of Energy and Mines (DEM) acts as the lead regulator using regulatory powers contained in the *Mining Act 1971* and the *Mining Regulations 2020*. The fact that the extractives industry is principally regulated by DEM, Groundwork Plus argues, has not reduced the complexity that arises from other state regulators, such as the EPA, exercising responsibilities under other Acts. In particular, the relative hierarchy of these regulatory obligations has not been clarified by DEM acting as the lead regulator of quarry sites:

> *Within the extractive industry there is often confusion regarding the hierarchy of legislation as it may apply to a quarry site, and while the Department for Energy and Mining (DEM) administer the Mining Act 1971 and Mining Regulations 2020 as a lead regulator, it is not clear what the provisions of a lead regulator entail and how this is applied to inform consistent and timely decision making for the assessment and regulation of the mining and extractive sector. With such diverse legislative applications, there is often overlap of legislative requirements for a site that can cause confusion and difficulty to navigate with so many regulators to report to. (Groundwork Plus, DR11, p.2)*

Notwithstanding the issues identified by Groundwork Plus, and the potential for improvement, the Commission's review of the extractives supply chain showed that the introduction of a lead regulator can successfully address a range of significant interdependencies.[165]

The inefficiencies created by overlapping obligations enforced by state regulators is exacerbated, Groundwork Plus maintains, by unresolved interdependencies between the state and Australian Governments:

> *…there is some overlap and duplication with the South Australian Native Vegetation Act 1991 particularly as an impact on a MNES [Matters of National Environmental Significance] will often be attributed with an impact upon native vegetation. This often results in a duplicated assessment process where a significant impact of a MNES will be referred to the Commonwealth for assessment while the impact to the native vegetation will be referred to South Australian DEW. While Bilateral agreements have been established to enable the States to assess the impacts upon MNES, the approval process is still duplicated. Additionally, if approved the impact for each piece of legislation required an offset to be established, however the offset framework for each piece of legislation are not consistent and often require duplicate offset requirements to be achieved for what can be viewed as the same impact activity. (Groundwork Plus, DR11, p.4)*

[165] For further details, please see South Australian Productivity Commission, *Extractives Industry Supply Chain Review,* Final Report, August 2020

At present, businesses within the extractives industry are required to meet regulatory obligations arising from both Commonwealth and state Acts: the *Environment Protection and Biodiversity Act 1999* (Cth) (EPBA Act) and the South Australian *Native Vegetation Act 1991* (SA) (Native Vegetation Act). Both statutes develop regulatory frameworks that are generally effective and efficient, Groundwork Plus argues, but the overlap between them creates additional reporting burdens and approval bottlenecks that affect businesses in the industry. Groundwork Plus maintains that this is particularly relevant to the way in which environmental impact is assessed and approvals granted. The Commission notes that while DEM's role as a lead regulator has reduced approval times for start-up and expansion applications, problems remain in the ongoing regulation of operations.

The Commission has not been able to identify other significant instances of overlap between state regulators in other industries, nor has it identified areas of duplication between state and national regulatory schemes, other than those associated with matters of national environmental significance, where a process is underway to harmonise and consolidate state and commonwealth approval processes. That said, any regulatory framework is vulnerable to the negative effects of interdependencies and jurisdictional overlap, and the Commission is interested in exploring strategies to ensure that the regulatory framework is not affected by the duplication of regulators' powers and responsibilities.

Increased coordination, if not integration, 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 goals and have different values. Increased coordination can enable potential conflicts in objectives between regulators to be identified, if not resolved, and can assist in improving design and/or implementation of regulatory policies to achieve complementarities and reduce overlaps or gaps in regulation.

Mechanisms to increase coordination include strengthening coordination between regulatory agencies through the development of common or shared objectives. In SA, a mechanism to achieve this is the CE performance agreement, as discussed in Chapter 3.

CE performance agreements 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 commit to action to contribute to cross sector priorities related to the three state-wide strategic priorities of 'economic growth', 'thriving SA' and 'easy to do business with'. Extension of the coverage of these new requirements to all state regulatory functions could assist in more effectively identifying and resolving interdependencies between regulators.

An complementary approach is to adopt a key element of the Australian Government's new regulator performance framework requiring regulators to report against their performance and deliverables set by their Minister in a *Statement of Expectations*. The regulator then issues a Statement of Intent describing how it will deliver on the Minister's expectations and against the framework's best practice principles, which include consideration of the Government's policy objectives and priorities, including the Deregulation Agenda (see Chapter 3).

In addition, reducing the negative effects of interdependencies can be achieved by implementing a lead regulator model (as already employed by DEM in the extractives industries); the development of MOUs between agencies (for example, Dairysafe); or establishment of forums of regulators for the exchange of information, identification and

resolution of issues. Alternatively, the authority of a central agency, backed by an across government policy, might be used to require and promote increased coordination.

Recommendation 6.1: lead regulatory coordinator model

To strengthen better regulation in the Growth State industries, the Commission recommends that the SA Government establish a lead regulatory coordinator model for each Growth State industry in which the lead coordinator encourages collaboration and coherence amongst regulators and seeks to reduce multiple information requests, share data and promote efficient approvals processes.

Harmonisation

Several stakeholders, such as the South Australian Freight Council and Business SA, have highlighted the benefits to businesses of regulatory alignment or harmonisation between jurisdictions. SA regulators often need to work to together to deliver optimal social, environmental and economic outcomes, but the extent to which this is formalised in legislation or regulatory policy, and successfully implemented in practice, is varied. Regulators also operate in a wider federalised system of governance and are required to work effectively with regulators at the Commonwealth, state and local levels.

Some of these relationships appear well-established between national and state governments (including, for example, consumer protection; the national energy market; standard setting in certain areas, such as food safety; and land transport, including rail and heavy vehicle regulation). Initiatives led by the Australian Government continue to be an important means for achieving harmonisation in regulatory practice. For example, in 2019, the National Heavy Vehicle Regulator commenced a review of jurisdictions' grain harvester management schemes to explore the possibility of a national scheme to improve cross border access for rural industries. More recently, Australian jurisdictions agreed to expand mutual recognition provisions under the *Mutual Recognition Act 1992* to include the automatic recognition of occupational licenses.

A number of stakeholders, such as the South Australian Freight Council (SAFC), maintain that national harmonisation of regulatory schemes has yielded significant and ongoing benefits for businesses in multiple sectors, including the road and rail freight sectors.[166] National harmonisation generally requires lengthy and complex multilateral negotiation between jurisdictions, but can improve outcomes for businesses by reducing the costs associated with duplicative or inconsistent regulatory obligations in different jurisdictions. Even in the absence of a nationally harmonised regulatory scheme, such as the national rail safety framework introduced under the *Rail Safety National Law (South Australia) Act 2012*, cooperation between regulators in different jurisdictions produces improvements in regulatory practice and industry outcomes. As Dairysafe observes in its submission:

> *Relationships with allied regulators either through committee structure, memoranda of understanding or a combination, assists in consistency of regulatory delivery and also in determining whole of government positions on regulatory systems… Dairysafe has established arrangements and meets quarterly with allied food safety regulatory agencies. SA Health, PIRSA and Dairysafe work collaboratively to ensure whole-of-government policy positions are delivered. Dairysafe maintains memoranda's of understanding with a number of agencies (PIRSA, SA*

[166] South Australian Freight Council, DR,

> *Health, and the Commonwealth Department of Agriculture, Water and the Environment) to ensure duplication of regulatory activities is eliminated or minimised and to reduce red tape and cost burdens on industry. (Dairysafe, DR 7, p.18)*

The benefits to businesses that can flow from a transition to a well-designed national regulatory framework, such as National Heavy Vehicle law, are potentially significant. In particular, harmonisation can play a significant role in increasing productivity and enhancing the ease of doing business for companies that operate between states and transnational companies that wish to enter the Australian market.

That said, the Commission notes that regulatory harmonisation is heavily dependent on the multi-lateral commitment between jurisdictions to create the necessary legislative 'infrastructure' at a national level. This is often lacking in practice, and the history of recent attempts to achieve regulatory harmonisation points to the difficulty inherent in achieving a national consensus on regulatory objectives and settings. In addition, while harmonisation can have considerable benefits in some sectors, it is unclear whether a general commitment to harmonising regulatory settings is always in the best interest of the state. The Commission notes that, in some cases, SA is likely to benefit from regulatory settings and objectives that are specific to the state's economic conditions and the government's growth strategy.

Recommendation 6.2: Harmonisation

To reduce regulatory costs and duplication on business and the SA economy and to improve access of SA businesses to national markets, the Commission recommends that the SA Government commits, where possible, to harmonisation with best practice or to regulatory equivalence of the state's regulatory settings with other best practice Australian jurisdictions, including in border regions of the state, while also pursuing, where possible, mutual recognition at the national level for new or amended regulation.

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 (CBC), 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 effect, 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, including changes to regulator mandates and practice;
- 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. Such an approach would complement efforts through the National Cabinet to achieve national consistency in regulation and is like that followed by the Victorian and NSW Cross Border Commissioners.

These Victorian and NSW arrangements have embedded strong accountability frameworks. The Victorian system includes a Regional Coordinating Minister; an actively managed, ongoing list of issues being addressed by agencies; a monitoring system of traffic lights; and an expectation that the accountable agency will address their issues.

Three options are set out for strengthening the accountability in South Australia for preventing, identifying, evaluating and responding to cross border issues. They are not mutually exclusive:

- **Stronger 'business as usual'**: Strengthen the accountability for all agencies, especially those with regional service delivery or other regional footprints, to consult with their local communities on issues within their agency responsibility and assess and respond to those issues. This includes referring matters to head office where local solutions are not possible. This step also includes stronger public reporting by agencies, both to affected communities and in their public reporting.

- **Across government coordination of cross-border issues**: This builds on 1 by tasking an agency with the accountability for coordinating the identification of cross-border issues, referring matters to agencies and monitoring and reporting on progress of responses. The key elements are:
    - Explicitly authorising an extension of PIRSA's regional role utilising its Regional Development Steering Committee. This Committee is supported by PIRSA's network of regional offices help to coordinate and facilitate development in the regions to be accountable/authorised for whole-of-government regional coordination, including border communities. This extension authorises PIRSA to assemble the intelligence on the issues, ensure they are referred to the responsible agency and monitor progress on responses. It fits PIRSA's on-ground regional structures. The two most important regions (Murraylands and Mallee; and Limestone Coast) match the respective LGA subgroups.
    - Make PIRSA's Minister the Regional Coordinating Minister with the explicit authority to raise regional matters with accountable Ministers.
    - Cabinet sets the expectation that responsible agencies address the cross-border issues where appropriate. That may require either amending the mandate of regulators or amending the application of the regulator or both. Agencies and regulators need to be tasked accordingly by Cabinet.
    - Monitor and report publicly on the progress on the issues.

  - Establish a regular (quarterly?) cycle for Cabinet to review progress on cross-border issues.

- **A South Australian Cross Border Commissioner**: This role would replicate the arrangements in NSW and Victoria and notionally builds on option 2. The role arguably elevates the attention – practically and symbolically –to cross border matters, which would be further reinforced by making it statutorily independent. Using the model in the other two states, this role would be supported by a small staff, have access to an appropriate travel budget, and would be located in a border community.

Options 1 and 2 build on the existing regional footprints and SA agencies and appear unlikely to require additional resources. Option 2 provides an authorised "go to" point in PIRSA for the NSW CBC and Victorian CBC and their governments on cross border issues. It maintains the accountability of Ministers and their agencies for addressing cross-border issues within their responsibilities; ensures ongoing high-level coordination and attention to the issues; and raises the visibility cross communities of progress on the full set of cross-border issues (i.e. a community-centric approach).

The additional benefit from option 3 compared with option 2 may be modest given that it would appear to require some additional resources if it were a new role. It may be possible to combine the cross-border role with an existing role.

Information request 6.2: cross border regulatory inconsistencies

The Commission is interested in improving its understanding of the costs of cross border regulatory inconsistencies:

a) How accurately has the Commission captured the extent of cross-border regulatory inconsistency experienced by SA businesses? What is missing?

b) What costs do these inconsistencies impose on SA businesses? Please provide examples and evidence.

c) Should institutional arrangements for identifying and responding to cross-border regulatory inconsistencies be strengthened in SA?

d) What benefits and costs do stakeholders see in options 1 – 3?

e) Is there a preferred option? Is there a better alternative?

Regulator performance assessment and reporting

Some shortcomings in performance measurement and reporting by SA regulators, compared to best practice principles, were identified in Chapter 3.

As discussed in Chapter 3, the Commission has developed its own framework for assessing SA regulator practice ,drawing on best practice guidance, which covers eight areas of practice indicative of regulator efficiency and effectiveness: (1) approvals and decision making; (2) stakeholder engagement; (3) monitoring and enforcement (risk-based and proportionate actions); (4) data management, information sharing and use of technology; (5) legal structure

and regulatory powers; (6) governance and accountability; (7) Regulatory Impact Assessment (RIA)/ ex-ante assessment; (8) ex-post evaluation.

The Commission is continuing to gather information and evidence on the current practices of SA regulators to inform this inquiry. In our final report, the Commission will provide a more comprehensive assessment of current practices drawing from further consultations, a survey of selected regulators, and case study examples. The Commission is also seeking stakeholder views on its proposed regulator performance framework and areas where regulatory practice should improve among SA regulators.

The Commission has recommended establishment of an across government policy framework for the monitoring, assessment and public reporting of performance by regulators, to increase transparency and accountability. The Commission has further recommended establishment of an across government strategy to promote and support continuous improvement of regulator practices (see Chapter 3).

The development of such across government policies and strategies would ideally be led and coordinated by a central agency (DPC or DTF). The degree to which responsibility for implementation is decentralised has implications for SA's state-wide architecture. The Commonwealth approach is quite decentralised, with individual Ministers having responsibility for the performance of regulators that report to them. A more centralised approach is used by some states (e.g. Victoria) with their offices for best practice and/or Treasury departments having a strong role.

6.4.3 Managing regulation

The Commission has found little evidence that SA's current regulatory architecture conforms to, or contains significant elements of, the OECD's recommendations on incorporating effective *ex-post* review mechanisms into the regulatory life cycle. According to the OECD, comprehensive and whole-of-government *ex-post* evaluation mechanisms are central to an effective and efficient regulatory system, and constitute one of the best ways of ensuring that the stock of regulation remains fit for purpose; delivers on its intended objectives; is being implemented effectively; and remains relevant relative to social and economic conditions.

Overall, the stock of regulation in SA does not appear to be managed on an active basis utilising a framework that is consistent with the OECD's principles for efficient and effective regulatory management or 'stewardship'. As discussed in Chapter 4, this would require a rigorous system of *ex-post* reviews to be integrated into the regulatory cycle as a permanent feature and would need to develop an evidence-based analysis of the outcomes of regulatory action. The Regulation Expiry Program (REP), which is undertaken on an annual basis pursuant to part 3A of the *Subordinate Legislation Act 1978*, embeds a statutory expiry provision into the state's regulatory framework, but the Commission has not been able to find evidence that the REP triggers regular, comprehensive and outcomes-focussed evaluations of regulatory impact.

As examined in Chapter 4, the need for an active approach to managing the stock of regulation, particularly in respect of evaluating the outcome of regulatory intervention, means that incorporating the central principles of stewardship into stock management has the potential to enhance the quality and efficiency of the state's regulatory framework. In effect, regulatory stewardship requires that agencies adopt an approach that entails, over the entire regulatory life cycle, "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".[167] Specific responsibilities and activities can include working collaboratively to:

- monitor, review and report on existing regulation and supporting systems;
- analyse and implement support for changes following impact and risk assessment; and
- provide good regulatory practice including accessible and timely information and support to educate and inform regulated entities and build capability within their agency.

A regulatory stewardship approach supports effective regulation stock management as:

- regulation stewards are required to plan, coordinate, and undertake reviews and reform on an individual regulation and/or regulatory system basis; and
- central oversight and/or coordination is a key element to enable the whole-of-system approach.

Some elements characteristic of regulatory stewardship are embedded within SA's regulatory architecture, including the fact that ministers and their portfolio departments are already responsible for, and are therefore the 'stewards' of, the state's stock of regulation. Nonetheless, the Commission notes that adopting the key principles of stewardship would allow the state's regulatory framework to become more adaptive and less dependent on essentially 'mechanical' and process-focussed mechanisms, such as the REP. These could be replaced or augmented by the stewardship model, which would have the effect of introducing a more outcomes-focussed approach to managing the entire regulatory life cycle. It is likely, however, that embedding the principles of regulatory stewardship in SA will necessitate legislative amendments, as was the case in New Zealand, including possible consequential amendments to the Subordinate Legislation Act.

6.5 Reform of state wide regulatory architecture

The overall efficiency and effectiveness of regulation is decisively affected by the governance arrangements that are put in place to structure the regulatory framework. The Commission notes, as discussed in Chapter 4, that performance across all stages of the regulatory life cycle can be positively or negatively affected by the governance structure that is in place.

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 providing advice, training and support to ministers and agencies on regulatory review and reform.

The Commission notes that most of these centralised units are tasked with providing information and advice to agencies, rather than having 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

[167] New Zealand Ministry of Justice, *What is regulatory stewardship?*, webpage accessible at < https://www.justice.govt.nz/justice-sector-policy/regulatory-stewardship/what-is-regulatory-stewardship/#:~:text=Regulatory%20stewardship%20is%20the%20monitoring,purpose%20over%20the%20long%20term.>

Prime Minister and Cabinet and are usually accountable to a minister with specific responsibility for regulatory reform.

The Commission is of the view that some form of centralised oversight, advice and coordination is a key mechanism to ensure that regulatory agencies have access to high quality, across government policy 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 or incentivise agencies and regulators to prepare regulatory proposals carefully to minimise the risk of obtaining a negative review by the central authority – particularly if that information is made available to cabinet or publicly.

Such a unit, reporting to a minister for regulatory reform, can lead and drive system-wide reform, while not encroaching upon individual agency and ministerial responsibilities for the administration of regulations and performance of regulators. A centralised unit can bring together 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 require collaborative work to develop solutions that are in the state's best overall interests, and they are often beyond the mandate of individual regulators.

A centralised unit could potentially take responsibility for a number of interconnected activities, including:

- monitoring overall regulatory framework performance 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 cross government and cross 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.

A centralised unit can also help ensure that the collective decision making of government is based on the best informed articulation of the regulatory challenges faced and a strategic assessment of the relative merits of different approaches to how they might be addressed.

Recommendation 6.3: central leadership and oversight

To provide leadership and advice on improving and optimising the value of the state's regulatory framework, including through adoption of best practice across the regulation life-cycle, the Commission recommends that the SA Government establish a dedicated unit, located in a central agency and responsible to a minister whose responsibilities include modern regulation reform. The unit's key accountabilities are:

- across government regulatory strategy, performance and priorities;
- building regulator capability; and
- expert advice on regulatory impact assessment and post implementation reviews.

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

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 in response to the Issues paper

Organisation name	Submission Number
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	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: Overview of submissions received in response to the issues paper.

	Developing Regulations Primary vs Subordinate Legislation / Making of Regulation
DR1 **DR2**	• Parliamentary scrutiny of legislation is important. • A more robust delegated lawmaking processes is required. • LRC requires greater resourcing. • There is a greater need for policy expertise within regulators/drafters of legislation/those making delegated legislation.
DR3	• Advocates for a balance between primary legislation that allows allowing for certainty and planning and subordinate legislation that allows for flexibility, rapid response, encourages innovation, ease of update or removal of redundant regulations due to changing situations and technology. • In favour of expanding LRC. • Need greater oversight of proposed legislation similar to NSW "recommend the disallowance of a statutory instrument on the grounds that it adversely affects the business community."
DR5	• Believes the review process should consider the social and economic impacts of the proposed regulations with a focus on ensuring that it is not overly burdensome on business and the community. • Reviews should take into consideration the time and complexity of compliance and reporting. • Regulations and legislation need to be nimbler and more responsive – e.g. where the City of Charles Sturt was able to allow temporary outdoor dining for food businesses and the State Government's relaxing of liquor licensing laws to allow takeaway beverages to be sold with food.
DR6	• COVID-19 demonstrated the need for regulation to be more flexible to be nimble and responsive to current circumstances. • Consideration around changes to outdoor dining, removal of parking spaces for parklet installations and the provision for continued ability for takeaway alcohol in hospitality venues were areas identified as critical in the ongoing survival of many businesses.
DR7	• Regulations were sufficient to allow Dairysafe to flexibly deal with the impacts of the pandemic and modify practices e.g. the ability to conduct remote compliance audits. • Interstate regulatory systems should be considered in the design of regulations. • It is important to link enforcement officers with the policy officers to ensure that any policy decisions and regulations can be implemented and enforced. • Balanced impact assessments need to be clearly articulated during the regulation development process to demonstrate that benefits outweigh costs. • Existing regulatory impact assessments undertaken in other jurisdictions should be considered and utilised. • Ensure wherever possible, consistency with allied regulation in other jurisdictions, utilising national standards or codes of practice where practicable. • Regulation must have clear intent, it must be evidence or science-based, and regulatory equivalence needs to be considered to allow for innovation. • Where 'should' is used it must be supported with a clearly articulated outcome, otherwise there may be difficulties in both compliance and enforcement. Otherwise,

	utilise 'must', whilst also allowing for an equivalent 'evidence or science-based' outcome.
DR8	• Opening legislation up to scrutiny by Parliament is good as it provides an opportunity for robust debate
DR9	• In the area of planning, decision making emphasises economic benefits over negative impacts. Governments tend to unduly emphasise the economic benefits of for example major projects above the potential negative environmental and social impacts. At most, decision-making rules simply require 'regard to' or 'consideration of' the environment. Decisions can be highly discretionary, and authorities may only need to pay cursory attention to environmental matters with associated risks of long-term environmental degradation.
DR13	• The local government sector welcomes a thorough investigation into opportunities to provide greater regulatory flexibility to the executive arm of government, with the caveat that the Cabinet process should be subjected to a greater level of transparency and consultation than currently exists. • A major business regulatory concern expressed by councils is that the state's reliance on primary legislation imposes a lowest common denominator approach, which is prescriptive, can unnecessarily stifle business operations and limits opportunities for the Government to incentivise good economic, social and environmental outcomes through innovation. • There is a disconnect which exists between many government policies and applicable regulatory instruments, which can adversely affect business investments and operations. • It is not clear whether legislation, introduced by successive South Australian Governments and passed through the Parliament, has progressed through a rigorous policy-development process in which the following questions have been asked: "What economic / social / environmental outcomes are we trying to achieve?"; "Is legislation the best method to achieve these outcomes?". • Many council respondents have expressed an interest in the establishment of a system of regulatory oversight which independently analyses the effects of regulations on different (and sometimes competing) economic, social and environmental interests. e.g. Planning and Design Code.
DR14	• Legislation should be simple, principles based and not prescriptive to support the community to understand its intent and their primary obligations. • There should be a primary objective to improve outcomes for the community with a balance of the social, cultural, environmental and economic outcomes. • The regulations are often drafted in such a way that are very difficult for people in the community to understand. • Legislation should be principles based, be focused on regulation that is in the interests of public good and should be less prescriptive in general, except for specific compliance requirements that enforce equity, risk management, safety and wellbeing outcomes. • Supports legislation that is designed to meet outcomes rather than imposing additional compliance activities. This should include the consideration of all outcomes and not prioritise one above the others. This assessment and consideration should form part of the design and drafting of legislation and can be enhanced by the involvement of local government experts. • Cabinet Office as the gatekeeper of the process would be best placed to comment upon the adequacy and quality of submitted regulatory impact analyses.

DR17	• Regulations are needed to manage a valuable resource and ensure that fish stocks are sustained. • Legislation and regulations are quite onerous for all processors and add substantial costs both in licence terms and in operational time and cost. • The way in which the legislation and regulations have been developed does not support innovation or investment. • The Act and the regulations read like a list of penalties and threats rather than a model of best practice and continuous improvement. • There are serious concerns with the way in which the Act and the regulations have been designed. Managing risk is one thing, overburdening an industry with administrative models that are complex and punitive is not the way to achieve real commitment to agreed compliance outcomes.
DR19	• That a regulatory regime should only apply regulation where necessary or where benefits outweigh costs. • Regulations should be outcomes based and regulatory goal focused. • Significant portion of regulation in transport and logistics is in primary legislation. • There is a lack of RIA and RIS in SA. • Greater emphasis is needed on support to the industry and longevity of the industry they regulate including costs to business.
	National vs State Regulation
DR3	• Suggest being able to pay state business-related fees, taxes, and premiums to a 'one stop shop' to reduce administrative burden on business and assist with interstate expansion. • Rationalising regulations between state and federal levels may lead to cost efficiencies for regulators, simplify and clarify business requirements and reduce administrative burden. • National Standard for the Storage and Handling of Workplace Dangerous Goods Legislative requirements around employee pay rates on public holidays conflict between state and national requirements.
DR7	• Policymakers and regulators in every jurisdiction should explore the possible application of alternate governance models that account for human/organisational behaviours and enable trust-based relationships between the various actors in the system.
DR16	• Support the NSW Government's Easy to do Business Program and believe there is significant scope to expand its usage into other states such as SA. Easy to do Business is an online, one-stop-shop for business customers, streamlining the way businesses transact with all levels of government to obtain the information, approvals and licences they need, cutting time and money. The first phase of Easy to do Business has focused on the high-growth café, restaurant and small bar sector. Previously, those wanting to start up and run a café, restaurant or small bar In NSW would have to deal with up to 13 agencies, 75 regulations, 30 phone numbers and 48 forms, and wait up to 18 months. Customers in participating local government areas can now open a café, restaurant or small bar in 90 days or less by filling in one online form or making one phone call.
DR19	• Advocates for harmonisation between jurisdictions - regulation should have as little differences as possible between jurisdictions. • A lot of transport regulation is national and adopted by jurisdictions. E.g. Rail Safety National Law & Heavy Vehicle National Law. • There is duplication of environmental protection regulation at state and commonwealth levels – greater need for dual reviews for projects.
	Regulator Practices

DR7	• In favour of MOUs between regulators to ensure consistent application of food safety regulation with minimum regulatory burden. Relationships with allied regulators either through committee structure, memoranda of understanding or a combination, assists in consistency of regulatory delivery and in determining whole of government positions on regulatory systems. • Believes use of a 'Statement of Expectations' by a government or minister could contribute to better practice thinking and continuous improvement in making and administering regulations. • Is of the view that regulation must be sufficiently flexible to enable new approaches to be taken up and implemented. • Covid-19 restrictions initially meant face-to-face audit and verification activities ceased. Arrangements for remote, or virtual, audits were subsequently developed to ensure regulatory responsibilities were maintained, there was interaction with regulated businesses, and industry compliance with food standards could continue to be verified. The remote audit protocols were further refined in consultation with Australia's dairy regulators to facilitate consistency and good regulatory practice. • Dairysafe has established arrangements and meets quarterly with allied food safety regulatory agencies. • SA Health, PIRSA and Dairysafe work collaboratively to ensure whole-of-government policy positions are delivered. • Dairysafe maintains memorandums of understanding with several agencies (PIRSA, SA Health, and the Commonwealth Department of Agriculture, Water and the Environment) to ensure duplication of regulatory activities is eliminated or minimised, and to reduce red tape and cost burdens on industry. • To improve food safety culture, it is necessary to develop incentive-based regulation, encourage voluntary compliance and be responsive to innovation and emerging trends.
DR8	• The OTR transitioned from paper-based processes and introduced the electronic certificate of compliance (eCOC).
DR9	• In relevant planning and other legislation there needs to be clear legal framework that aims to achieve sustainable development outcomes that should be operationalised in decision making. • Regulation should include additional guidance on fully integrating economic, social and environmental considerations and applying ESD principles in decision-making.
DR10	• ESCOSA is enhancing their analytical capacity and capability and the use of market intelligence to underpin regulatory design, monitoring of performance outcomes and the regulatory actions they take. • ESCOSA continues to seek working partnerships with regulated entities, other regulators and agencies and consumer groups, in order to improve information sources, knowledge and abilities. • ESCOSA uses market monitoring to provide performance information to consumers, guidance and performance feedback to regulated entities and reshape their compliance and enforcement approach to ensure that it is efficient and effective in driving positive consumer outcomes.
DR11	• Many extractive operations have previously been approved and established prior to environmental legislation being established during the 1990's. As such, many instances of poor regulation arise through the gaps that may become evident through the review of historical approval and licencing documentation in comparison to the newer pieces of environmental legislation and policies that have evolved after the commencement of the operations. • It is understood that the EPA and DEM have established a Memorandum of Understanding (MOU) for the co regulation of a site, however, there have been

	instances where this co regulation has still resulted in inconsistencies and ambiguous regulation of a site. • There are various annual reports published by South Australian Government Agencies reporting on their respective performance and regulatory responsibilities, however it is not clear how this information is used to review and improve regulator performance. Additionally, whilst the annual reports provide a framework for defining performance objectives and targets, regulatory key performance indicators (KPI's) are not typically defined within the reports. • Establishing a clear and structured regulatory review framework that is consistent across all government agencies and publicly available will go a long way to support a strong culture of continuous improvement through performance management, while also increasing transparency and agency accountability.
DR12	• In favour of proactive compliance and suggests additional resources for the OTR and outsourcing systems to private sector.
DR13	• An example of an effective method employed to incentivise best-practice business regulation and other business supports is South Australia's Small Business Friendly Council Initiative, administered by the Office of the Small Business Commissioner. The Initiative's Charter includes a council commitment to: "provide clear advice and guidance to small businesses to assist them to understand and meet their regulatory obligations, and to work with them to achieve compliance." According to many council respondents, the Charter's commitment to limit unnecessary administrative burdens on small business, through efficient data storage and use, is not matched by Government agencies. • Government agencies do not share access to data, including business information stored by different agencies.
DR14	• Being practical in the application of legislation and having discretion that meets the principles that the legislation establishes could support businesses. • Enabling councils, delegates and authorised officers to determine the risks associated with an activity and exercise discretion to support economic outcomes based on legislative principles may assist, noting there is more risk exposure to be managed in this approach. • Establishing ongoing structured relationships between state and local government with a focus on legislation and reform may be a more effective method of garnering feedback and continuous improvement, rather than dialogue only at the time that the reform is occurring on specific legislation.
DR15	• Advocates for prevention of anti-competitive behaviour to facilitate investment and competition going forward.
DR17	• Advised that the large fees paid by processors to PIRSA are used for compliance. Argued some of the funds collected could help with some of industry development issues. • South Australia needs a new model of industry support which encompasses a range of elements to grow the industry by improved targeting and deployment of resources. The regulator still has a policing mentality which is counterproductive. • For many years the industry was beset with a mountain of paper forms. The introduction of electronic reporting has eased this burden to a degree, but it is still a compliance heavy system with the major burden of work still falling on the processors. • Compliance is still seen as policing within the department and the regulations support that approach. This is at odds with how governments interact with other industries sectors, including farming and horticulture. • Rather than impose a heavy reporting burden on processors, it is suggested that future regulations be managed through a standards-based approach with periodic

	auditing of businesses. They could even have a rating system based on audit results (as with VET providers) Those potentially breaking the law by buying product from recreational fishers will have a lower rating and be subject to more regular audits. • In the short to medium term we need to undertake an urgent and significant reform of licence fees whilst we reboot our markets.
DR19	• Believes there is a need for greater emphasis on an outcomes focused approach. • Supportive of regulator performance reviews that include views of those regulated and not self-assessment.
	Inconsistencies/ Duplication within SA
DR3	• Varying need for multiple permits across councils. • Multiple stated-based regulators that work with competing legislation. • Multiple regulators operating in the same sector leads to complication and increased burden for the business community (e.g. energy regulation) is national level regulation a solution?
DR6	• Case study provided on development application process for operation of a forklift within a preparation area without causing fumes or smoke and the need to seal concrete within the operation area. • Advocates for small venue licences to be available for other metro and regional areas. • As the foreshore is a dry zone there are many barriers for tourism operators to conduct experiences that involve the serving of responsible alcohol.
DR7	• In South Australia, SA Health, PIRSA and Dairysafe have established memoranda of understanding (MoU's) to ensure there is clarity around responsibility for food regulation, to minimise duplication, to recognise auditing services conducted by one organisation on behalf of the other, to provide support and to ensure there are capacity, administration and servicing levels required by the legislation. The MoU's are in place to avoid duplication and regulatory gaps and to ensure food safety risks are managed without unnecessary burden on businesses. • A similar MoU, between Dairysafe and the Commonwealth Department of Agriculture, Water and the Environment, has recently been established with the same intent, to ensure clarity of responsibility and to minimise duplication.
DR16	• Interim Restaurant Authorizations introduced into NSW Liquor legislation in 2017 represent a simple but significant departure from previous regulatory practice, that R&CA believes should be followed in other states. An interim restaurant authorisation allows businesses to begin serving liquor as soon as they have lodged a liquor licence application.
DR11	• Within the extractive industry there is often confusion regarding the hierarchy of legislation as it may apply to a quarry site, and while the Department for Energy and Mining (DEM) administer the Mining Act 1971 and Mining Regulations 2020 as a lead regulator, it is not clear what the provisions of a lead regulator entail and how this is applied to inform consistent and timely decision making for the assessment and regulation of the mining and extractive sector. With such diverse legislative applications, there is often overlap of legislative requirements for a site that can cause confusion and difficulty to navigate with so many regulators to report to. • From an industry perspective, a leading practice regulatory framework would consist of a key regulator with delegated powers from relevant legislation, enabling the key regulator to make the final decision on all regulatory aspects as they relate to a site, providing a centralised regulatory framework to support the industry and reduce regulatory burden. • There are often duplicated assessment processes where a significant impact of a Matters of National Environmental Significance (MNES) will be referred to the

	Commonwealth for assessment while the impact on native vegetation will be referred to South Australian DEW. While Bilateral agreements have been established to enable the states to assess the impacts upon MNES, the approval process is still duplicated. The offset framework is not consistent and often requires duplicate offset requirements to be achieved for what can be viewed as the same impact activity.
DR18	• Lengthy paper Service SA forms for farmers/rural that cannot be submitted electronically
DR13	• Some councils expressed dissatisfaction with the lack of transparency involved in the South Australian Government's Cabinet decision-making process, the inconsistency with which council by-laws have been disallowed by the Legislative Review Committee in recent years (examples provided related to by-laws regulating dog and cat management), while others questioned whether this oversight role would be better undertaken by a panel of independent and appropriately qualified legal and regulatory experts appointed by the Parliament rather than the Members of Parliament themselves.
DR14	• There are several regulatory processes which appear to impose additional requirements on business that could potentially be revised. Development processes for approvals, leases 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 licencing, food inspections, bollards, provision of state funded parking in economic precincts etc can be very challenging for businesses. These areas should be considered to determine if there are opportunities to support business through regulatory amendment. • PAE has identified some overlap, duplication, cost shifting/sharing and confusion in some key Acts and Regulations that impact local government. An example is the application the Environment Protection Act 1993 and associated regulation and policies. As there are several requirements for specialised technical expertise to be applied before a decision is undertaken under this legislation, and that this expertise are not typically employed by councils, reconsideration of the appropriate authority is required. • Because of a lack of clarity and inappropriate assignment of responsibility, there are several examples where the legislation has created unnecessary complexity and confusion for community members. This can result in people 'falling through the cracks' in terms of who community members can approach, who is responsible and who is resourced to deliver the requirement of the Regulation or Policy on behalf of the customer. • Councils (and therefore communities) may also incur unnecessary legal costs in trying to determine who and how the legislative requirements can and can't be applied.
DR16	• One common complaint amongst R&CA members is the inconsistent rules in place across varying local councils relating to issues such as outdoor dining. • R&CA submits there is an opportunity for the SA Government to play a leadership role in identifying where these inconsistencies are most damaging to business activity and working to standardize those rules wherever possible.
DR19	• Views the ACCC as slow to make decisions, heavy handed and disregards history of compliance. They do not consider cost implications to industry from administrative burden or delays. • There is duplication of environmental protection regulation at state and commonwealth levels.
	Access & Ability to understand Information

DR4	• Information on regulatory requirements and forms for business in a particular industry can be spread across multiple websites - suggest centralised location.
DR8	• Suggests a landowner information service to improve early engagement, consultation and information sharing.
DR11	• Groundwork Plus Pty Ltd assists clients to navigate the various regulatory frameworks that apply to a particular activity or operation to ensure that appropriate approvals and management measures are implemented. Often this process can become more complicated than originally anticipated and result in additional time and cost to resolve legislated approval processes
DR14	• Legislative requirements can be difficult to identify and navigate. • Feedback from the business community is that it is not always clear which legislative requirements apply to them, nor the most effective sequence of legislative requirements and therefore interactions. • The regulations are often drafted in such a way that are very difficult for people in the community to understand. This can lead to confusion, frustration, avoidance or additional costs being incurred for them to seek expert assistance. • PAE has employed Economic Development Officers who establish relationships with business in the area to support them to navigate the necessary legislative requirements that impact their business. • Council also supports the Adelaide Business Hub, a not for Profit organisation that provides strategic, financial and planning advice to businesses to establish themselves and be successful.
DR16	• Suggests a 'Tell us Once/One Stop Shop' Approach to Regulator Practice to help reduce the time it takes to open a business in SA.
	Stakeholder Engagement
DR4	• Seeks greater consultation with councils on review of regulations, and greater support for businesses during COVID around requirements e.g. sanitiser, QR codes, COVID Marshalls.
DR6	• There can be additional requests for information from different sections of regulators under the same process. • Clearer direction is needed at the beginning of the process as to information requirements.
DR8	• DEM undertook an online consultation process for public engagement on draft regulations during COVID. • DEM has engaged Rural Business Support to deliver and pilot a landowner information service to improve early engagement, consultation and information sharing.
DR9	• There needs to be a uniform and comprehensive process for public comment on matters which utilise a variety of platforms including social media and the YourSAY website. • Key issues include the failure of many regulators to properly involve the community in the formation of regulations and inherent conflicts of interest. An example is the Department of Energy and Mining (DEM). The DEM has an inherent conflict of interest as both a promoter of mining and energy projects and as a regulator.
DR10	• ESCOSA is building stakeholder engagement and providing for consumer inputs by genuinely engaging with all stakeholders to facilitate understanding of consumer and regulatory issues, obtaining the best and widest range of evidence for our work and providing opportunities for consumers to contribute to and challenge service providers' business plans. This has particularly been the case in relation to economic regulation of SA Water.

DR12	• Suggest that registered inspectors should be required to visit every licenced electrician once a year. In that visit they could cover developments in the relevant industry provide an overview of regulatory changes and inspect some of the electrician's work. They could check insurance, training certificates, and on-going professional development.
	• Believe there is a lack of transparency and stakeholder consultation involved in the preparation of Regulatory Impact Assessments (RIA), carried through the Cabinet Office. • Suggest establishment of a business concierge service.
DR14	• Considers that the local government sector could contribute towards the consideration of impacts to the community, which may result in improvements to the application of the legislation once enacted. There is currently a lack of stakeholder consultation in development and review of legislation. • Making impact statements publicly available may also assist.
DR17	• There is no clear mechanism for regular government engagement with seafood processors and exporters. Engagement is sporadic and usually one way. • There should be a funded body with an executive group that meets regularly with the minister and key departmental staff to review and improve the current systems.
DR19	• Not enough consultation with industry on regulatory changes. • There is a need for a central area in government to report issues with regulation.
	Managing Stock
DR7	• 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.
DR8	• Evaluates reform through regular outreach to stakeholders in forums such as the Mining and Energy Advisory Council and Roundtable for Oil and Gas. • Provided example of regulation due for expiry and the consultation process (Electricity (Principals of Vegetation Clearance) Regulations 2010).
DR10	• ESCOSA is embedding evaluation of their performance – both regulatory and operational – across all their work, with ex-post and post-implementation reviews being an important element of that evaluation. They regularly review regulatory frameworks to ensure that they continue to be effective, targeted to the needs of consumers and cost-effective in practice, thereby protecting consumers' long-term interests. For example, a recent assessment of new and enhanced processes adopted for the SA Water Regulatory Determination 2020 – was done in a public and transparent manner (including an independent report on the process and a subsequent Issues Paper seeking views on that report and potential next steps)
DR13	• A system of review should be established which lessens the occurrence of government policies contradicting applicable regulations. • More local content should be included in the Planning and Design Code so that non-harmful business practices can be accommodated. There is an absence of enough local policy content in the Planning and Design Code, which could assist primary producers with more streamlined planning processes. • Council respondents support a 'stewardship' model of regulatory management and suggested an immediate step to achieve this would be the re-establishment of the State-Local Government Red Tape Taskforce. • Provided specific examples of reform for temporary events, live music, food health, outdoor dining. • Advocates for the removal of anti-competitive business regulation. • In favour of extending small venue liquor license beyond Adelaide metro.

DR14	• Lifecycle of legislation should support innovation and evolution of technology. • PAE supports implementation of a whole-of-government management system of the stock of regulation, according to an OECD (Organisation for Economic Cooperation and Development) framework, to highlight the importance of "ensuring that regulations remain fit-for-purpose; deliver on their intended objectives; are effective in their implementation; and are relevant to the prevailing social and economic conditions."
DR15	• The South Australian ports access regime under the Maritime Services (Access) Act 2000 (SA) has not materially changed, having only been amended once in the last 12 years. • The current legislation does not adequately address vertical integration which has a direct impact on competition and investment by firms looking to enter or operate in the South Australian market. • The Access Regime does not address the incentives or ability to discriminate created by vertical integration. • The statutory framework unhelpfully limits the recommendation that can be made by ESCOSA to the Minister to a binary choice of whether to keep the regime, or to lose it entirely. • There needs to be greater focus on the prevention of anti-competitive behaviour and assistance to facilitate competition going forward to avoid harm to investment.
DR19	• Lack of post implementation review but when done (e.g. 5 yearly with ESCOSA) it is beneficial. • There are greater opportunities for regtech to be used in transport regulation – e.g. charging mechanisms, electric vehicles, distance, location, fatigue monitoring and management with electronic monitoring aids.

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