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Issues Paper

Inquiry into reform of South Australia's regulatory framework

31 March 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. The Chair of the Commission also serves as the Chief Executive of the OSAPC.

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.

The release of this issues paper supports interested parties to participate in the inquiry by highlighting the key issues and by raising questions to generate feedback.

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

Making a submission

The Commission invites submissions on the issues paper by Friday, 21 May 2021. Submissions may address any of the issues covered by the paper and the terms of reference.

Submissions are also 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

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31 March 2021

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21 May 2021

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July 2021

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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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Acronyms

AI	Artificial Intelligence
GDP	Gross Domestic Product
GFC	Global Financial Crisis
LRC	Legislative Review Committee
OECD	Organisation for Economic Co-operation and Development
REP	Regulation Expiry Program
RIA	Regulatory Impact Assessment
RIS	Regulatory Impact Statement
SAPC	South Australian Productivity Commission
OSAPC	Office of the South Australian Productivity Commission

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. ¹
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" ² .
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.

¹ OECD, *Glossary of Statistical Terms*, (Web page, 25 March 2021) <<http://www.oecd.org/dataoecd/8/61/2376087.pdf>>

² 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 sun-setting 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 <i>Subordinate Legislation Act 1978</i> (SA) defines three types of instruments as regulations for the purposes of the act: regulations, rules or by-laws ³ .

³ South Australian Government, *Subordinate Legislation Act 1978*, s4

1. Introduction

1.1 Purpose of the inquiry

Modern Regulation Project

The Premier of South Australia approved the development by the South Australian Productivity Commission (Commission) of the modern regulation reform project in September 2020. This project aims to reinvigorate and reform the state's regulatory system applying to business to encourage jobs, productivity and economic growth. The project has two complementary streams comprising:

- stream 1 - this inquiry on reforming South Australia's regulatory framework to make it more resilient, flexible and forward oriented; and
- stream 2 – two shorter reviews to identify reforms that can offer more immediate economic benefits to the South Australian economy – one focussing on the referrals process for the state's development approval system, and one focussing on regulation and the tourism industry.

Inquiry into reform of South Australia's regulatory framework

The Commission has been asked to make recommendations to modernise South Australia's (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.

The inquiry recommendations will aim 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 sun-setting regulations and reform systems and processes for developing and managing the stock of regulations; and
- establish a clear, fit for purpose and whole of government accountability framework for ongoing improvement to the state-wide system of regulation.

The Commission's approach to the inquiry will include 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 South Australian Government regulation. This will include regulation where local government is authorised by state legislation to act as a regulator on behalf of the government. That said, 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 South Australia (SA) and other jurisdictions.

This issues paper is structured as follows:

- the remainder of this chapter discusses the importance and economic impacts of regulations and introduces some key concepts used in subsequent chapters;
- chapter 2 considers the development and management of regulations in SA;
- chapter 3 discusses regulator structure, practice and performance; and
- chapter 4 discusses the importance of and opportunities for reform.

1.2 Regulation and the economy

The importance of regulation

Regulation can be used to achieve certain economic, social or environmental policy objectives including, but not limited to, the protection of the community and environment against harms, to address negative externalities generated by productive activities and to achieve social welfare and economic objectives. Regulation may impose mandatory obligations on businesses and the community (so called 'command and control' regulation) or may implement market-based policies such as taxes and subsidies to influence changes in behaviour (for example, by changing the cost of inputs).

A well-functioning regulatory framework supports the design, management, implementation and review of regulation toward the achievement of policy outcomes whilst imposing the minimum necessary costs on businesses and individuals. A well-functioning regulatory framework can also boost market confidence in the economy – signifying that it is a safe, consistent and reliable investment choice. 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'*⁴. An ineffective regulatory framework can unnecessarily impede business investment and innovation and hinder the government's capacity to respond to unforeseen or uncontrolled events.

In practice, it can be difficult to determine the optimal type, level and nature of regulation that may be required, as well as to manage the administration of that regulation. Governments often do not have the appropriate information or data to determine the optimum approach, and a number of factors can influence whether or not the regulatory proposal achieves its stated objectives – some of which may be unforeseen or unplanned. Policy makers may also consider other market based methods when considering how to achieve a policy objective. The Coase theorem⁵ posits that two parties can bargain with each other in order to reach an agreement that efficiently addresses externalities. However, there are limits to market based approaches in practice as they require transaction costs to be low (the costs incurred by the parties negotiating an agreement) and property rights need to be well defined (i.e. who owns and can use the resource).

⁴ Queensland Productivity Commission (QPC), *Improving regulation research paper*, March 2021, 2

⁵ Lumen, *Market Failure: Externalities, Private Solutions*, (Web page, 25 March 2021)
<<https://courses.lumenlearning.com/boundless-economics/chapter/private-solutions/>>

In a pandemic-afflicted economy, the regulatory burden on business has, of necessity, become bigger - particularly in those sectors that have been directed to amend their operations to accommodate public health concerns and/or have been impacted by closed borders. The pandemic has also resulted in innovative regulatory and business responses to support ongoing business operations without compromising health outcomes.

Safely growing jobs, lifting economic growth and raising productivity are urgent priorities across Australian jurisdictions – including in this state. Other Australian jurisdictions are pursuing regulatory reform agendas including reforms to lift productivity for a post-pandemic economic recovery. SA has had a lower level of productivity growth compared with other jurisdictions over the last decade or more.⁶ Regulation is one area of state government activity where early action that reduces unnecessary barriers to economic activity and fosters productivity growth can make a difference.

Economic impact of regulation in South Australia

Regulation of businesses can have important consequences for productivity and economic growth given its impact on what activities can be undertaken, how certain activities are performed and input costs. It can also affect the movement of resources between alternative uses. For example, 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.⁷

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).⁸

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'.⁹

The cumulative effects of regulation on businesses in SA relative to other jurisdictions are difficult to quantify. Table 1.1 shows the business licensing requirements that apply in different jurisdictions for specific hypothetical businesses operating in each of SA's Growth State industries¹⁰, using information extracted from the Australian Business Licence and Information

⁶ SAPC, Dean Parham, *A data-driven investigation of South Australia's productivity performance*, research discussion paper no.1, September 2020, 60

⁷ QPC, *Improving Regulation research paper*, March 2021, 6

⁸ QPC, *Improving Regulation research paper*, March 2021, 14

⁹ 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>>

¹⁰ South Australian Government, South Australian Growth State, (Web page, 25 March 2021) <<https://www.growthstate.sa.gov.au/>>

Service (ABLIS)¹¹. The table suggests that there are fewer licensing requirements in these industries in SA than other jurisdictions except Queensland.

Table 1.1: Number of business licences by growth state industry by jurisdiction, 2021

GROWTH STATE INDUSTRY	BUSINESS MODELS	State Licences						Aust gov't Licences
		SA	VIC	QLD	NSW	WA	TAS	
Food, Wine & Agribusiness	Dairy cattle farming	53	90	42	81	57	60	37
	Grain growing and sheep or beef cattle farming							
	Wine grape growing							
Defence & Space	Controlled weapons manufacturing	27	43	15	39	36	34	37
	Professional, scientific and technical services n.e.c.							
	Space transport service							
Health & Medical Industries	Biotechnological manufacture of pharmaceutical and medicinal products	29	56	18	39	45	39	31
	Disinfectant manufacturing							
	Professional, scientific and technical services n.e.c.							
Tourism	Hotel operation	31	37	38	50	39	42	23
	Tour operator service (arranging and assembling tours)							
	Travel agency operation							
International Education	Business college and school operation	25	39	14	47	34	42	25
	Secondary school operation (combined primary/secondary school)							
	Technical and further education college operation							
Energy & Mining	Copper ore mining	44	50	41	68	61	43	23
	Electricity distribution							
	Gold ore roasting and flotation extraction, including metallurgical hydro-extraction							
Hi-Tech	Computer manufacturing	27	44	18	37	30	33	22
	Engineering consulting service n.e.c.							
	Signalling equipment, electrical, manufacturing n.e.c.							
Creative Industries	Motion picture production	23	35	22	43	22	28	35
	Television broadcasting network operation							
	Web hosting							

Source: OSAPC based on ABLIS data, March 2021

It is important to note that the data in Table 1.1 above 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 jurisdiction has a relatively lower 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.

¹¹ 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/>>

To recover fully from the adverse economic impacts of the pandemic SA will require an increase in investment to drive innovation, productivity and employment growth. With low population growth post COVID-19 due to restrictions on migration, regulatory reforms that make it easier for business to interact with government offer an opportunity to lift the state’s productivity and attractiveness as a location for businesses and workers. SA needs to compete, not just with other Australian states, but with international jurisdictions for available capital and skilled resources.

The development and administration of regulation accounts for a significant amount of state government expenditure and revenue. Improving regulation also offers an opportunity to lift productivity in the public sector and free resources for delivery of other public services.

The inquiry will assess options for modernising the regulatory framework in SA, noting that there has not been a significant review of SA’s regulatory framework for some time.

1.3 Key concepts

Forms of regulation

The inquiry terms of reference defines 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 that principally affect businesses.

In SA legislative provisions are contained in either primary legislation (Acts of Parliament) or subordinate legislation. 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 below.

Figure 1.1: Forms of Regulation in South Australia

‘Black letter’ law (or Explicit government regulation)	Primary Legislation	Acts of Parliament
	Subordinate Legislation (delegated legislation - Subordinate Legislation Act 1978)	Regulations, rules & by-laws
	Other statutory instruments Acts Interpretation Act 1915 (SA) section 4	Codes, standards, notices & other instruments of a legislative character
‘Grey letter’ law	Quasi legislation	Codes, advisory or guidance notes, rules of conduct etc.
Self regulation	Self regulation*	Industry based codes or agreements, principles, voluntary industry standards, guidelines etc.

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 industry¹²

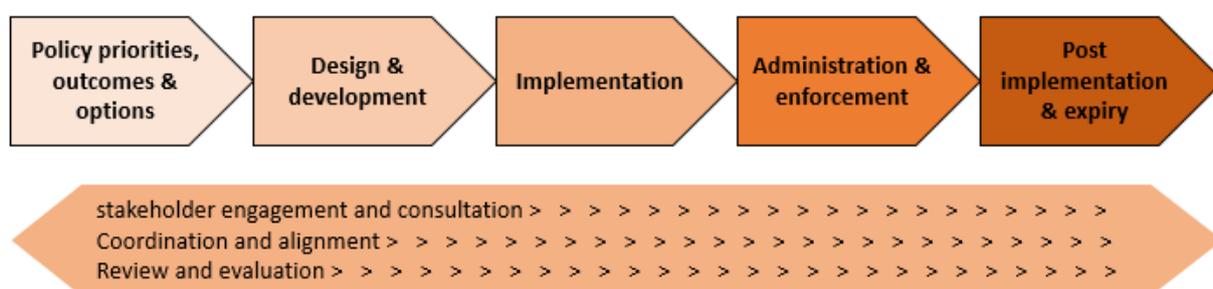
¹² Commonwealth Interdepartmental Committee on Quasi-regulation, *Report on grey-letter law*, December 1997, 6

In practice, the boundaries between the different forms of regulation may be indistinct – particularly over time. For example, industry may decide to develop a voluntary code of practice which may then be written into law – moving from self-regulation to primary legislation over time¹³.

Regulatory life-cycle

The regulatory life-cycle (Figure 1.2) refers to the various stages involved in the development, implementation and management of regulation. Activities throughout the regulatory life-cycle will generally entail policy departments and regulatory agencies undertaking stakeholder engagement, cooperating with co-regulatory authorities, ensuring alignment with policy objectives, and coordinating 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.

Figure 1.2: Regulatory life-cycle



Source: OSAPC

Better practice principles

The development and application of regulatory principles to describe best or better practice assists government policy makers and regulators to develop and implement regulation that is necessary, effective and minimises unnecessary burdens on affected stakeholders. At each stage of the regulatory life-cycle, from design to expiry, policy officers and regulators should consider the principles.

Published literature on better practice approaches to regulatory development refer to guiding 'best practice' principles and standards¹⁴. In particular, in 1995, the first international statement of regulatory principles common to OECD countries was published by the OECD (*Recommendation of the Council on Improving the Quality of Government Regulation, 1995*). In 2012, the OECD Council adopted the *Recommendation of the Council on Regulatory Policy and Governance* which provides guidelines and principles on regulatory quality and performance.¹⁵ Together with other OECD countries, the Australian Government has adopted the OECD 2012 best practice regulatory principles. The principles were promulgated through the then COAG (Council of Australian Governments)¹⁶ regulatory reform plan. The South Australian Government adapted and included the best practice regulation principles in its

¹³ Commonwealth Interdepartmental Committee on Quasi-regulation, *Report on grey-letter law*, December 1997, 5

¹⁴ See, for example, Department for Business Innovation and Skills (UK), *Principles for Economic Regulation 2011* (2011); OECD, *Regulatory Policy Outlook 2015* (2015a); and OECD, *Best Practice Principles for Regulatory Policy* (2020a).

¹⁵ OECD, *Recommendations and Guidelines on Regulatory Policy*, (Web page, 25 March 2021) <<https://www.oecd.org/regreform/regulatory-policy/recommendations-guidelines.htm>>

¹⁶ COAG ceased to exist in May 2020 following the formation of National Cabinet.

Better Regulation Handbook on how to design and review regulation¹⁷. Refer to chapter 2 for further discussion on regulation design and development.

Additionally, the published literature points to a range of common principles and standards of conduct which apply to regulator practice. In comparing SA regulator structures and practices with best or better practice, the Commission draws on the work of the OECD. Refer to chapter 3 for further discussion on regulator structure, practice and performance.

Information request 1:

- a) The Commission is interested in gaining a better understanding of what constitutes best or better practice: what may be considered to be best practice or better practice for each stage of the regulatory life-cycle (from design and development through to implementation and ex-post review)? Please provide examples from SA or other jurisdictions where possible.

¹⁷ Government of South Australia, *Better Regulation Handbook*, January 2011

2. Development and management of regulation

Regulation is one of a number of possible choices of government policy instruments. As such, the effectiveness and efficiency of regulatory activity depends on: whether it is the best policy instrument; on choices about whether and what to regulate; the design and management of regulations; and the manner in which they are administered and enforced by regulators. This chapter considers the state-wide systems currently in place to determine what is to be regulated, the design of regulatory instruments, and the mechanisms for managing the stock of regulation. The following chapter examines regulator practices.

2.1 Developing regulation

South Australia's approach

In South Australia (SA), regulatory provisions are contained in either primary legislation (Acts of Parliament) or subordinate legislation. Subordinate legislation is created by the government on the basis of power delegated by Parliament. The specific power to make subordinate legislation is contained in an instrument's enabling legislation. Regulations, rules and by-laws, in particular, are subject to the provisions contained in the *Subordinate Legislation Act 1978* (Subordinate Legislation Act). (See Figure 1.1)

Regulators' effectiveness is affected by their statutory instruments that partly determine the way in which they regulate businesses. The adequacy of the statutory instruments at regulators' disposal has the potential to constrain or enhance their capacity to implement better practice regulatory principles.

Governments can impose regulatory requirements on businesses by using a range of instruments. The Commission understands that regulations are the main type of subordinate legislation used in SA, with two of the most significant exceptions being policies under the *Aquaculture Act 2001* and the *Environment Protection Act 1993*. These instruments are very similar to regulations in their effect, but the processes by which they are made and reviewed are specific to their enabling statutes.

The Commission notes that some other Australian jurisdictions, including the Australian Government, tend to make greater substantive use of subordinate legislation.¹⁸ By contrast, SA appears to have a history of incorporating significant regulatory requirements in primary legislation, possibly as a way of strengthening Parliament's scrutiny of executive action. The Commission understands that there are some exceptions to a reliance on primary legislation in SA, especially in the planning system, where other statutory instruments, such as the Planning and Design Code, are currently in force.

The state's institutional architecture is also affected by the *Local Government Act 1999* (Local Government Act), which prescribes the making of by-laws by councils. Councils' authority under the Local Government Act to make a range of by-laws has the potential to add to the stock of regulation affecting businesses in SA. The Commission notes that councils' by-laws, including model by-laws created pursuant to the Local Government Act, are disallowable instruments under the Subordinate Legislation Act.

Some of local government's regulatory functions are conferred by a range of state statutes, thereby making councils agents of the state government. Regulatory responsibility is shared between both levels of government, including in areas like planning regulation. This raises the

¹⁸ These are referred to as legislative instruments in the Commonwealth, pursuant to the *Legislation Act 2003*.

possibility of regulatory overlap, duplication and inter-jurisdictional inconsistencies, including questions of 'cost-shifting' and 'cost-sharing' and their associated effects on business.

Legislative Review Committee

SA's framework for developing regulations is centred on the executive branch of government, with the authority to make statutory instruments delegated by Parliament. As in other Australian jurisdictions, the South Australian Parliament has devolved responsibility to scrutinise delegated law-making activity to the Legislative Review Committee (LRC).

The *Parliamentary Committees Act 1991* and the *Subordinate Legislation Act* together create the committee's specific remit, which includes responsibility for considering all instruments referred to it by force of section 10A(1) of the *Subordinate Legislation Act*. As pointed out above, these instruments are defined as regulations, rules and by-laws, and thereby exclude other types of delegated legislation, such as environment protection policies created under the *Environment Protection Act 1993*.

The LRC may recommend the disallowance of any instrument that it deems to be in breach of its scrutiny principles. These ensure that the statutory instrument is both lawful and likely to achieve its stated purposes. The scrutiny principles applied by the committee are legal and technical in scope and character. The economic impact of an instrument is largely subsumed under a consideration of its strict legality, constitutionality and its effect on common law rights and freedoms.¹⁹

Regulatory impact assessment

Regulatory impact assessment (RIA) is the process by which the economic and other impacts of proposed new regulations or amendments to existing regulations are assessed. SA's RIA framework was introduced in 2011 and is based on the Council of Australian Government's (COAG) recommendations on best practice regulation principles.²⁰ The RIA forms the principal framework through which regulatory impact is analysed as part of the broader policy development process. The RIA is administered by the Cabinet Office in the Department of the Premier and Cabinet (DPC), with the framework's policy rationale and mandatory requirements laid out in the *Better Regulation Handbook*²¹. The RIA framework was introduced by Cabinet, rather than on a statutory footing, and adherence to its requirements is mandatory for all government agencies, whenever the government is contemplating the introduction of new regulations or the variation of existing regulations.

Depending on the complexity and potential effect of a proposed regulation, agencies might also be required to produce a regulatory impact statement (RIS). The RIS is designed to assess the potential objective of proposed regulation, and whether other approaches, including quasi-legislation or self-regulation, are likely to achieve the intended effects more efficiently and effectively. The policy requires that a Cabinet submission that seeks approval to make new regulation be accompanied by a RIS, where appropriate, regardless of whether the desired regulatory outcomes are to be achieved through primary or delegated legislation.

Cabinet Office is responsible for the whole-of-government implementation of the RIA process. The Commission notes that Cabinet Office is required to confirm that a RIS submitted for

¹⁹ See, for example, Parliament of SA, *Legislative Review Committee Information Guide: Report of the Legislative Review Committee* (2020), 7.

²⁰ COAG, *Best Practice Regulation: A Guide for Ministerial Councils and National Standards Setting Bodies* (October 2007), 4.

²¹ Government of South Australia, *Better Regulation Handbook*, January 2011

Cabinet's consideration meets the requirements set out in the handbook. Cabinet Office also provides advice to agencies on whether a RIS is required to support a proposed regulation.

Better practice principles

The Commission notes that the diverse literature on better practice approaches to regulatory development, offers a range of principles and standards available to guide practice.²² The OECD's framework for better practice in regulatory development is succinctly expressed in its *2012 Recommendation of the OECD Council on Regulatory Policy* (the recommendation). The Commission notes that, while the principles identified by the OECD are focussed on the full 'life-cycle' of regulation, several key principles apply to developing effective, efficient and proportionate regulation. The Commission will be guided by the OECD's approach when developing a framework with which to assess SA's regulatory architecture.

The OECD maintains that high quality regulatory development requires governments to commit to an explicit whole-of-government policy for regulatory quality. The policy needs to include clear objectives and frameworks for implementation to ensure that the economic, social and environmental benefits justify the associated costs. It must also ensure that distributional effects are considered and net benefits to society are optimised.

In addition, better practice in regulation development requires governments to adhere to principles of open government, including transparency and public participation in the regulatory process to ensure that regulation serves the public interest. Governments should also establish mechanisms to provide active oversight of regulatory policy, procedures and goals to foster regulator quality.

A high performing development framework must also ensure that regulatory impact assessment (RIA) is integrated into the early stages of the policy process for the formulation of new regulatory proposals. An RIA must clearly identify policy goals and provide a framework to evaluate whether regulation is necessary and determine the most effective and efficient policy lever. Governments should also develop a policy to establish the functions of regulatory agencies and provide confidence that decisions are made on an objective and consistent basis, without apparent or actual conflict of interest or improper influence.²³

Challenges and opportunities in SA

The Commission has been advised that SA's institutional and statutory regulatory framework may be marked by a tendency to place regulatory provisions in primary legislation, rather than making greater use of delegated legislation. The Commission intends to explore this matter further as it may have the effect of shifting regulatory reform from the sphere of executive action to the legislative process, potentially reducing a government's capacity to act rapidly to address complex issues, including unusual events like the COVID-19 pandemic.

The Commission notes that, while South Australia's approach strengthens parliamentary scrutiny and enhances business certainty and executive accountability, it may make executive action less responsive. The longer timeframes for drafting and introducing primary legislation makes it likely that South Australia's framework is less flexible than one where regulatory provisions are more frequently contained in delegated legislation. It may limit a government's ability to undertake regulatory reform without engaging in potentially complex legislative

²² See, for example, Department for Business Innovation and Skills (UK), *Principles for Economic Regulation 2011* (2011); OECD, *Regulatory Policy Outlook 2015* (2015a); and OECD, *Best Practice Principles for Regulatory Policy* (2020a).

²³ OECD, *Recommendation of the Council on Regulatory Policy and Governance* (2012), 4 – 5.

amendments. It is also probable that regulatory provisions contained in primary legislation will be more prescriptive (as a way of avoiding statutory ambiguity), rather than outcomes-based.

A rigid framework could, in principle, affect a state'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 could also constrain the state's capacity to implement contemporary approaches to regulation that are outcomes-based and assist governments 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.

The use of 'black letter' law to achieve regulatory outcomes is part of a broader continuum of regulatory action, including self-regulation. This can include a wide variety of instruments, not all of which are legally enforceable. Positioned somewhere between self-regulation and 'black letter' law are approaches that can be defined as quasi-legislation, sometimes also referred to as 'grey letter' law. Quasi-legislative schemes all rely on arrangements that are not legally enforceable, but which allow governments to influence businesses to act in particular ways. Quasi-legislation can take a range of forms, including codes of practice, advisory or guidance notes, rules of conduct, standards or accreditation schemes. (see Figure 1.1)

Quasi-legislative instruments tend to be issued by governments, often on the basis of co-design with industry, but can also be designed and implemented by industry bodies or associations with the support of government. Recourse to quasi-legislation is generally most common in areas where there is only a limited need for direct government regulatory action and where industry-led compliance is feasible.

The practice appears more common within the Australian Government. Examples include the Australian Securities and Investments Commission's (ASIC) 'e-payment' scheme, which is designed to ensure uniform standards for electronic payment transactions. The Code is administered by ASIC and extends to banking and non-banking businesses, yet adherence is not legally enforceable and subscribing to the code is voluntary. The Commission notes that it is unclear whether quasi-legislative approaches are common in SA or whether quasi-legislation is an appropriate approach in the South Australian context.

Some of the regulatory challenges presented by businesses in the sharing economy, such as Uber and Airbnb, have resulted in new approaches to outcomes-based regulation in some jurisdictions, including the United States. In the context of the sharing economy, regulating on an outcomes basis entails adopting a risk-based approach where outcome targets take precedence over a set of prescriptive provisions and rules. Regulated entities are held to account through monitoring mechanisms made possible by large-scale data analytics, including real time data, and by using data to develop consumer protection mechanisms. This has the potential to replace prescriptive requirements contained in regulation with a set of outcomes that regulated entities are required to achieve.²⁴ The Commission notes that it is not clear whether SA's regulatory framework readily facilitates the adoption, where appropriate, of such newer regulatory models.

Legislative review committee

The Commission notes that the LRC's remit may be more limited than equivalent committees in other states and territories. In some of these jurisdictions, the relevant parliamentary committee 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

²⁴ See, for example, Abbey Stemler, "Regulation 2.0: The Marriage of New Governance and Lex Informatica", in *Vanderbilt Journal of Entertainment and Technological Law* [2017] 19(1).

apply to impact assessment have been met. These statutory provisions are intended to support the development of regulation through an effective parliamentary scrutiny process.

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. The NSW committee has the authority under its enabling legislation, the *Legislation Review Act 1987* (NSW), to recommend the disallowance of a statutory instrument on the grounds that it adversely affects the business community. 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.²⁵

Regulatory impact assessment

The principles underlying the SA's RIA framework are broadly consistent with the better practice principles developed by the OECD. Governments have access to a range of policy instruments when developing a response to a policy problem. Regulation using black letter law is only one possible response, which makes it important that a decision to regulate derives from the broader policy development process. Other Australian jurisdictions have found in recent reviews that the formal requirements of the RIA process have not led to a rigorous policy development process that critically assesses the costs and benefits of various policy options, including both regulatory and non-regulatory approaches.²⁶ In NSW, the Greiner Review found that "stakeholders reported that the quality of RIAs is inconsistent and that robust assessments are far from the reality".²⁷

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.²⁸

The Commission notes that it is unclear whether SA's RIA framework, especially its ex-ante assessment, has promoted the evaluation of regulatory impact and contributed to effective policy development. The Commission understands that only a small number of RISs are prepared for Cabinet. This might not align with the total number of proposals reaching Cabinet with a regulatory impact that reaches the threshold for the preparation of a RIS. It is unclear whether the apparent shortfall reflects faults in the RIA framework, the way in which it is administered (including cultural factors), or whether it suggests a deficit in agencies' policy capabilities.

The Commission also understands that some SA regulators are responsible for both regulatory and policy functions within their areas of responsibility. The Commission considers that a lack of separation between policy development and enforcement functions has the potential, in some cases, to create a structural conflict of interest.

²⁵ NSW Government, *NSW Regulatory Policy Framework Independent Review* (Final Report, 2017), 55.

²⁶ See, for example, NSW Government, *NSW Regulatory Policy Framework: Independent Review – Final Report* (August 2017), 42.

²⁷ *Ibid.*, 42.

²⁸ *Ibid.*, 44.

Information request 2.1:

- a) Does SA have an appropriate balance between regulating through primary legislation and subordinate legislation? How does this affect the capacity of regulators to respond effectively to changing circumstances and priorities?
- b) Does SA's approach to regulatory design and development constrain innovative approaches to regulation, such as outcomes-based regulation or different types of regtech? If so, how can this be addressed?
- c) What role does local government play in the state's regulatory framework? Is it effective? How could it be improved?
- d) Are there ways of enhancing the central scrutiny functions exercised by the Legislative Review Committee?
- e) Given the acknowledged importance of ensuring that benefits to society exceed costs, are regulatory impact statements prepared frequently enough by agencies?
- f) Do regulatory policy development and implementation functions require greater separation in the SA public sector?
- g) Does the quality of regulatory impact analyses require improvement? If so, how might this be achieved?
- h) Are the objectives and expected outcomes of regulations, as outlined in the *Better Regulation Handbook*, clear and unambiguous?
- i) Are there specific examples of ineffective or inefficient regulations? Are there examples of regulations that do not have clear policy goals?
- j) How common are self-regulation and quasi-legislation in SA? Are there examples, in SA or elsewhere, of successful regulatory outcomes that have been achieved by relying on self-regulation or quasi-legislative approaches to regulation?

2.2 Managing the stock of regulation

Recent reviews of the way in which regulations are developed and managed have found that the stock of regulation throughout Australia has increased substantially.²⁹ An analysis by NSW Treasury found that the total number of sections in regulations stands at approximately 40,000 in NSW alone, and twice as many sections were created between 2010 and 2019 than in the preceding decade.³⁰

South Australia may have experienced a similar increase in the stock of regulation over this period. An assessment of the overall stock of regulation in South Australia could be undertaken using a range of possible indicators, such as the average age of an act or regulation or the percentage of instruments that have been edited since they were made. The Commission notes that NSW Treasury's recent audit of the stock of regulation in NSW was supported by Deloitte's *RegExplorer* tool, which utilises AI and text analysis software to identify key features of the statutory landscape.

²⁹ See, for example, Queensland Productivity Commission, *Research Paper: Improving Regulation* (March 2021).

³⁰ NSW Government, *Regulating for NSW's Future* (July 2020), 3.

Additionally, the Commission notes that a government's total expenditure on regulatory activity can assist in identifying ways to enhance public sector productivity and assess whether regulators' activities are delivering the greatest overall community benefit. The Queensland Productivity Commission recently estimated that the gross cost of administering and enforcing regulations in that state is approximately \$2.6 to \$3.1 billion annually. The Commission is interested in assessing the overall level of business-focused regulatory activity in SA, subject to the availability of the necessary data.

South Australia's approach

South Australian 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, and 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 in 2008 and 2009, and the *Simplify Day* initiative. The latter occurred in 2016 and 2017 and amended or repealed regulatory provisions in primary and delegated legislation. The Commission notes that the absence of relevant data or ex-post evaluations makes it difficult to assess the effectiveness of these programs and initiatives.

Regulation expiry program

Responsibility for managing, varying and remaking regulations in South Australia rests with individual ministers and the agencies within their portfolios. With the exception of the regulation expiry program (REP), there is no overarching policy program, statutory provision or Cabinet direction that encourages or mandates the proactive management of regulations in SA. The REP is undertaken on an annual basis and is overseen by Cabinet Office with advice from the Office of Parliamentary Counsel. The REP is the equivalent of the sunset and review mechanisms currently in place in other jurisdictions. The Commission notes that the REP does not apply to primary legislation, despite the fact that, as noted above, SA appears to place much of the substance of regulatory provisions in primary legislation.

The REP is required under part 3A of the Subordinate Legislation Act, which prescribes that regulations made since January 1987 will expire automatically on "1 September of the year following the year in which the tenth anniversary of the day on which they were made falls".³¹ The act allows the mandatory expiry of regulations to be postponed by a total of four years, although each postponement period is not permitted to exceed two years at a time. Nothing in the act prevents an instrument, such as a regulation, from being either revoked or remade before it is due to expire.

The Commission understands that approximately 100 regulations have reached the threshold for expiry prescribed in the Subordinate Legislation Act. The majority appear to have been postponed at least once since 2018. The program appears to be adversely affected by the lack of an incentive for agencies to proactively assess and remake the stock of regulations. The 'default' position appears to be to postpone the expiry of regulations instead of actively reassessing their adequacy using an ex-post review mechanism (as recommended by the OECD). The Subordinate Legislation Act does not require ministers or agencies to undertake impact assessments to justify a decision to postpone the expiry of regulations.

Better practice principles

The effective management of the stock of regulations is an integral aspect of high quality regulatory practice, and a number of better practice models have been developed. The OECD provides one of the most comprehensive frameworks to guide jurisdictions in the whole-of-

³¹ *Subordinate Legislation Act 1978*, s 16B(g).

government management of the stock of regulation. The OECD's framework highlights the importance of ex-post review in 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. Ex-post review is primarily a mechanism for improving the stock of regulation.

The OECD proposes several overarching principles for the ex-post review of regulations. They must be an integral and permanent part of the regulatory life-cycle; incorporate comprehensive analytical processes, bolstered by stakeholder consultation; include an evidence-based assessment of the actual outcomes of regulatory action; and contain recommendations that address any deficiencies.³² The OECD recommends that a portfolio of approaches is needed to ensure that the type of review undertaken is the most suitable and cost effective, including programmed reviews. The latter includes those for which a requirement is embedded in the legislation itself, especially for more significant and innovative laws; sunset requirements for the mass of subordinate legislation; and post-implementation reviews, conducted within a shorter timeframe, as a way of bolstering processes for developing regulations that might be deficient.

The OECD also proposes ad hoc reviews, such as 'stocktaking' of regulations across a sector or economy; benchmarking of regulations that allow a like-for-like comparison; and in-depth public reviews of major regulatory regimes. In addition, these types of review should be bolstered by processes to support ongoing management of the stock of regulation, such as administrative processes that enable learning-by-doing as regulations are implemented; offset rules for new regulations; and burden reduction targets, including 'red tape reduction' initiatives, to reduce the number and cost of existing regulations.³³

The OECD considers key questions for any ex-post review include whether a valid rationale still exists for regulating (appropriateness); whether the regulations achieved their objectives (effectiveness); whether they have given rise to unnecessary costs and other unintended impacts (efficiency); and whether modifications, removal or replacement are required.³⁴

Challenges and opportunities in SA

The REP might be less effective in SA than its equivalents in other jurisdictions because of a greater reliance on primary legislation. The Commission understands that delegated legislation in SA frequently contains ancillary provisions, such as fees and prescribed forms required to implement the related primary legislation. That said, the Commission notes that this limitation might be more pronounced in some areas of the state's regulatory framework, with the planning system making greater use of other instruments (such as the Planning and Design Code). Nonetheless, the overall utility of the REP could be adversely affected by the more limited substantive use of delegated legislation in SA.³⁵

Some major reviews undertaken in comparable jurisdictions, including New Zealand, have found that many of the initiatives designed to manage regulations, such as sun-setting programs and 'red tape' reduction targets, often fail to facilitate the effective management of the stock of regulation.³⁶ Actively managing the stock of regulation, sometimes referred to as

³² OECD, *Reviewing the Stock of Regulation, OECD Best Practice Principles for Regulatory Policy* (OECD Publishing, 2020b), 8. < OECD iLibrary | Reviewing the Stock of Regulation (oecd-ilibrary.org) >

³³ *Ibid.*, 9.

³⁴ *Ibid.*, 9.

³⁵ The Commission notes that the current Planning and Design Code, which is made pursuant to the *Planning, Development and Infrastructure Act 2016* (SA), has not been deemed to be subordinate legislation under the *Subordinate Legislation Act 1978* (SA), s 9.

³⁶ See New Zealand Productivity Commission, *Regulatory Institutions and Practices – Final Report* (June 2014).

'stewardship', entails regularly assessing the effectiveness and appropriateness of regulation as part of the routine business of government administration. It is designed to complement, but is separate from, other better regulation initiatives like sunseting programs or an annual deregulation initiative (such as 'Simplify Day'). The Commission notes that previous reviews, including the Greiner Review in NSW, have argued that sunseting programs do not support agencies' active management of regulations.³⁷

Some other jurisdictions have found that regulations are rarely managed as a public asset in the absence of a 'stewardship' approach to regulation.³⁸ The Commission notes that this was the experience of New Zealand, where the NZ Productivity Commission found that agencies generally adopted a 'set and forget' approach to regulatory action.³⁹ This lack of active stewardship was complicated by agencies' preference for adopting a 'regulation first' approach to complex policy issues.⁴⁰ Similar flaws might also affect the management of regulation in SA, especially as no mechanism mandates the active stewardship of regulations.

The Commission notes that it has not been able to locate any evidence of post-implementation reviews being conducted in South Australia, with the exception of review provisions contained in some primary legislation, such as the *Plastic Shopping Bags (Waste Avoidance) Act 2008*.

Information request 2.2:

- a) Does South Australia's regulation expiry program assist in managing the overall stock of regulation? How could it be improved?
- b) Could the current sunseting arrangements be expanded to incorporate primary legislation? What are other options for ensuring that regulatory provisions contained in primary and delegated legislation are fit for purpose?
- c) Are regulations in SA subjected to sufficiently rigorous and frequent ex-post evaluations? How are these conducted?
- d) Should the ten year timeframe applying to the regulatory expiry program be shortened? Should a decision to postpone expiry of a regulation require a full ex-post assessment?
- e) What barriers or disincentives exist to repealing or varying regulations once they exist?
- f) What are the benefits of adopting a 'stewardship' model of regulatory management? How could this be implemented in SA?

³⁷ NSW Government, *NSW Regulatory Policy Framework Independent Review*, 19.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

3. Administration and enforcement of regulation

A sound regulatory regime requires effective regulators. The following sections of this chapter consider in turn, structure, practice and performance. Regulator performance, including efficiency and effectiveness, is related to a range of factors which affect their structure and practices.

3.1 Regulator structure

Regulator structure

Regulators may be established and operate as:

- independent entities with their own enabling legislation;
- separate units attached to an agency or a department; or
- a business unit within an agency or department.

Under the *Local Government Act 1999 (SA)* (and other state Acts), local government has certain powers and responsibilities that councils administer and enforce regulation(s) on behalf of the South Australian (SA) Government. In this respect, councils (or local government authorities) are regulatory authorities for specific state government regulations.

Regulator structure (at the individual and across government level) can influence the regulator's practices and performance. Factors impacting on regulator structure include:

- the type and nature of the industry and/or activities it regulates including levels of inherent risk, competitiveness (ease of entry and exit), market structure (existence of natural monopolies etc), interactivity with other sectors and jurisdictions, types of occupations and so on;
- the legislation that establishes a regulator and its operation including governance arrangements (and independence), the language used (prescriptive or outcomes focussed regulations), reporting and accountability obligations;
- the extent to which regulators operate as separate entities or are part of an across government framework;
- interactions and interdependencies with other regulators, government jurisdictions and/or sectors which can give rise to instances of regulatory overlap, duplication or inconsistency;
- whether a regulator is required to be involved at all stages of the regulatory life-cycle or is principally involved only at the implementation stage; and
- how a regulator is funded (such as via budget allocation and/or cost recovery) and how the funding arrangements impact on the regulator functions, operations and culture.

Table 3.1 summarises some of the key existing SA Government regulators. The Commission is developing a comprehensive list of regulators relevant to the inquiry.

Table 3.1: Selected key SA Government regulators, March 2021

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
Consumer and Business Services (CBS)	Provides a diverse range of services to protect consumers support and regulate business in areas such as: liquor, gambling and lotteries, tenancies, labour hire licencing, second-hand vehicle dealers and pay day lending.
Environmental Protection Authority (EPA)	Deals with regulation for environmental protection in areas such as pollution, waste, noise and radiation.
Department of Energy and Mining (DEM)	Conducts assessment, approval and compliance monitoring of mineral exploration and mining activities throughout SA, including aspects of environmental protection.
Department of Environment and Water (DEW)	Deals with regulations and makes decisions relating to the sustainable development of South Australia's natural resources, water, native vegetation and heritage.
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.
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.
Planning and Land Use Services, AGD	Manages the planning and land use system for South Australia.
PIRSA	Deals with market access and other regulation pertaining to primary industries, including aspects of environmental protection.

Source: OSAPC, March 2021

The Commission has found it difficult to obtain a clear understanding of the number, type and scope of regulators that administer and enforce SA Government regulations limiting the Commission's ability to review regulator performance. The Commission is undertaking research and consultation to identify regulators for further consultation and review as part of the inquiry process. Given the range of regulators that exist in SA, it is necessary to focus on those regulators whose role and functions closely align with the inquiry terms of reference, as discussed in section 1.1.

Information request 3.1

- a) What type of regulator structure would be leading practice for South Australia? Why and are there any examples? What are the key issues to consider when determining the most appropriate structure for a regulator in South Australia?
- b) Given the inquiry terms of reference, the Commission asks for suggestions on which regulators the Commission should focus on for the inquiry and why?

Better practice approaches

Regulator structure can support and improve regulator performance by:

- setting accountability arrangements that: clearly allocate responsibilities between regulators and government; facilitate decision making; scrutinise regulatory powers; and provide legitimacy and capability;
- supporting outcomes focussed responses to policy problems rather than using specific instruments aimed at penalties and rules;
- enabling regulators to engage with relevant stakeholders as part of their functions;
- providing opportunities for regulators to cooperate, and to share information and lessons learned with other regulators; and
- facilitating the independence and autonomy of the regulator via appropriate funding arrangements.

Challenges and opportunities in SA

The Commission is interested in exploring the potential challenges and opportunities relating to regulator structure in South Australia and how changes to structure can improve regulatory outcomes. For example, how regulator structure can support and influence:

- capacity to embed and harness innovative and technological advances to 'future-proof' the regulatory framework;
- regulator performance – how regulator structure can lift and support performance;
- regulation performance – how regulator structure is both influenced by, and impacts on, the legislative language used (prescriptive versus outcomes based), and the reliance on primary versus subordinate legislation (and consequential impacts on agility and innovation);
- effectiveness of regulatory reform initiatives to improve the flow and stock of regulations;
- coordination between regulators and regulatory coherence and consistency at state-wide level; and
- stakeholder engagement within and outside of government to improve effectiveness and efficiency.

Regulators often have very specific mandates set by the legislation under which they operate. These mandates tend to focus upon economic, environmental or social objectives, but rarely upon more than one of these objectives.

The Commission is interested in views on how trade offs between economic, environmental and social objectives are realised in the South Australian context, both in organisational structure and operational practice. Institutional frameworks that encourage policy coordination between policy agencies and review processes involving regulators assessing impacts across all three objectives are possible mechanisms that could be used to align growth with sustainable development outcomes.

Information request 3.2

- a) What are the challenges and opportunities relating to the structure of regulators and the state-wide regulatory framework in South Australia and what changes to structure would improve regulatory outcomes?
- b) Provide examples in the development of regulations or in regulator practice in South Australia where economic, environmental and social objectives have been balanced to achieve sustainable development outcomes? Are there any areas for improvement?

3.2 Regulator practice

Regulators have a responsibility to administer regulation well. Broadly, they must 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.⁴¹

Regulators' practices impact on the efficacy of the regulatory law in two ways⁴². First, as regulators interact with stakeholders 'at the coal face', they are well placed to identify issues that can help shape improvements to regulatory rules. Second, the manner in which regulators administer and enforce regulation itself has a direct effect on the costs and benefits of regulation to businesses, consumers, and the broader community.

Regulators 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 monitoring strategy).

⁴¹ 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> >

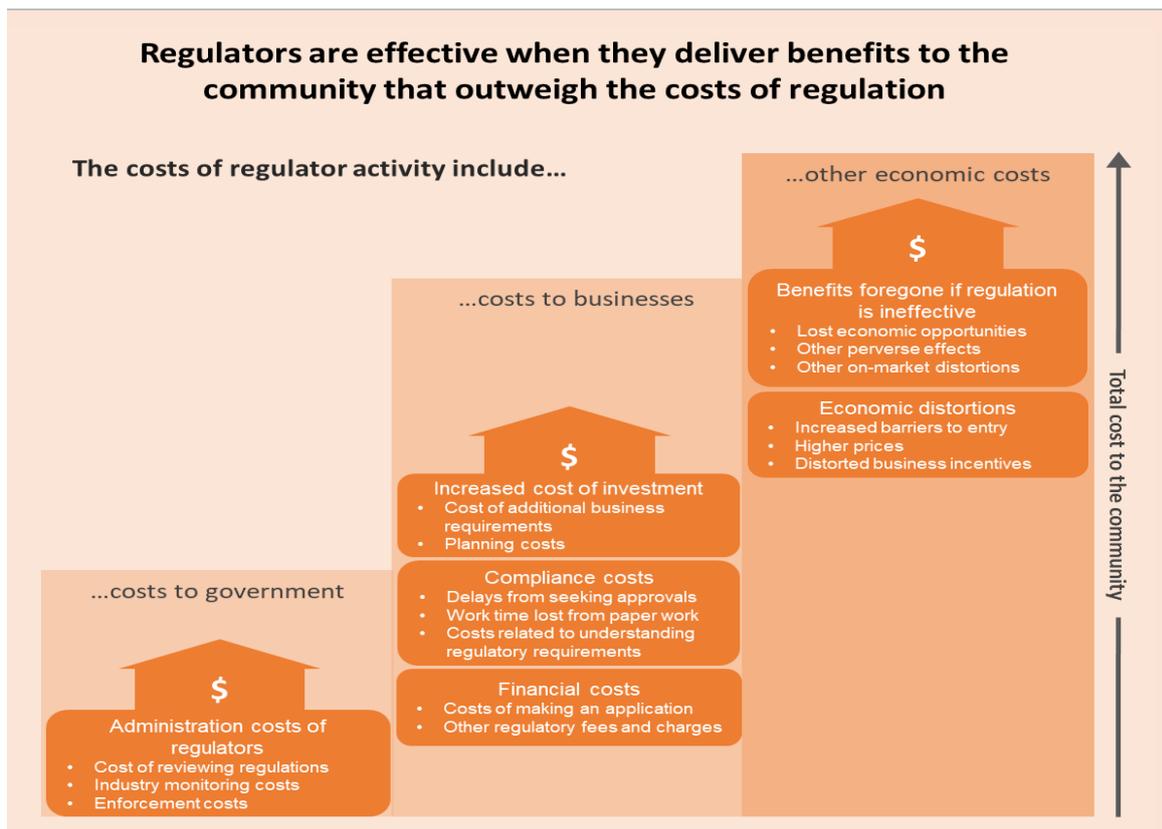
⁴² Productivity Commission (Cth), *Implementing and Evaluating Regulation Reforms* (Productivity Commission, 2014), 2 < <https://www.pc.gov.au/research/supporting/regulator-audit-framework/regulator-audit-framework.pdf> >

- Encouraging compliance (e.g. educating entities on regulations, providing information and advice on how to comply, and monitoring an entity's return to compliance).
- 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)⁴³.

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 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 licence 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.

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.

⁴³ ANAO (Cth), *Administering Regulation: Achieving the Right Balance, Better Practice Guide* (Commonwealth of Australia, 2013); Productivity Commission (Cth), *Regulator Audit Framework* (Productivity Commission, 2014).

Regulator practice in South Australia

Complaints raised by businesses on regulators' practices may relate to issues around the costs of complying with regulations, such as:

- the cost borne by businesses to understand and seek advice on their regulatory obligations before even starting up their business;
- the time taken by regulators to make decisions and provide their approval on business proposals, including through the use of sequential (rather than parallel) approvals processes;
- poor information management, where requests for information by a regulator for an application occur multiple times within or across regulators. Alternatively, delays to regulator decision making may occur when entities do not understand or find it difficult to provide the information required.
- dealing with multiple regulators (including private sector systems) on the same or similar issues, who do not share information with each other or have overlapping responsibilities.

Industry participants raised similar issues with the Commission in its 2020 *Extractives Industry Supply Chain Review*⁴⁴. The Commission recommended improved interactions between the Department of Energy and Mining (DEM) and businesses, including through increased transparency and providing additional guidance, improving pre-lodgement review processes and formalising referral arrangements between regulators.

Better practice approaches

The terms of reference request that the Commission have regard to leading practice in other jurisdictions and the OECD. The OECD has identified seven principles for the design and conduct of regulators. These are: (1) regulator role clarity; (2) preventing undue influence over the regulator and maintaining integrity and public trust; (3) establishing an appropriate decision making system within the regulator's governing structure; (4) accountability and transparency in regulatory practice; (5) effective engagement with key stakeholders; (6) adequate government funding for the regulator to undertake its responsibilities effectively; and (7) conducting formal evaluations of the regulator's performance⁴⁵. Similar principles and good practice standards are contained in established frameworks for assessing regulator performance, which have been adopted by other Australian states and internationally (see Figure 3.2).

⁴⁴ South Australian Productivity Commission, *Extractives Industry Supply Chain Review, Final Report* (SA Government, 2020).

⁴⁵ The Governance of Regulators, *OECD Best Practice Principles for Regulatory Policy* (OECD Publishing, 2014).

Figure 3.2: Principles and practice standards from regulator performance frameworks

Australian Government Regulator Performance Framework ⁽¹⁾	Victorian Government Statement of Expectations Framework for Regulators ⁽²⁾	OECD ⁽³⁾⁽⁴⁾
<p><i>Key performance indicators</i></p> <ul style="list-style-type: none"> Regulators do not unnecessarily impede the efficient operation of regulated entities Communication with regulated entities is clear, targeted and effective Actions undertaken by regulators are proportionate Compliance and monitoring approaches are streamlined and coordinated Regulators are open and transparent in their dealings with regulated entities Regulators actively contribute to the continuous improvement of regulatory frameworks 	<p><i>Mandatory elements</i></p> <ul style="list-style-type: none"> Timeliness Risk based strategies Compliance-related assistance and advice <p><i>Recommended element</i></p> <ul style="list-style-type: none"> Incentive-based regulation <p><i>Other suggested elements</i></p> <ul style="list-style-type: none"> Role clarity Cooperation amongst regulators Stakeholder engagement Accountability and transparency Clear and consistent activities 	<p><i>Principles for regulator governance</i></p> <ul style="list-style-type: none"> Role clarity Preventing undue influence and maintaining trust Decision making and governing structure for independent regulators. Accountability and transparency Engagement Funding Performance evaluation <p><i>iREG Score</i></p> <ul style="list-style-type: none"> Regulatory impact assessment Stakeholder engagement Ex-post evaluation
UK Hampton Implementation Reviews ⁽⁵⁾	Productivity Commission's recommended framework ⁽⁶⁾	RegX Atoms of Excellence ⁽⁷⁾
<p><i>Principles</i></p> <ul style="list-style-type: none"> Risk-based regulation Transparency and accountability Economic progress <p><i>Practice standards are around:</i></p> <ul style="list-style-type: none"> Design of regulations Advice and guidance Data requests Inspections Sanctions Focus on outcomes 	<ul style="list-style-type: none"> 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 	<p><i>Utmost integrity</i></p> <ul style="list-style-type: none"> Fidelity to law Respect for democracy Commitment to public interest <p><i>Empathic engagement</i></p> <ul style="list-style-type: none"> Even-handedness Listening Responsiveness <p><i>Stellar competence</i></p> <ul style="list-style-type: none"> Analytical capability Instrumental capacity High performance

Sources: ⁽¹⁾ Australian Government (Cth), *Regulator Performance Framework* (Commonwealth of Australia, 2014); ⁽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⁾ Coglianesi, C., *Listening, Learning and Leading: A Framework for Regulatory Excellence* (University of Pennsylvania Law School, 2015).

The literature emphasises the importance of an 'outcomes focus', risk minimisation and proportionality in ensuring efficient and effective regulator practice. This requires that regulators track their success not by their particular activities or outputs, but on whether they deliver on their objectives, and at the least cost⁴⁶. Malcolm Sparrow, an expert in regulatory theory, considers that regulators should pivot their functions toward risk reduction and focus on areas of non-compliance within programs that impose the greatest harm⁴⁷. Such an approach adopts proportionate responses to risk, and as the Australian National Audit Office has observed, has the potential to benefit all parties:

*Adopting a risk-based approach to regulatory administration can have benefits for both regulated entities and regulators. Compliance costs for regulated entities can be minimised with entities assessed as lower risk being subject to a lighter touch compliance approach without unnecessary intrusion by regulators. On the other hand, higher risk entities may be subject to more scrutiny by a regulator and incur additional compliance costs, with these costs offset by improved regulatory outcomes and benefits for the community... [R]esources can be concentrated in areas where they can contribute most to the achievement of the regulatory outcomes with compliance responses proportionate to the level of risk.*⁴⁸

Stakeholder engagement is another key area of regulator practice. To be effective, regulations must reflect current economic, market and social conditions. It therefore requires regulators to understand issues from the perspective of relevant stakeholders (businesses, consumers, employees, community groups, and others) throughout the regulation development process⁴⁹. Regulators that adopt transparent processes through stakeholder engagement also build trust among regulated entities, while increasing their awareness and understanding of regulatory regimes, which promotes compliance⁵⁰.

Finally, an appropriate level of capability and competence is essential to effective practice. Personnel need a clear understanding of their role and function, and possess the skills required to achieve their objectives⁵¹. This knowledge can guide a regulator's workforce planning, including training, development and retention of its officers, and the targeted recruitment of staff to meet skills gaps. Importantly, the skills and capability of regulatory officers can be very broad, including technical, analytical and data proficiency, as well as more 'instrumental' skills in areas of stakeholder engagement, risk management, problem solving and communication.⁵²

Challenges and opportunities in SA

Improving how regulators work, and the quality of their regulatory interactions with business and the community, has the potential to boost productivity and economic growth in SA. For example, streamlining processes, timely decision making, and providing clear advice and information to consumers and businesses, saves everyone time and money. Also, applying

⁴⁶ National Audit Office (UK), Hampton Implementation Reviews (UK Government, 2007), 19 < https://www.nao.org.uk/wp-content/uploads/2008/03/HIR_Guidance.pdf > Productivity Commission (Cth), Regulator Audit Framework (Productivity Commission, 2014), 6.

< <https://www.pc.gov.au/research/supporting/regulator-audit-framework/regulator-audit-framework.pdf> >
⁴⁷ Malcolm K Sparrow, *The Character of Harms: Operational challenges in control*, (Cambridge University Press, 2008).

⁴⁸ ANAO (Cth), *Administering Regulation: Achieving the Right Balance, Better Practice Guide* (Commonwealth of Australia, 2013), 14.

⁴⁹ OECD, *OECD Regulatory Policy Outlook 2018* (OECD Publishing, 2018), 29 < <https://www.oecd-ilibrary.org/sites/9789264303072-en/index.html?itemId=/content/publication/9789264303072-en> >

⁵⁰ ANAO (Cth), *Administering Regulation: Achieving the Right Balance, Better Practice Guide* (Commonwealth of Australia, 2013), 15-16.

⁵¹ Ibid. 23.

⁵² Ibid. 23-14; Coglianese, C., *Listening, Learning and Leading: A Framework for Regulatory Excellence* (University of Pennsylvania Law School, 2015), ii < <https://www.law.upenn.edu/live/files/4946-pprfinalconvenersreport.pdf> >

and enforcing rules in a way that is proportionate avoids businesses having to comply with overly burdensome requirements. The Commission seeks further information on the strengths and weaknesses of SA regulators' current practices, and on areas where regulators could improve their efficiency and effectiveness.

Information request 3.3

- a) What are some specific examples of good and poor regulator practice in SA? What areas of regulator practice require the most improvement?
- b) How well do regulators work together? Are there any examples of duplication or overlapping roles between SA regulators? Between SA and other levels of government?
- c) Do regulators have the right capabilities to administer and enforce regulations effectively?
- d) Do some regulators engage with stakeholders better than others? In what ways could stakeholder engagement be improved?
- e) Are there any other issues around specific regulator practices that the Commission should look at more closely?

3.3 Improving regulator performance

Regulator performance is enhanced when regulators themselves adopt a culture of continuous improvement. This means that regulators should have processes in place for data collection and performance monitoring, and for ex post evaluation. As the Australian Productivity Commission (PC) observed in its exploration of regulator audit:

Regulator culture is a critical input into performance. Consequently, for [an] audit framework to add the most value it should be targeted at creating a culture that promotes clear and effective communication, ensures consistency in all of its actions, embraces a risk-based approach, practices good governance (accountable and transparent), and values continuous improvement.⁵³

South Australia's approach

Currently, there is no state-wide policy in place for performance monitoring and improvement across SA regulators. SA's regulators report on their performance individually as part of their own statutory reporting requirements, and in their annual reports. Where regulatory functions are located within larger departments, information on regulatory performance may be reported alongside their other activities, which could reduce transparency. Regulatory bodies may also conduct performance monitoring and evaluations internally, with no requirements for external scrutiny or the public release of the results. 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.

⁵³ Productivity Commission (Cth), *Regulator Audit Framework* (Productivity Commission, 2014
< <https://www.pc.gov.au/research/supporting/regulator-audit-framework/regulator-audit-framework.pdf> >

As part of this inquiry, the Commission will examine how SA regulators currently track, evaluate and report on their performance. It will also assess the efficacy of SA regulators.

Better practice approaches

Centralised oversight

Centralised oversight and formal governance structures can help improve regulator performance. Some jurisdictions have introduced centralised functions that oversee and support regulator activity. For example, Better Regulation Victoria (BRV) promotes better practices across Victorian government regulators, including by:

- overseeing regulatory impact assessments and legislation impact assessments;
- working closely with departments and regulators on regulatory improvement initiatives;
- maintaining good relationships with around 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.

Under its *Better Approvals* initiative, BRV is currently working with regulators to identify and implement solutions that will streamline and fast track approvals processes, especially for small business.

The Australian Government Office for Best Practice Regulation (OBPR) promotes good regulatory practice across government agencies. It also oversees the *Australian Government Regulator Performance Framework*⁵⁴, whereby Commonwealth regulators that administer, monitor or enforce regulations are required to report annually on the quality of their practices.

Performance assessment frameworks

Monitoring, reporting and evaluating regulators against good practice performance frameworks can encourage continuous improvement. The use of such frameworks is well established by governments and institutions in other jurisdictions, as well as by individual regulators (Figure 3.3 contains some examples). Some frameworks are primarily designed to enable regulators to self-assess their performance against best practice principles (e.g. the *Australian Government Regulatory Performance Framework* and *RegX Atoms of Excellence*) while others take the form of an external audit (e.g. the OECD iREG Score). Additionally, some jurisdictions have a policy of annual performance reporting specifically targeted to regulators with the aim of improving regulatory practice.

⁵⁴ Australian Government (Cth), *Regulator Performance Framework* (Commonwealth of Australia, 2015).

Figure 3.3: Regulator performance frameworks

Performance frameworks assist regulators to assess and report on their performance against good practice standards, increasing transparency and accountability, and encouraging a culture of regulatory excellence and continuous improvement. Several performance frameworks have already been developed by governments and institutions in other jurisdictions, as well as by regulators themselves.

PERFORMANCE FRAMEWORK	DESCRIPTION
<i>Australian Government Regulatory Performance Framework</i>	Commonwealth regulators that administer, monitor or enforce regulations are required to report annually on the quality of their practice under the Australian Government Regulatory Performance Framework. A central element of the framework is a requirement for regulators to measure, monitor and publicly report their performance against six Key Performance Indicators (KPIs) that the government has identified as characteristic of good regulator conduct. It is 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 must also employ a process for external validation of these self-assessments, for example, by engaging external assessors, peer reviewers or industry bodies. The regulator self-assessment mechanism is complemented by the Commonwealth's 3-yearly programmed reviews and an option for the government to undertake ad hoc external reviews of selected regulators.
<i>Victorian Government Statement of Expectations Framework</i>	<p>The Victorian Statement of Expectations (SoE) framework requires regulators to identify, monitor and report to the government and publicly on improvements to regulatory practice, including their performance against minimum and best practice standards. Under the SoE framework, a regulator must:</p> <ul style="list-style-type: none"> 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 the 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. <p>Additionally, policy departments are required to conduct post-implementation evaluations of regulator performance, with findings used to improve the design and development of the regulator's next SoE.</p>
<i>OECD iREG Score</i>	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 the questions on regulatory practice. The more regulatory "good standard" practices a country has implemented, the higher its iREG score. The iREG comprises indicators across three categories of performance – (1) stakeholder engagement, (2) Regulatory Impact Assessment (RIA) and (3) ex post evaluation – while assessment under each category focuses on four equally weighted sub-categories: (1) regulatory methodology, (2) oversight and quality control, (3) systematic adoption, and (4) transparency.
<i>RegX Atoms of Excellence</i>	<p>Developed by the Alberta Energy Regulator under the auspices the University of Pennsylvania, RegX is designed for practical application by regulators, distilling the essence of 'regulatory excellence' into three core attributes:</p> <ol style="list-style-type: none"> 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 about how respectfully the regulator and its personnel treat regulated entities and other stakeholders (e.g. even-handedness, listening and responsiveness). Stellar competence: This is about the actual delivery of outcomes that maximise public value, and the regulator's technical capacities, instrumental capacity, and strategic actions to achieve high performance. <p>The RegX framework does not set specific standards but is aspirational in nature, encouraging regulators to make improvements to practices in each of these areas.</p>

Sources: ⁽¹⁾ Australian Government (Cth), *Regulator Performance Framework* (Commonwealth of Australia, 2014); ⁽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).

One example of a whole-of-government regulator performance framework is the Victorian Statement of Expectations (SoE). This framework requires regulators to identify, monitor and report to the government and publicly on improvements to regulatory practice, including their performance against minimum practice standards. Responsible ministers issue a letter outlining the SoE to regulators every two years, which is developed collaboratively between regulators, their policy department and the Victorian 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 the 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.

Another example of a performance framework, used by the OECD for assessing regulatory regimes across countries, is the iREG score. While it does not focus on individual regulators per se, it includes questions on regulatory practice. The more good practice regulatory approaches a country has implemented, the higher its iREG score. The iREG survey includes detailed questions across three categories of regulator performance, for example:

- **Stakeholder engagement:** How often does the regulator consult on draft regulations or proposed rules? What forms of engagement are used? What types of documents are made available to support engagement? Is there a formal requirement for a minimum period of public consultation? Are regulators required to publish a response?
- **Regulatory impact assessment:** Are regulators required to identify the costs of a new regulation? When developing regulation, are regulators required to include assessments on — competition, the environment, trade, market openness, small business, social impact and distributional effects? Are any attempts made to quantify impacts? Are reports published online evaluating the performance of the RIA?
- **Ex post evaluation:** Are ex post evaluations required to consider the consistency of regulations and take steps to address areas of overlap/ duplication/ inconsistency? Are ex post evaluations required to assess: consistency with comparable international standards/ costs and benefits/ the impact of existing regulation to alternative options⁵⁵?

Challenges and opportunities in SA

The Commission has been asked to make recommendations to improve the efficiency and effectiveness of regulators in the administration and enforcement of regulations and institutionalised on going improvement and better practice. As part of this inquiry, the Commission will conduct an assessment of regulator performance, drawing from good practice approaches as outlined by the OECD and from other jurisdictions.

The Commission is also considering how the government could promote a culture of continuous improvement among SA regulators. Possible approaches could include requiring

⁵⁵ OECD, *OECD Regulatory Indicators of Regulatory Policy and Governance: Design, Methodology and Key Results*, OECD Regulatory Policy Working Papers No. 1. (OECD Publishing, 2015b) <2015 Indicators of Regulatory Policy and Governance | READ online (oecd-ilibrary.org)>

public reporting against a specified standard, as observed in other jurisdictions. A strategy could also incorporate ex-post evaluation of performance, increasing transparency and accountability to government, or better enabling regulators to learn from each other.

It is also important that regulators strive to harmonise regulations and practice with other jurisdictions in Australia and internationally, where appropriate, to reduce the cost of doing business and to facilitate both new investment in SA and export from SA.

Information request 3.4

- a) Do SA regulators currently apply a framework or process for monitoring, reviewing and improving their performance? What, if any, key performance indicators or other data do regulators currently collect to measure their performance?
- b) Are regulator performance review systems adequate in SA? Are regulators transparent when assessing and reporting on their performance?
- c) What measures or processes should the government use to assess regulator performance effectively?
- d) What steps are required to embed a culture of continuous improvement among SA's regulators?
- e) What are some recent examples of regulatory improvement initiatives undertaken by regulators?
- f) Are there examples of harmonisation of regulations or practice across Australia or opportunities to do so?

4. Regulating for the future

Targeted reforms to the state's regulatory framework offer an opportunity to improve the systems and processes for managing the flow and stock of regulations and the efficiency and effectiveness of the state's regulators. This will enhance the capacity of the state's regulatory system to protect the public interest and promote South Australia's competitiveness, generate productivity gains for the public and business sectors, and lift the state's attractiveness as a business location.

The Commission notes that enhancing the efficiency, effectiveness and competitiveness of the state's regulatory framework will require a focus on regulator practice, including regulators' governance arrangements, and on a range of issues affecting the system architecture as a whole. These include broader structural questions around the interaction and interdependence of regulators within the framework, the systems in place for developing, making and reviewing regulations, and the culture and capacity of the state's regulators.

A range of tools is available to drive improvements in regulators' practices and to enhance the effectiveness of the wider regulatory framework, including the use of independent reviews of both regulations and regulators, communities of practice to facilitate knowledge transfers between regulators, benchmarking regulators' performance, strengthening agencies' policy capabilities, and the use of monetary incentives to drive improvement. Structural reforms could involve the creation of a new institution to provide centralised regulatory oversight or a shift to a lead regulator model.

The Commission considers that deeper reforms offer the greatest prospect of realising ongoing improvements in the state's regulatory framework over the longer term. Reforms to enhance the resilience and adaptability of the state's regulatory framework will likely need to focus on strengthening the system's capacity to withstand significant market disruptions (such as the advent of Uber and the wider sharing economy), external shocks (such as the COVID-19 pandemic) and changes in technology (including AI and big data analytics). These reforms will need to be supported by further institutionalising a culture of continuous improvement within the state's regulators.

Regulation is likely to remain agile and fit for purpose only if better practice principles are embedded within the state's broader regulatory framework. The OECD notes that this requires, among other things:

- an overarching regulatory improvement policy with measurable objectives;
- clear roles and responsibilities for improving the system; and
- a transparent mechanism for monitoring and reporting progress.⁵⁶

The Commission notes that the Australian Productivity Commission (PC) recently assessed the role that various forms of regtech can play in enhancing the efficiency and effectiveness of regulation. The PC concluded that regtech solutions, including machine learning, natural language processing, data analytics and data transfer protocols and distributed ledger technology (such as blockchain), have the potential to improve regulation by increasing processing agility and the speed of reporting and monitoring, integrating technological solutions and improving the overall quality of analytics by using digital information and big

⁵⁶ See, for example, OECD, *Recommendation of the Council on Regulatory Policy and Governance* (2012).

data.⁵⁷ The possibilities (and potential risks) of regtech will likely influence strategies aimed at improving the management of regulations and enhancing the efficiency and effectiveness of SA's regulators.

The rapid emergence of new industries constitutes another challenge to the way in which regulation is designed and managed in SA. Regulation can impede innovation, not necessarily because of explicit restrictions contained in primary or subordinate legislation, but as a result of an absence of applicable regulation. New ways of doing business might not align with an existing set of regulations. Business innovation often involves new processes and application of new technology. This can increase risks, the management of which is often left to regulators using their existing regulatory frameworks. This can result in regulators being left to develop responses to innovation which can promote and enhance investment, if agile approaches are used, or discourage investment, if risk averse approaches are taken or the framework is too prescriptive.

Outcome focussed regulation, which is technology neutral, is more agile and able to respond both to new technologies and new ways of doing business. Regulation sandboxes, which are innovation hubs established to facilitate new technology or new business processes, allow new technology driven products to be tested in a safe environment in which any harm to markets or consumers can be limited and assessed.

A well-functioning and effective state regulatory framework will foster confidence in the state, lift the rate of innovation, improve competitiveness and raise productivity. The Commission's aim through this inquiry is to identify regulatory reforms that promote post-pandemic economic recovery in the short term and underpin stronger growth in the longer term.

Information request 4.

- 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 South Australia 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) What action is required to develop a regulatory system that is more adaptable, agile and future oriented?
- e) The Commission is interested in views on the extent to which South Australia's regulatory framework supports innovation in business. Are you aware of specific example of good practice?
- f) Are regulatory sandboxes a useful mechanism to support business innovation? Are there examples of the successful use of regulatory sandboxes in South Australia or areas of opportunity?

⁵⁷ Productivity Commission, *Regulatory Technology – Information Paper* (October 2020), 6.

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 sunseting 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. Inquiry - Information Requests

Information request 1

- a) The Commission is interested in gaining a better understanding of what constitutes best or better practice: what may be considered to be best practice or better practice for each stage of the regulatory life-cycle (from design and development through to implementation and ex-post review)? Please provide examples from SA or other jurisdictions where possible.

Information request 2.1

- a) Does SA have an appropriate balance between regulating through primary legislation and subordinate legislation? How does this affect the capacity of regulators to respond effectively to changing circumstances and priorities?
- b) Does SA's approach to regulatory design and development constrain innovative approaches to regulation, such as outcomes-based regulation or different types of regtech? If so, how can this be addressed?
- c) What role does local government play in the state's regulatory framework? Is it effective? How could it be improved?
- d) Are there ways of enhancing the central scrutiny functions exercised by the Legislative Review Committee?
- e) Given the acknowledged importance of ensuring that benefits to society exceed costs, are regulatory impact statements prepared frequently enough by agencies?
- f) Do regulatory policy development and implementation functions require greater separation in the SA public sector?
- g) Does the quality of regulatory impact analyses require improvement? If so, how might this be achieved?
- h) Are the objectives and expected outcomes of regulations, as outlined in the *Better Regulation Handbook*, clear and unambiguous?
- i) Are there specific examples of ineffective or inefficient regulations? Are there examples of regulations that do not have clear policy goals?
- j) How common are self-regulation and quasi-legislation in SA? Are there examples, in SA or elsewhere, of successful regulatory outcomes that have been achieved by relying on self-regulation or quasi-legislative approaches to regulation?

Information request 2.2

- a) Does South Australia's regulation expiry program assist in managing the overall stock of regulation? How could it be improved?

- b) Could the current sunset arrangements be expanded to incorporate primary legislation? What are other options for ensuring that regulatory provisions contained in primary and delegated legislation are fit for purpose?
- c) Are regulations in SA subjected to sufficiently rigorous and frequent ex-post evaluations? How are these conducted?
- d) Should the ten year timeframe applying to the regulatory expiry program be shortened? Should a decision to postpone expiry of a regulation require a full ex-post assessment?
- e) What barriers or disincentives exist to repealing or varying regulations once they exist?
- f) What are the benefits of adopting a 'stewardship' model of regulatory management? How could this be implemented in SA?

Information request 3.1

- a) What type of regulator structure would be leading practice for South Australia? Why and are there any examples? What are the key issues to consider when determining the most appropriate structure for a regulator in South Australia?
- b) Given the inquiry terms of reference, the Commission asks for suggestions on which regulators the Commission should focus on for the inquiry and why?

Information request 3.2

- a) What are the challenges and opportunities relating to the structure of regulators and the state-wide regulatory framework in South Australia and what changes to structure would improve regulatory outcomes?
- b) Provide examples in the development of regulations or in regulator practice in South Australia where economic, environmental and social objectives have been balanced to achieve sustainable development outcomes? Are there any areas for improvement?

Information request 3.3

- a) What are some specific examples of good and poor regulator practice in SA? What areas of regulator practice require the most improvement?
- b) How well do regulators work together? Are there any examples of duplication or overlapping roles between SA regulators? Between SA and other levels of government?
- c) Do regulators have the right capabilities to administer and enforce regulations effectively?
- d) Do some regulators engage with stakeholders better than others? In what ways could stakeholder engagement be improved?
- e) Are there any other issues around specific regulator practices that the Commission should look at more closely?

Information request 3.4

- a) Do SA regulators currently apply a framework or process for monitoring, reviewing and improving their performance? What, if any, key performance indicators or other data do regulators currently collect to measure their performance?
- b) Are regulator performance review systems adequate in SA? Are regulators transparent when assessing and reporting on their performance?
- c) What measures or processes should the government use, to assess regulator performance effectively?
- d) What steps are required to embed a culture of continuous improvement among SA's regulators?
- e) What are some recent examples of regulatory improvement initiatives undertaken by regulators?
- f) Are there examples of harmonisation of regulations or practice across Australia or opportunities to do so?

Information request 4

- 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 South Australia 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) What action is required to develop a regulatory system that is more adaptable, an agile and future oriented?
- e) The Commission is interested in views on the extent to which South Australia's regulatory framework supports innovation in business. Are you aware of specific example of good practice?
- f) Are regulatory sandboxes a useful mechanism to support business innovation? Are there examples of the successful use of regulatory sandboxes in South Australia or areas of opportunity?