IPART
New South Wales

Independent Pricing and Regulatory Tribunal

# IPART submission to the *Independent Review of the NSW Regulatory Policy Framework* Issues Paper

**Cross Sector — Submission to Issues Paper**
December 2016

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# Contents

# 1 Independent Pricing and Regulatory Tribunal's (IPART's) response to the Issues Paper

The regulatory policy framework should be enhanced to be fit-for-purpose and better equipped to meet the needs of our community well into the future.

**In IPART's view, there will not be real or tangible improvement to the quality of regulatory policy in NSW until:**

- **the issue of regulatory oversight and accountability is addressed, and**
- **sector-wide cultural change towards better regulation is embraced and upheld.**

## 1.1 A regulatory model that supports the cultural change required

### 1.1.1 Political leadership and an independent oversight body to lead

A successful regulatory policy framework requires strong support from both the Premier and the NSW Department of Premier and Cabinet (DPC). It also requires a 'champion' to provide political leadership and accountability for the quality of the regulatory development process. This support is necessary to drive the required cultural change throughout the NSW public service.

We recommend, at least initially, that the Premier should be this champion, to ensure the champion has sufficient authority to lead, establish and support the sector-wide cultural change that is required.

We recommend that the NSW Government appoints an independent oversight body (similar to IPART or the Audit Office of NSW)[1] to oversee and ensure compliance with best practice regulatory policy by:

- assessing the adequacy of Regulatory Impact Assessments (RIAs)[2], and
- guiding and assisting agencies[3] to undertake adequate RIAs before regulatory proposals proceed to Cabinet or the Executive Council.

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1 The oversight body should be established to be independent of the NSW Government, similar to the way in which IPART and the Audit Office of NSW have been established.

2 Within this submission we use 'RIAs' to cover both Better Regulation Statements under the *NSW Guide to Better Regulation* and Regulatory Impact Statements under the *Subordinate Legislation Act 1989* (NSW).

3 Within this submission, we use 'agencies' to refer to NSW Government agencies, departments and regulators.

We also recommend that the independent oversight body maintains a central portal to publish RIAs and its assessment of the adequacy of RIAs.[4]

Recommendations

1 That the NSW Government:

- allocates responsibility for the quality of the regulatory development process to the Premier, and
- establishes an independent oversight body, to implement and undertake an adequacy assessment process for all RIAs, and to promote, educate, oversee and report on compliance with best practice regulatory policy.

### 1.1.2 Ensuring best practice RIAs

RIAs are currently required for new and existing regulatory proposals. We recommend that the independent oversight body assess the adequacy of RIAs accompanying Bills, Regulations and other significant regulatory instruments. A regulatory proposal would not proceed to Cabinet, or to the Executive Council, unless the accompanying RIA is adequate.[5]

In our view all RIAs, for new and existing regulation, should be subject to an assessment of adequacy by the independent oversight body. In order to promote accountability, transparency and incentivise best practice, we recommend the following:

- The independent oversight body's assessment of an RIA's adequacy should be provided to the Legislation Review Committee.
- In exceptional circumstances, agencies would be able to apply (via the relevant portfolio minister) and provide justification to the independent oversight body for an exemption from the requirement to undertake an RIA. Unless an exemption is granted by the independent oversight body, then an RIA would be required and would be assessed for adequacy.

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4 Our recommended model is largely consistent with the model that we recommended in our **2006 Red Tape Review** with the exception of who should be the champion and where the oversight body should be situated. In 2006 we recommended that the Minister for Regulatory Reform be the champion and that the oversight body be situated in a central government agency. We now recommend that the Premier be the 'champion' and the oversight body be an independent body. The NSW Government adopted our 2006 recommendation to establish a 'Better Regulation Office' (BRO). In our view, the BRO was not effective due to its lack of independence, inadequate resourcing and ineffective 'championing' within Government. IPART, *Investigation into the burden of regulation in NSW and improving regulatory efficiency – Final Report*, October 2006 (**2006 Red Tape Review**), pp 48-59, 64.

5 We previously recommended this in our **2006 Red Tape Review**, pp 56-59.

- The independent oversight body's decision on whether an exemption has been granted (along with the justification provided) would be made publicly available and provided to Cabinet or the Executive Council. It would also be provided to the Legislation Review Committee.[6]
- In cases where an exemption is granted, an RIA and RIA adequacy assessment process has not been undertaken or the RIA is assessed as inadequate, and the regulatory changes are made, a post-implementation review would be undertaken. The independent oversight body would undertake the review and make this publicly available.
- In exceptional circumstances, eg, where regulatory proposals are to be urgently considered by Cabinet, agencies would be able to apply for a fast-tracked RIA adequacy assessment.
- RIAs and RIA adequacy assessments would be proportionate to the potential impacts of the regulation.[7]
- RIAs and RIA adequacy assessments would be made publicly available, including all relevant economic modelling used in support of an RIA.[8]

Under our proposed model, the absence of an adequate RIA or an exemption would not prevent a Bill from being tabled in Parliament. It is not appropriate to impose this requirement on Parliament. However, requiring transparency around this process would incentivise compliance with RIA requirements for principle and amending Bills.

For subordinate legislation (eg, Regulations, Rules, By-laws), we do not have the same concern, as responsibility for this is delegated to agencies. Therefore we recommend that an adequate RIA (or an exemption granted by the independent oversight body) be a precondition of subordinate legislation proceeding to the Executive Council.

### Recommendations

2 That in exceptional circumstances, agencies could apply (via the relevant portfolio Minister) to the independent oversight body for:

  – an exemption to the requirement to undertake an RIA, or

  – a fast-tracked RIA adequacy assessment.

  The independent oversight body would publicly report on exemptions granted and fast-tracked RIA adequacy assessments.

3 That RIAs undertaken by agencies and RIA adequacy assessments undertaken by the independent oversight body be proportionate to the potential impacts of the regulation.

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6 See Appendix A, response to question 1 (and our Recommendation 9).
7 See Appendix A, response to question 7.
8 See Appendix A, response to question 21.

4 That the independent oversight body makes RIAs (including all relevant economic modelling used in support of an RIA), RIA adequacy assessments and exemptions publicly available via a central online portal.

### 1.1.3 Building capacity to facilitate change and progress

Oversight by the Premier and the independent oversight body would facilitate cultural change and better regulation in NSW by:

- acting as a champion for the quality of regulatory policy
- assisting, overseeing and reporting on compliance with best practice regulatory policy, and
- assessing the adequacy of RIAs accompanying new and existing regulation.

#### Independent oversight body

Successful implementation of the independent oversight body that efficiently achieves better regulation would include:

- a transparent and accountable structure
- processes that provide incentives to comply with best practice guidance, and
- a mechanism for continual feedback and improvement.

The independent oversight body would also need to be appropriately resourced with the right mix of skills and capabilities to:

- develop meaningful and practical guidance
- provide adequate (and where possible, proactive) training and advice to agencies
- develop and undertake RIA adequacy assessments, and
- deliver feedback and support agencies in addressing feedback.

Additionally, agencies would have the option to commission the independent oversight body to undertake RIAs on a fee-for-service basis.

#### Parliamentarians and agencies

One of the independent oversight body's key roles would be to promote, educate, oversee and report on compliance with best practice regulatory policy. In undertaking this role, the independent oversight body would help to facilitate cultural change across the NSW public service and regulatory policy landscape.

Making RIA adequacy assessments publicly available (via a central online portal) would facilitate greater transparency and accountability. It would provide a reputational incentive for Parliamentarians and agencies to comply with best

practice guidance and adopt the necessary culture and capabilities. However, a phased approach would likely be required to allow time for the right culture and mix of capabilities to be developed. A period of 'growing expertise' would allow time to undertake the necessary upskilling/capacity building.

At present, new Parliamentarians participate in an induction process.[9] Given the significant role that Parliamentarians, in particular Ministers, play in developing regulatory policy, we consider that training on best practice regulation and requirements for RIAs should be provided as part of this induction process. The independent oversight body should be available to provide this training.

We also support development of capacity within agencies. This would include developing economic expertise within agency clusters to undertake RIAs and the independent oversight body providing training and guidance to agencies.

In order to promote and facilitate cultural change, the Premier (initially as champion) and DPC would need to support and drive the enhanced regulatory policy framework throughout the NSW public service.

### Recommendations

5 That the NSW Government ensures training on best practice regulation and requirements for RIAs is provided as part of the induction process for new Parliamentarians.

6 That the independent oversight body provides training and guidance to agencies and Parliamentarians on current and emerging best practice approaches to regulation, as required.

## 1.2 Address recommendations from previous reviews

The proposed model would also incorporate a sound and responsive process for review of regulation, to facilitate regular review, as well as identification and prioritisation of specific areas of regulation that require review. Review of regulation should consider whether there is an ongoing need for government intervention (regulation should be used as a last resort), whether an alternative approach could address the issue, and where regulation is necessary, that it is proportionate to the risk being addressed.

9 Department of the Legislative Council, *New South Wales Legislative Council Member's Guide*, 2015, pp 66-67.

IPART has undertaken a number of previous reviews on improving regulatory policy in NSW, including our **2006 Red Tape Review**, **2014 Licensing Review**, **2014 Tow Trucks Review**, **2014 Local Government (LG) Enforcement Review** and **2016 LG Regulatory Burdens Review**.[10]

A number of recommendations from these reviews have not been addressed. For example:

- Our Final Reports from our **2014 LG Enforcement Review** and **2016 LG Regulatory Burdens Review** have not yet been made publicly available.
- In our **2014 Tow Trucks Review** a number of regulatory amendments were recommended to reduce red tape and received NSW Government support. However, to date, only the fee change recommendation has been implemented.

Other State and federal bodies have also undertaken reviews in this area, in particular the Productivity Commission.

Recommendations

7 That the NSW Government takes IPART's previous reviews into account as a part of any regulatory review or staged repeal process of relevant Acts, Regulations or other significant regulatory instruments.

## 1.3 Responses to specific questions raised in the Issues Paper

In Appendix A of this submission, we have provided responses to specific questions raised in the Issues Paper. It should be noted, we consider that many of our recommendations are likely to be ineffective unless the issue of regulatory oversight and accountability is addressed and sector-wide cultural change embraced.

## 1.4 Recommendations

Our recommendations are listed below, in the order they appear and are discussed in this submission.

Recommendations



[10] IPART, *Reforming licensing in NSW – Review of licence rational and design* (2014) - **2014 Licensing Review**; IPART, *Review of local government enforcement and compliance* (2014) - **2014 LG Enforcement Review**; IPART, *Review of Tow Truck Fees and Licensing in NSW* (2014) - **2014 Tow Trucks Review**; IPART, *Review of reporting and compliance burdens on Local Government* (2016) - **2016 LG Regulatory Burdens Review**.

# Appendix A

# A Responses to specific Issues Paper questions

## A.1 Current regulatory policy arrangements in NSW – Legislative arrangements and guidelines

**Issues Paper question 1:**

Are the *Legislation Review Act 1987* (NSW) and *Subordinate Legislation Act 1989* (NSW) critical to ensuring better regulation practices in NSW? If not, why?

### Response to question 1

In our view, a legislative framework for best practice regulatory development is critical to ensuring better regulation practices.[11] However, we consider the current legislative framework needs to be improved to be more effective.

Consistent with our **2006 Red Tape Review** we recommend that the NSW Government amends the *Subordinate Legislation Act 1989* (NSW) to:

- require RIAs for Bills (principal and amending), as well as Regulations (principal and amending) and other enforceable regulatory instruments (eg, operating licences) likely to impose a significant impact(s)
- allow RIAs to be proportionate to the potential impacts of the regulation
- extend the standard consultation period for new regulatory proposals from 28 days to 42 days, and
- require Acts, Regulations and other significant regulatory instruments to be regularly reviewed – every five years, with a maximum of five annual postponements.

One of the current roles of the Legislation Review Committee is to consider whether the RIA requirements of the *Subordinate Legislation Act 1989* (NSW) have been complied with in relation to Regulations. However, the Committee's review occurs at the end of the regulatory development process, once a Regulation is gazetted and tabled in Parliament; and its expertise and focus relates to legal issues, rather than an assessment of the adequacy of RIAs from an

[11] In our **2006 Red Tape Review** and **2014 LG Enforcement Review** we considered the role of the *Legislation Review Act 1987* (NSW) and *Subordinate Legislation Act 1989* (NSW) in achieving better regulation.

economic point of view.[12] As a result, we favour this 'gatekeeping' role being given to the independent oversight body.

Further, consistent with our **2014 LG Enforcement Review** we recommend giving statutory force to the *NSW Guide to Better Regulation* (the Guide), [13] either through amendment to the *Subordinate Legislation Act 1989* (NSW) or incorporation in to a new replacement Act.

In our view, the current legislative framework should also be amended as follows:

- Remove current overlaps and inconsistency between the *Subordinate Legislation Act 1989* (NSW) and the Guide.
- Remove the current role of the Legislation Review Committee of considering whether the RIA requirements of the *Subordinate Legislation Act 1989* (NSW) have been complied with in relation to Regulations, and give this role to the independent oversight body. However, there should be a requirement that a copy of the independent oversight body's RIA adequacy assessment accompany the regulation to be considered by the Committee.

### Recommendations

8 That the NSW Government amends the *Legislation Review Act 1987* (NSW) and *Subordinate Legislation Act 1989* (NSW) and/or creates a new Act to:

- incorporate the *NSW Guide to Better Regulation* (the Guide), and remove current overlaps and inconsistencies between the Guide and the *Subordinate Legislation Act 1989* (NSW)
- require RIAs to be proportionate to the potential impacts of the regulation
- extend the standard consultation period from 28 days to 42 days, and
- require all Acts, Regulations and other significant regulatory instruments to be reviewed every five years, with a maximum of five annual postponements.

9 That the NSW Government removes the requirement for the Legislation Review Committee to consider compliance with the RIA requirements in relation to Regulations. The independent oversight body would undertake this role and provide its RIA adequacy assessment to the Committee.

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12 The Legislation Review Committee has an expert legal panel, but not an expert economic panel. The Committee does not routinely comment on whether the RIA requirements have been complied with in its reports to Parliament – see the Legislation Review Digests at: https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=245, accessed on 28 November 2016.

13 Whilst maintaining flexibility in terms of what is stated in the Guide, to ensure it can be updated to reflect best practice as it continues to evolve.

**Issues Paper question 2:**

Are the principles in the Guide to Better Regulation appropriate, and can they be improved?

## Response to question 2

While the principles in the Guide are generally appropriate, we recommend improvements to the Guide.

The Guide was recently amended to incorporate IPART's Licensing Framework and Licensing Guide[14] requirements for regulatory proposals that introduce or amend a licence (developed in our **2014 Licensing Review**). This was in response to one of the key recommendations we made in that Review.

In our view, to ensure consistent application of the Guide, the new independent oversight body should provide further guidance and training for agencies implementing regulation.

Consistent with our **2014 LG Enforcement Review** and **2016 LG Regulatory Burdens Review,** we recommend that in relation to developing regulations involving regulatory or other responsibilities for local government, the Guide should be revised to include requirements for the agency to:

- consider whether a regulatory proposal involves responsibilities for local government
- clearly identify and delineate State and local government responsibilities
- consider the costs and benefits of regulatory options on local government
- assess the capacity and capability of local government to administer and implement the proposed responsibilities, including considering adequate cost recovery mechanisms for local government
- collaborate with local government to inform development of the regulatory proposal
- if establishing a jointly provided service or function, reach agreement with local government as to the objectives, design, standards and shared funding arrangements, and
- develop an implementation and compliance plan (see Box A.1 below).

[14] PricewaterhouseCoopers (PwC), *A best practice approach to designing and reviewing licensing schemes*, and *A best practice approach to designing and reviewing licensing schemes – Framework and Guidance material*, 2013 (Licensing Framework and Licensing Guide).

**Box A.1 Implementation and compliance plans**

Each implementation and compliance plan should:

- clearly define roles and responsibilities of councils and State Government
- align State agency operational boundaries with local government areas to best enable coordination between councils and State Government, and efficient delivery of services or regulatory functions to the community
- set out proposed structures for ongoing consultation and partnership arrangements with councils, to ensure coordination between the two tiers of government
- identify the regulatory or other tools and infrastructure to be provided by the State Government to councils (eg, registers, databases, portals or online facilities, standardised or centralised forms, inspection checklists, templates for orders/directions, etc)
- identify the use of best practice approaches, such as risk-based enforcement, at the local government level
- set out mechanisms for recovering councils' efficient regulatory costs (eg, fees, charges, debt recovery, funding arrangements, hypothecated revenue, etc)
- identify the training or certification needs of councils to undertake their responsibilities and how this would be met
- set out how councils' regulatory or service performance would be efficiently monitored and reported on, and ensure such reporting requirements are targeted, utilised and not unnecessarily burdensome, and
- provide review mechanisms or procedures for the implementation and compliance plan.

We support the principles in the Guide, subject to these improvements and giving statutory force to the principles (ie, by incorporating the Guide into the *Subordinate Legislation Act 1989* (NSW) or a new replacement Act – see our response to question 1 above).

### Recommendations

10 That the NSW Government:

- gives statutory force to the principles in the *NSW Guide to Better Regulation*, and
- updates the *NSW Guide to Better Regulation* to specifically consider the impacts of regulations on local government.

11 That the independent oversight body provides training to agencies on using the Guide and further guidance on implementing regulation.

## A.2 Current regulatory policy arrangements in NSW – Institutional arrangements

**Issues Paper question 3:**

What model of regulatory oversight would work best in NSW? If a central oversight body is called for, which agency should be responsible for it? Is there a case for more decentralised oversight within agencies? Why or why not?

### Response to question 3

As discussed in section 1.1, we favour using an independent oversight body, to undertake oversight and gatekeeping functions in relation to the quality of regulatory policy development and impact assessment. See our Recommendation 1.

We do not support use of a central oversight body located in a central agency. In our view, part of the reason why the Better Regulation Office was not effective was due to its lack of independence. It was also inadequately resourced and ineffectively 'championed' within the NSW Government.

We also do not support greater decentralisation of the oversight function within agencies. This is likely to weaken accountability. However, we would support development of capacity within agencies. This would include developing economic expertise within agency clusters to undertake RIAs and the independent oversight body providing substantial training and guidance to agencies. As discussed in section 1.1, we also support the independent oversight body publishing RIAs via a central online portal, and publicly reporting on the adequacy of RIAs.

Recommendations

12 That the NSW Department of Premier and Cabinet oversees the development of capacity within agencies, at a cluster level, to undertake adequate RIAs.

## A.3 Current regulatory policy arrangements in NSW – Regulatory impact assessments

**Issues Paper question 4:**

In your experience, how effective are RIAs in informing policy decisions? How can RIAs be further improved?

### Response to question 4

In our **2006 Red Tape Review**, we found that existing NSW statutes and guidelines for developing and implementing regulation were not being applied consistently. Sound regulatory impact analysis is the single most effective tool to inform decision-makers, and promote efficient and effective regulation. As such, RIAs could be improved in a number of ways.[15]

#### Improve oversight and guidance

As indicated in section 1.1, we consider that the independent oversight body would assist in improving the quality of RIAs.

We consider that the Guide could be improved by considering the impact that State regulation has on local government.[16] This could also improve the quality of RIAs undertaken.

We also consider that establishing better regulation principles with a statutory basis (as recommended in our response to question 1 above) should result in general improvements to the RIA process. This would help eliminate and prevent the creation of red tape by:

- improving the level of commitment by Ministers and NSW Government agencies to the RIA process, and
- strengthening the regulation-making processes by having one set of clear and cohesive requirements.

#### Improve culture and incentivise better compliance with best practice

In our **2006 Red Tape Review** we noted that anecdotal evidence suggests that attitudes and resources applied to developing, administering and reviewing

15 **2006 Red Tape Review**, pp 45-48.
16 See our response to question 2.

regulation differ considerably across departments and agencies.[17] We consider that a top-down cultural change is required.

In particular, the rationale, objectives and scope of a regulatory proposal should be considered early in the policy development process. Currently this often occurs too late in the process. In order to support and facilitate this, RIAs should be initiated early in the policy development process and developed as part of that process, as opposed to being undertaken at the end of the process.

In our **2006 Red Tape Review** we also commented on the lack of incentives to objectively consider alternatives to regulation, complete a robust RIA process, or engage in timely, effective consultation with stakeholders.[18] In our **2014 LG Enforcement Review** we considered that publishing RIA adequacy assessments would lead to better compliance. Requiring RIAs and RIA adequacy assessments to be made publicly available (as in our Recommendation 1, and as recommended in the **2016 Audit Office Report**[19]) is likely to provide regulators and agencies with a reputational incentive to comply with best practice guidelines, including considering alternative options.

### Recommendations

13 That agencies be required to initiate RIAs early in the policy development process, and develop RIAs as part of that process.

17 **2006 Red Tape Review**, p 48.
18 **2006 Red Tape Review**, p 48.
19 Audit Office of New South Wales, *New South Wales Auditor-General's Report – Performance Audit – Red Tape Reduction*, August 2016 (**2016 Audit Office Report**), p 5.

**Issues Paper question 5:**

Do regulatory agencies adequately consider the cost and benefits of regulation for business, consumers and the community? Please provide specific examples, if you can.

## Response to question 5

### Examples of how IPART has assessed costs and benefits of regulation

When we recommend regulation through operating licences, we subject them to cost-benefit analysis. For example, IPART considered the cost and benefits of regulation through application of the Licensing Framework and Licensing Guide to the licences that we administer (eg, when undertaking the Hunter Water operating licence assessment, LPG distributor licence assessment).

We also undertake cost-benefit analysis of certain recommendations in special reviews that the Premier asks us to undertake. In our **2014 LG Enforcement Review** and **2016 LG Regulatory Burdens Review**, we identified costs to the community at large, and costs to the State for specific industry areas (eg, building, planning, and transport). We considered administrative, compliance and delay costs, as well as fees and charges. However, for our **2016 LG Regulatory Burdens Review**, many local councils were unable to provide robust data on the costs of regulation. In our 2016 review of **multi-peril crop insurance**, we undertook a cost-benefit analysis of the proposed measures to increase uptake of insurance.

In costing recommendations, many costs can be difficult to quantify. To overcome this, better use could be made of qualitative assessments of costs and benefits in the absence of quantitative data.

### Example of costs and benefits of regulation inadequately assessed

The Urban Water Regulation Review RIA for the *Water Industry Competition Act 2006* (NSW) (WIC Act) review compared the scope of the proposed amended framework to the existing framework. By restricting the RIA to only the scope change the amendments compared favourably to the current legislation. However there were also substantial amendments to the framework itself, and there was no comparison of the individual cost to licensees which would increase significantly. The costs and benefits to businesses or the regulatory agency were not adequately considered. The scope change to the WIC Act was assessed rather than the impact to individual licence holders and the regulator.

### Update guidance material on measuring costs of regulation

The proposed independent oversight body should update the existing NSW Government guidance: *Measuring the Costs of Regulation*[20]. We recommend it be updated to:

- Reflect *The Australian Government Guide to Regulation*[21] and the *Regulatory Burden Measurement Framework guidance note*[22]. In particular, to specify:
  - that when considering the costs and benefits of regulation, the net benefits of the proposed policy option and alternative options (including maintaining the status quo) should be considered, and
  - the steps which should be followed in assessing the likely net benefit of each option.
- Provide guidance on assessing benefits and costs consistently including for environmental impacts and physical harm (eg, injury, death) (see the *Environmental Valuation and Uncertainty guidance note*[23] and *Best Practice Regulation Guidance Note: Value of statistical life*[24]).
- Include guidance on qualitative assessments of costs and benefits in the absence of quantitative data.

#### Recommendations

14 That the independent oversight body updates the existing NSW Government guidance: *Measuring the Costs of Regulation* to:
   - reflect *The Australian Government Guide to Regulation* and the *Regulatory Burden Measurement Framework guidance note*
   - provide guidance on assessing benefits and costs consistently including for environmental impacts and physical harm (eg, injury, death), and
   - include guidance on qualitative assessments of costs and benefits in the absence of quantitative data.

20 NSW Department of Premier and Cabinet, *Measuring the Costs of Regulation*, June 2008.
21 Australian Government, *The Australian Government Guide to Regulation*, 2014.
22 Australian Government, *Regulatory Burden Measurement Framework guidance note*, February 2016.
23 Australian Government, *Environmental Valuation and Uncertainty guidance note*, 2016.
24 Australian Government, *Best Practice Regulation Guidance Note: Value of statistical life*, 2014.

**Issues Paper question 6:**

How can regulatory agencies better consider, consult and communicate the impacts of regulation? Please provide specific examples, if you can.

### Response to question 6

In our **2006 Red Tape Review**, stakeholders noted that the consultation that occurs when regulation is being developed is often inadequate.[25] Consistent with that review, we recommend that:

- the independent oversight body further develop current consultation and communication policy to improve transparency and effectively communicate with stakeholders
- the standard RIA consultation period, set out in the *Consultation Policy*[26], be extended from 28 to 42 days (as recommended in our response to question 1)
- the independent oversight body make the RIAs (and the adequacy assessments) publicly available, as set out in our Recommendations 1, 2 and 4.

Publishing RIAs and RIA adequacy assessments (or instances of non-compliance with RIA requirements) would increase transparency. It may also lead to better compliance with the Guide and improved quality of analysis.

In response to recommendations in the **2016 Audit Office Report**, the NSW Government is considering establishing a central repository for records of significant regulatory assessments.[27] We support this move towards improving transparency and accessibility.

We also consider that establishing the Premier as the champion for the quality of regulatory policy, and the establishment of the independent oversight body would also assist in helping agencies better consider, consult on and communicate the impacts of regulation (see section 1.1).

IPART has a strong process of engaging with stakeholders through our review processes. Throughout the course of an IPART review, stakeholders are given multiple opportunities to engage with key issues or questions and provide input into IPART's analytical process.

In developing its regulatory policy (including in preparing the RIA) the relevant agency, should:

25 **2006 Red Tap Review**, p 46.
26 NSW Government, **Consultation Policy**, November 2009.
27 **2016 Audit Office Report**, p 27.

- engage with stakeholders throughout the policy development process, including early in the process
- appropriately target stakeholders (eg, consult with affected agencies or local government, as well as regulated entities to ensure ample opportunity for stakeholders to determine how new regulation would be implemented and managed on a day-to-day basis – failure to do this may result in unforeseen increased burden on an affected agency or councils), and
- undertake engagement in a variety of forms in a clear, concise and widely accessible manner (eg, available online).

Where appropriate, stakeholder engagement could include:

- making relevant reports/RIAs publicly available and easily accessible, ideally from a central portal
- conducting public hearings and/or interactive and collaborative workshops
- utilising social media eg, for important announcements
- conducting web forums/webcasts (this may be particularly useful if stakeholders are located across NSW)
- using online surveys (eg, via Have Your Say), and
- lodging online submissions.

Agencies should consider the cost and likely benefits of different methods of engagement.

### Update the *Consultation Policy*

The proposed independent oversight body should update the existing *Consultation Policy*. This policy appears dated when compared to the Australian Government *Best Practice Consultation guidance note*[28], and policies in other jurisdictions (eg, the Victorian Department of Education and Early Childhood Development and the Australian Government Department of Health have each developed a stakeholder engagement framework which includes a set of engagement principles and a process guide).

#### Recommendations

15 That the independent oversight body updates the existing *Consultation Policy* to reflect best practice consultation and communication policy.

28 Australian Government, *Best Practice Consultation guidance note*, 2016.

**Issues Paper question 7:**

Should there be a tiered approach for RIA depending on the significance of the regulatory proposal? If so, who in Government should determine if a proposal is of low, medium or high significance? What requirements should apply for each level?

## Response to question 7

Linking the requirements of an RIA to its level of significance is appropriate. This approach allows the NSW Government to focus its resources on areas of greatest impact. As such, we support a move to using a tiered approach to RIAs.

### Determining the level of significance

Determining whether the level of significance of a regulatory proposal is low, medium or high requires judgement. It is difficult to set specific monetary values for each level as this data is not often available, particularly prior to a proposal's implementation. This means that subject matter expertise is required to appropriately determine the potential impacts of a proposal.

For this reason we recommend that the lead agency responsible for the regulatory proposal should also be responsible for the initial assessment of significance. This assessment would then be confirmed or overruled by the independent oversight body.

To assist agencies in determining the level of significance, the independent oversight body would develop a standardised assessment process and criteria guidelines. This would enhance consistency. The Licensing Framework and Licensing Guide is an example of this standardised assessment process in practice. In order to ensure that all agencies are applying the guidelines consistently, we recommend that the independent oversight body also be responsible for evaluating agencies' assessments of their proposals significance. This process should be modelled on the method used by the Office of Better Practice Regulation (OBPR) at the federal level.[29]

### Requirements for proposals with different levels of significance

Box A.2 below outlines a set of possible requirements for RIAs by level of significance.

[29] Australian Government, Department of Prime Minister and Cabinet, Office of Best Practice Regulation, *Developing a regulation impact statement*, https://www.dpmc.gov.au/regulation/developing-regulation-impact-statement, accessed 5 December 2016.

**Box A.2 RIA requirements by level of significance**

- Low – Initial or preliminary assessment sufficient with limited or no public consultation required (eg, a short-form impact assessment tool as outlined in question 9).
- Medium – Full RIA process without compulsory public consultation but including targeted consultation (eg, with regulated parties).
- High – Full RIA process including appropriate (eg, broad and targeted) public consultation.

Recommendations

16 That the RIA process becomes a tiered system with higher analytical requirements for regulatory proposals of greater significance.

17 That the independent oversight body develops a standardised assessment process and criteria guidelines for determining a proposal's significance. All NSW Government agencies would use these guidelines when determining a proposal's significance.

18 That the lead agency for a proposal be responsible for the initial determination of the proposal's significance. This determination should then be confirmed or overruled by the independent oversight body.

**Issues Paper question 8:**

Are there existing exemptions from RISs or the Better Regulation requirements that should be reconsidered? Should there be new additional exemptions? Should there be specific requirements for exemptions (either for a category of regulations or specific exemptions) such as a post-implementation review?

### Response to question 8

Unless there are exceptional circumstances, exemptions from RIAs where there is a significant regulatory impact should not be available as they weaken the overall effectiveness of the process.

However, we recommend that the existing exemptions, as listed on page 9 of the *NSW Guide to Better Regulation*, be maintained. These exemptions are either for relatively minor issues where the regulatory impact is not significant, such as standard fee increases or cover proposals that have already had an independent body assess their merits (as listed on page 9 of the *NSW Guide to Better Regulation*). Removing these exemptions would not substantially improve the quality of regulation in NSW and would increase regulatory cost.

As set out in Recommendation 2, we recommend that there be a fast-track process for RIA adequacy assessments in exceptional circumstances to ensure timely responses to time urgent policy changes.

In order to be granted fast-tracking, the relevant portfolio minister would be required to apply in writing to the independent oversight body outlining the reasons why the fast-track is necessary. If granted, the independent oversight body would work closely with the relevant agency to conduct a streamlined RIA adequacy assessment.

If a complete exemption from the RIA process is sought, the relevant portfolio minister would need to apply, in writing, to the independent oversight body outlining why an exemption is required. The independent oversight body would then assess this rationale and make a determination on whether to grant an exemption, and be required to specify the reasons why the exemption has or has not been granted.

If an exemption were not granted, the independent oversight body would publish its decision, including the reasons for not granting the exemption. This information would be provided to Cabinet or the Executive Council with the regulatory proposal. It would also be provided to the Legislation Review Committee with the relevant regulatory proposal.

Recommendations

19 That the existing exemptions outlined on page 9 of the *NSW Guide to Better Regulation* be maintained.

**Issues Paper question 9:**

Should a short-form impact assessment tool be developed instead of, or in addition to, the current RIA processes?

### Response to question 9

IPART supports taking a risk-based approach to regulation. We have made a number of recommendations to incorporate risk-based elements into current regulation, including in our **2014 Licensing Review**.

We consider that a short-form assessment tool would supplement the current RIA process. This tool would assist agencies in understanding the potential risk and impact of a regulatory proposal at an early stage and enable agencies to concentrate their resources into higher risk proposals.

For low significance regulatory proposals, we consider that this short-form impact assessment tool should count as the RIA process. This would allow agencies to focus their resources on higher significance regulatory proposals.

We recommend that this short-form assessment process be modelled on the OBPR's preliminary assessment process.[30]

#### Recommendations

20 That a short-form impact assessment, based on the *Australian Government Preliminary Assessment Form* be developed by the independent oversight body. For low significance regulatory proposals this assessment would satisfy the RIA requirement.

[30] See https://www.dpmc.gov.au/resource-centre/regulation/australian-government-ris-preliminary-assessment-form-ris-required, accessed 5 December 2016.

**Issues Paper question 10:**

What other steps should the Government take to encourage best practice across the policy development, decision-making and implementation process?

## Response to question 10

### Improve oversight and guidance

The model of regulatory oversight in our Recommendations 1, 2 and 4, would encourage best practice across the policy development, decision-making and implementation process.

We also recommend that regulatory performance measures and RIA adequacy assessments be transparently published by the independent oversight body to help incentivise compliance with best practice guidelines.

Regulatory policy development, decision-making and implementation practices should be evidence-based and transparent. The rationale for, and objectives of proposed regulation must be clear. Agencies should undertake RIAs alongside the policy/regulation development process, as opposed to at the end of the process.

We also support and encourage the use of the Licensing Framework and Licensing Guide, as an example of outcomes and risk-based regulation, which now forms part of the Guide. In particular, we support the principle raised in the Licensing Guide that regulation should be used as a last resort, and that where regulation is necessary, it should be proportionate to the risk being addressed.

We also recommend (in section 1.1.3) that the independent oversight body updates and improves available guidance and undertakes a training and development role to facilitate cultural change and develop the right mix of capabilities.

### Other approaches

Where appropriate, the NSW Government could collect big data to develop an evidence-base to inform regulatory policy development. This could help to more transparently identify priorities and better inform policy development, decision-making, and outcomes and impacts of regulatory policy.

Co-design and collaboration approaches are likely to help inform policy development and decision-making, and better engage and inform stakeholders. However, the risk of regulatory capture may be higher using these approaches.

## A.4 Current regulatory policy arrangements in NSW – Regulatory reviews and sunsetting

**Issues Paper question 11:**

Do the existing arrangements for staged repeal of regulations after five years meet the objective of keeping laws and regulations up to date and relevant? Would more or less frequent periodic reviews be more appropriate? How might the mechanisms for developing and reviewing regulation and legislation be improved?

### Response to question 11

Consistent with our **2006 Red Tape Review,** we recommend:

- the existing staged repeal of Regulations after five years, with a maximum of five annual postponements, subject to varying the grounds for postponing the automatic repeal of a statutory rule to include where a post-implementation review has already been undertaken
- implementing ongoing periodic reviews for Acts of Parliament – currently new Acts include a provision for the Act to be reviewed five years after its assent – amending Acts should include a further review within a 5-10 year period
- agencies developing more robust performance monitoring and public reporting against policy objectives of regulations (ie, regulatory performance indicators), and
- greater use of post-implementation reviews for regulations that are contentious or have potentially significant impacts (the arrangements for which should be set out in the initial RIA).

In our experience, more frequent reviews are often not effective or warranted (as it takes time to gain experience and insight into the workings of new or amended regulation). In addition, the costs and disruption (ie, to people who are impacted by the regulation) imposed by more frequent reviews are unlikely to outweigh the benefits of potential changes, except in exceptional circumstances.

#### Recommendations

21 That the staged repeal of Regulations after five years continue, with a maximum of five annual postponements, subject to including as a ground for postponement the undertaking of a post-implementation review.

22 That a review clause be included in all amending Acts (not just new Acts).

**Issues Paper question 12:**

Is a shift in focus from RIAs to greater emphasis on post-implementation monitoring/reviews warranted?

### Response to question 12

The **2016 Audit Office Report** demonstrates the value of post-implementation reviews) in understanding the true impact of a regulatory proposal. Only after a proposal's implementation can its impact be measured accurately.

We recommend that post-implementation reviews should be undertaken by the independent oversight body. Regulatory proposals which were initially assessed as being highly significant, or that did not undergo an initial RIA process, should undergo a post-implementation review within five years of their implementation to test:

- whether the regulation achieved its policy goals
- whether government action was justified
- if alternative policy options would have worked better, and
- the actual impacts of the regulation.

Any post-implementation review should be conducted prior to the mandated five year periodic review required under the *Subordinate Legislation Act 1989*. The findings of the post-implementation review should be used to inform this review and any required changes to the regulation.

A public post-implementation review process is a useful tool for assessing the NSW Government's past regulatory performance and improving processes for future reforms. However, resources spent on conducting a post-implementation review should not come at the expense of the formal RIA process conducted prior to a regulatory proposal's implementation.

#### Recommendations

23 That regulatory proposals that have been assessed as highly significant or have not undergone an RIA, be subject to a post-implementation review (undertaken by the independent oversight body) within five years of implementation.

**Issues Paper question 13:**

What industries or sectors should the Government focus on for targeted reviews, and why?

### Response to question 13

It is essential to put in place an effective framework and regulatory model (see our Recommendations 1, 2, 3 and 4) that incorporates a sound and responsive process for review of regulation and which identifies and prioritises specific regulation that requires review.

Reviews of regulation should consider whether there is an ongoing need for government intervention and the principle that regulation should be used as a last resort.[31] In addition, agencies should consider whether an alternative approach could address the issue.

Reviews of regulation are also likely to vary in scale, scope and context, and should be proportionate to the risk being addressed. For some reviews, a broader context than just the specific area of regulation may need to be considered.

In the context of undertaking our work at IPART, we are often exposed to regulatory areas that would benefit from a targeted review, as they suffer from a lack of clarity and/or are exposed to jurisdictional overlaps. We outline some of these areas below. As indicated in section 1.2, and Recommendation 7, we recommend that the NSW Government considers the recommendations of our previous reviews.

#### Areas previously recommended for targeted reviews

Our **2016 LG Regulatory Burdens Review** identified local government regulation of water utilities as an area that warrants a focused review. We recommended that the Department of Primary Industries Water (DPI Water) regulate Local Water Utilities (LWUs) on a catchment or regional basis, rather than on an individual LWU basis, using a whole-of-government, risk-based and outcomes-focused regulatory approach.

We also recommended that the requirements in the *Local Government Act 1993* for Ministerial approvals be reviewed and any that are not justified on the basis of corruption prevention, probity or protecting the interests of the State be removed.

[31] This is a principle that should be considered under the Licensing Framework and Licensing Guide.

As stated in our **2014 LG Enforcement Review** we recommended that the:

- *Local Government Act 1993* (NSW) be reviewed and amended in consultation with councils to:
  - remove duplication between approvals under the *Local Government Act 1993* (NSW) and other Acts, including the *Environmental Planning & Assessment Act 1979* (NSW) and *Roads Act 1993* (NSW) in terms of: footpath restaurants; installation of amusement devices; installation and operation of manufactured homes; stormwater drainage approvals
  - allow for longer duration and automatic renewal of approvals, and
  - provide more standard exemptions or minimum requirements from section 68 approvals, where possible, in areas such as: footpath restaurants; A-frames or sandwich boards; skip bins; domestic oil or solid fuel heaters; busking; set up, operation or use of a loudspeaker or sound amplifying device and deliver a public address or hold a religious service or public meeting.

As stated in our **2014 Licensing Review** we recommend that the NSW Government should review the 'Top 40' reform priority licences (specified in our **2014 Licensing Review** Final Report) using the Licensing Framework and Licensing Guide. We also recommend the following licences be reviewed against the Licensing Framework and Licensing Guide:

- Registered fish receiver licence.
- Farm milk collector's licence.
- Licence to cultivate spat.
- Licences under the *Liquor Act 2007* (NSW).

The **2014 Tow Trucks Review** identified a range of:

- improvements to the current design of the tow truck licence scheme that are likely to reduce the burden on the industry while also improving outcomes
- changes to the current administration of the tow truck licence scheme likely to improve the efficiency of the administration of the scheme, as well as improve the level of compliance in the industry.

### Other areas where targeted review may be warranted

Below we have suggested a number of other areas that may warrant a targeted review.

- We consider that the NSW Government should wind-down **duplicative components of the state-based green energy and energy efficiency schemes** (including the NSW Energy Savings Scheme), with the option to transfer any residual functions to the national Emissions Reduction Fund.

- We consider that the NSW Government should streamline **utility licences under the *Electricity Supply Act 1995* (NSW)** to improve consistency.
- **Safety inspection ('pink slip') requirements for light vehicles** could be further reviewed. In our **2014 Licensing Review** we recommended extending the validity of pink slips (which the NSW Government adopted). However NSW and the Northern Territory (NT) are the only Australian jurisdictions that require regular periodic safety inspections, and NSW's arrangements are stricter than the NT's (annual inspections are required after five years in NSW, and after 10 years in the NT). Many other states only require an inspection to be performed when offering a used vehicle for sale.
- **Building Sustainability Index (BASIX) requirements** could be reviewed to assess whether these requirements result in net benefits (eg, whether the rain water tank requirement for renovations results in net benefits).

### Recommendations

24 That the NSW Government consider undertaking a targeted review of:

- duplicative components of State and national green and energy efficiency schemes
- licences under the *Electricity Supply Act 1995* (NSW)
- safety inspection ('pink slip') requirements for light vehicles, and
- BASIX requirements.

**Issues Paper question 14:**

What mechanisms or measures can be introduced to help identify priority areas for regulatory reform, on an ongoing basis?

### Response to question 14

As recommended in the **2016 Audit Office Report**, a stocktake and assessment of existing regulations could be undertaken to establish a baseline and priorities, although we recognise that this would likely be a costly exercise.

Regulatory reform priorities could be identified using an approach similar to that which we used in our **2014 Licensing Review** to identify licence reform priorities. This approach included identifying reform categories based on best practice licensing principles (eg, for licence design and administration), undertaking a stocktake and assessment of existing licences, then ranking the licences based on a relative score.

A similar approach could be applied to identify regulatory reform priorities (eg, by regulatory instrument type and/or industry area). The objectives and desired outcomes of regulatory policies should also be considered and assessed in terms of whether the desired outcomes are currently being met. Where desired outcomes are not being achieved, this may represent a priority reform opportunity.

In our **2014 LG Enforcement Review** and **2016 LG Regulatory Burdens Review**, we recommended that the NSW Government undertakes a stocktake of local government regulation.

We propose that the independent oversight body should be responsible for undertaking and maintaining stocktakes (noting that this would be at a cost), or at a minimum maintain a database of all Acts and Regulations and when they are due for review.

Ongoing and effective stakeholder consultation is also an important mechanism for identifying reform priorities.

Recommendations

25 That the NSW Government identify priority areas for review through:

- considering the objectives and desired outcomes of regulatory policies and assessing whether desired outcomes are currently being met
- ongoing stakeholder consultation, and
- stocktakes, undertaken and maintained by the independent oversight body (or at least, by maintaining a database of all Acts and Regulations and when they are due for review).

## A.5 Regulatory performance benchmarks

**Issues Paper question 16:**

How can regulatory burden best be measured, for meaningful evaluations of regulatory impact? Which measures work and which don't?

### Response to question 16

In our experience, measures such as the number of regulations (eg, the "one on, two off" policy) or the number of pages of regulations, are not meaningful or effective measures of regulatory impact.

We found that measures to remove or minimise the regulatory burden on one sector (eg, businesses, councils) often shifted regulatory burdens to another sector/s (eg, the public, the NSW Government). We also found in the **2016 LG Regulatory Burdens review** that 'cost-shifting' from the NSW Government to councils was a valid concern of local government.

In undertaking our regulatory reviews, we used surveys to stakeholders (eg, businesses and councils) to try to estimate time and money spent on compliance. We generally found that stakeholders could not provide detailed cost data. We examined the costs and benefits to particular sectors (ie, business, community, councils, NSW Government) to determine the net costs and benefits of our reform proposals. In our view, in order to understand the impacts of regulation, specific sector burdens need to be measured or understood, in the context of measuring the net costs and benefits of regulation.

**Issues Paper question 18:**

Are there examples of how data can be used to develop effective performance metrics under outcomes and risk-based regulatory regimes?

### Response to question 18

Compliance data and complaints data can be used effectively in risk-based regulation. For example, IPART undertakes risk-based auditing of WIC Act licencees and Energy Savings Scheme (ESS) accredited providers. The extent of the audit and the audit frequency are determined through risk-rating, which in part is determined by prior compliance history. Additionally, we consider data on complaints in relation to our water regulation and ESS functions.

In our **2006 Red Tape Review**, IPART acknowledged the difficulties involved in measuring performance effectively. We have found that it is difficult to develop effective outcomes-based performance metrics in relation to entities we regulate (eg, water utilities). We are in the process of assessing the effectiveness of the performance indicators we impose on water utilities.

It is also often difficult to develop performance metrics that enable valid comparison across a sector (eg, councils, water utilities), due to significant variations in scale, location and activities undertaken.

In addition to the guidance provided in the *NSW Guidance for regulators to implement outcomes and risk-based regulation*[32] we also recommend that guidance and lessons from other sectors, for example the health care sector (see Box A.3 below), be considered in developing performance metrics.

[32] NSW Department of Finance, Services and Innovation, *NSW Guidance for regulators to implement outcomes and risk-based regulation*, October 2016.

### Box A.3 Lessons from the health sector

In developing effective performance metrics:

- A framework for and the objectives and desired outcomes of the performance measurement system should be clearly defined. The framework should also include a mechanism for evaluation of the performance measurement system and continual improvement.
- Data collection and validation plays a major role. Data is generally required on performance at a State level in terms of current practice vs best practice, productivity and efficiency.
- Qualitative data and assessment is likely to be important in addition to quantitative data and assessment, especially when there is no/little quantitative data available (or it is not likely to be cost-effective to collect/procure such data).
- Information governance systems and analytical capacity should be considered and adequately planned.
- Validity, reproducibility, reliability and feasibility of the metrics should be considered. Incentives to act on performance measures should also be considered, eg, performance levels should be made publicly available to incentivise further quality improvement and enhance accountability.
- When measuring outcomes, potential confounding variables should be considered. There should also be consideration of unintended outcomes, eg, shifts in quality from one area to another.

**Source:** World Health Organization (WHO), *Performance Measurement for Health System Improvement: Experiences, Challenges and Prospects,* 2008.

## A.6 Culture and capabilities

**Issues Paper question 19:**

In your experience, do NSW Government agencies develop and administer regulation in compliance with best practice? If not, what are the key constraints (eg. budget, capabilities, tools)?

### Response to question 19

While agencies often undertake processes in developing and administering regulation, there is considerable scope for improvement. Some agencies have good processes in place. However, in our experience, many regulatory proposals do not meet best practice. For example, in our **2014 LG Enforcement Review** we found that the *Swimming Pools Act 1992* (NSW) had not been developed in compliance with best practice, as substantial impacts on councils had not been considered and councils had been inadequately consulted.

In our experience, best practice is not followed as a result of the following constraints:

- political direction (ie, election promise or Minister directing)
- lack of resources and time-constraints
- lack of in-house capability (ie, not all agencies have economic expertise)
- insufficient guidance and support, and/or
- insufficient accountability or importance (ie, limited consequences).

**Issues Paper question 20:**

What capabilities do NSW Government agencies and regulators need to respond to innovation and change? What incentives might encourage agencies and regulators to adopt the necessary culture and capabilities?

### Response to question 20

As noted in section 1.1, the effectiveness of regulatory policy relies on agencies having the right culture and capabilities. The capability to develop and administer more flexible and targeted regulatory regimes that are responsive to change is likely to become increasingly important. Recruitment and performance frameworks for staff and management would also need to be flexible.

To respond to innovation and change in the regulatory landscape agencies need:

- risk-based assessment capabilities
- data capabilities including ability to collect, manage, assess and effectively report on data, including big data
- economic assessment capabilities, and
- leadership capabilities.

Agencies need to ensure they have a culture that is responsive to stakeholders, and which values and employs current and emerging best practice approaches to regulating.

In order to support agencies building the necessary culture and capabilities, upskilling of existing staff and/or recruitment of new staff may be required. An environment that facilitates and supports continuing professional development is necessary to ensure that staff are adequately equipped to respond with flexibility to new challenges and innovations.

As indicated in section 1.1, we consider that the independent oversight body should play a lead role in educating and assisting agencies to help promote the necessary culture and capabilities.

## A.7 Technology empowering new approaches to regulation – Enhancing accountability and transparency

**Issues Paper question 21:**

What mechanisms can be used to empower businesses and the community to make government more accountable for regulatory outcomes?

### Response to question 21

As a general rule, making as much information as possible publicly available would empower both businesses and the community to make the Government more accountable.

#### Making RIAs and the adequacy assessments publicly available

As indicated in our response to question 6, we support the 2016 Audit Office's recommendation that a central public repository be maintained for all final regulatory decisions and RIAs. Making this information more easily accessible means that interested stakeholders can find the necessary data to properly place the Government's policy decisions in context and, where necessary, hold them to account.

Further, as indicated in section 1.1, we recommend that the independent oversight body be responsible for assessing the adequacy of each RIA. This is done by the OBPR at the federal level and it helps ensure that each Department is held accountable for their regulatory performance.

#### Making Cost-Benefit Analysis (CBA) publicly available

In making regulatory decisions many Government departments and agencies use CBA or other types of economic modelling to demonstrate the value of the proposed changes. While this type of analysis is useful, the final result depends substantially on the underlying data choices and assumptions made by the modeller. Without access to this information it is difficult for stakeholders to properly assess the efficacy of the economic model, and therefore hold the Government accountable.

IPART regularly commissions consultants to conduct independent assessments of the impact of our determinations and recommendations. These reports are typically released alongside our reports in order to give our stakeholders the necessary information to properly consider our recommendations. For example when releasing our **LG Enforcement Review** Draft Report in 2014 we also released the CBA analysis that we commissioned to calculate expected red tape

savings. This allowed our stakeholders to test our assumptions and calculations when formulating their responses to our Draft Report.

In our Recommendation 4, we recommend that all economic or other type of cost modelling used in the support of an RIA process be made publicly available. This should occur at the same time as the RIA is made public. This would assist both businesses and the community in making the NSW Government more accountable.

**Issues Paper question 22:**

How can data be better harnessed to evaluate risks and understand potential impacts from regulatory proposals?

## Response to question 22

Data could be better harnessed by:

- Considering the role big data can play in evaluating risks and understanding impacts.
- Ensuring available data is easily accessible from one source – the existing NSW Open Data Portal (www.data.nsw.gov.au) could become a more extensive central data warehouse.
- Promoting data sharing across agencies, subject to privacy and confidentiality restrictions - NSW Government departments and agencies could investigate options to optimise central data management systems. An integrated approach could reduce duplication and costs to government and provide greater access to data for the purposes of policy development and review.
- Developing a data framework and guidance to ensure data is relevant, consistently collected, validated, analysed and presented, and is accurate, reliable and reproducible.

There may be substantial costs associated with the infrastructure and technology required to set up an integrated, central data system (or systems), particularly across different regulators. For example, these costs may include the cost of linking different NSW Government databases. Privacy laws, risk of identity fraud or theft and technological feasibility are also potential issues that require consideration.

As indicated in the Issues Paper, the NSW Government has committed to:

- maintaining a central repository for records of significant regulatory assessments, and
- annual reporting of regulatory reform measures to Parliament.

As noted above (in our response to question 21), we support this move towards improving transparency and accessibility, which would assist in understanding the potential impacts of regulatory policy, subject to it delivering net benefits.

## A.8 Technology empowering new approaches to regulation – New approaches to implementation and compliance

**Issues Paper question 24:**

Are there any barriers to introducing regulatory technology? What opportunities are there to improve compliance and self-regulation using technology?

### Response to question 24

The major barriers to introducing regulatory technology are cost and the ability to share information across agencies.

#### Cost

The cost of regulatory technology is a major barrier to introducing technology. However, in our **2014 LG Enforcement Review** and **2016 LG Regulatory Burden Reviews** we came across many instances where cost effective use of regulatory technology successfully improved compliance or regulation. These include:

- Sutherland council, which uses iPads in the field to reduce duplication in data entry and issues electronic section 149 planning certificates
- the Food Authority's development of an app for its Scores on Doors program, and
- Department of Planning and Environment's (DPE's) development of its ePlanning program, including the online Electronic Housing Code which assists proponents of complying developments.

#### Data sharing and availability

It is difficult to effectively use regulatory technology without the ability to easily share data across agencies and the public. This is particularly the case in areas of compliance and self-regulation. We note that DFSI has already undertaken significant work in making data more available.

Our **2016 LG Regulatory Burdens Review** Draft Report made two recommendations aimed at encouraging agencies to work with DFSI to make better data available and that DSFI support councils in making local government data collection easier by using a central portal.

Making compliance information, including any negative findings, available can play a strong role in improving industry performance. We have made a number of recommendations in this area in the past, in particular recommending that the

licensing and complaints databases for building certifiers be merged to allow the public to readily see a certifier's disciplinary record.

**Issues Paper question 25:**

Regulatory burden is in part a product of how regulation is administered. What measures could the Government put in place to encourage agencies to implement and administer regulation in a way that minimises burden to business and the community?

### Response to question 25

We have advocated the use of a risk-based approach to regulation to minimise burdens on business and the community in our **2006 Red Tape Review** and subsequent **2014 LG Enforcement Review** and **2016 LG Regulatory Burdens Review**.

IPART adopts a risk-based approach to regulating water utilities, energy networks and the energy savings scheme. For example, for private water utilities we determine audit frequency and the conditions of a licence to be audited through risk ranking based on the likelihood and consequence of a breach, and a licensee's prior compliance history. As a result, not all licence conditions are audited each year, and once sufficient compliance history is established audit frequency can be reduced for good performers (eg, every 2 years).

In our **2006 Red Tape Review** and subsequent **2014 LG Enforcement Review** and **2016 LG Regulatory Burdens Review**, we have both recognised and recommended agency initiatives to minimise burdens on businesses and the community through online solutions. These initiatives have related to the online submission of forms and information such as licence applications, registrations or certificates, and electronic data sharing amongst agencies. For example, we have:

- Supported the extensive work being undertaken by DPE to implement ePlanning (including the Electronic Housing Code) and recommended the extension of this program to the payment of fees and provision of section 149 information or certificates. We have also recommended the automation of data collection from councils by the DPE.
- Recommended the creation of an online facility for the submission of Annual Fire Safety Statements.
- Recommended the use of online companion animals' registration and a one-step registration process.

#### Recommendations

26 That agencies:

- adopt risk-based approaches to regulation, and
- employ technology to administer regulations where efficient.

## A.9 Technology empowering new approaches to regulation – New approaches to self- and co-regulation

**Issues Paper question 27:**

How can the NSW Government better use open data to encourage more consumer and business-led compliance?

### Response to question 27

The Guide encourages agencies to consider self-regulation when developing regulatory proposals. As indicated in the Issues Paper, innovative approaches to self-regulation or co-regulation, such as customer rating systems (eg, eBay, Uber) can be used to incentivise businesses to maintain certain standards of quality and safety and empower customers, thereby supporting more effective competition, and better quality goods and services.

Improving the availability and accessibility of quality data could support a greater reliance by consumers and businesses on lower order interventions – such as self-regulation, quasi-regulation or co-regulation – than direct regulation. This is because technological innovation and advancements can assist in overcoming information asymmetries, thereby addressing underlying market failures that would otherwise require government intervention.

Access to open data could allow consumers and businesses to develop compliance through eg, 'Scores on Doors' and 'Name and Shame' systems like the ones used to monitor food retail business performance (and referred to in our **2014 LG Enforcement Review** and **2016 LG Regulatory Burdens Review**). Access to open data could allow widely accessible systems to be developed, eg, using mobile applications. Publishing compliance 'stats and facts' directly to consumers can drive compliance through providing reputational incentives.

However, it is also important to note that:

- Whilst technological innovation and advancements can help address market failures, regulation may still be required and appropriate where not regulating would result in severe consequences and/or where the likelihood of consequences occurring are very high (as determined via a risk assessment).
- Making data publicly accessible, without providing adequate analysis and caveats may lead to reporting bias by organisations that use the data.

## A.10 Reducing red tape across multiple levels of government

**Issues Paper question 28:**

In which areas of regulation can the regulatory burden be reduced through addressing overlap between different levels of government? Please provide specific examples, if you can.

### Response to question 28

In past reviews we have investigated a number of areas where overlap between different levels of government occurs. We have also made a number of recommendations to Government, most recently in our **2014 LG Enforcement Review** and **2016 LG Regulatory Burden Review**.

A key recommendation arising from these reviews was to develop a 'partnership model' between State and Local Governments. This would reduce delays, inconsistency, duplication and red tape. We recommend that this partnership model be extended to regulatory areas of high cost/complexity such as planning, building and the environment.

The Food Authority partnership model is a good example of an agency limiting the regulatory burden of overlapping responsibility. Their 'partnership model' provides a structured, consistent and enduring relationship. Key aspects include:

- clear delineation of regulatory roles and responsibilities
- guidance from the relevant agency including standard forms, templates and other regulatory tools
- two way exchange of information to monitor, assess and provide feedback on regulatory performance, and
- dedicated forum for strategic consultation.

Other areas of regulatory overlap where the burden could be reduced include:

- clarifying the delineation of responsibilities between councils and the Environment Protection Authority, for example, in relation to contaminated sites and waste disposal
- removing duplicative approvals required under the *Local Government Act 1993* (NSW) and *Environment Planning and Assessment Act 1979* (NSW), and enabling councils to recognise another council's approval (ie, mutual recognition), and

- creating a new single State regulator to undertake, at a minimum, the roles of the Building Professionals Board in relation to building certifiers and the building trades regulation aspects of NSW Fair Trading.

### Recommendations

27 That the NSW Government implements the 'partnership model' recommendations contained in IPART's 2014 Local Government compliance and enforcement review and the 2016 Local Government Regulatory Burdens review.

**Issues Paper question 29:**

Where can compliance with regulatory requirements (that are administered by multiple levels of government) be made easier? Please provide specific examples, if you can.

### Response to question 29

In the course of conducting various reviews, we have identified numerous instances where compliance with regulatory requirements administered by multiple levels of government could be made easier.

The removal of overlapping, duplicative or inconsistent regulation imposed by different levels of government can make compliance easier. In our **2006 Red Tape Review** we discussed using the following approaches to address issues with overlapping, duplicative or inconsistent regulation - clear delineation of roles/jurisdiction; removing overlapping, duplicative or inconsistent provisions; national harmonisation efforts; uniform legislation; mutual recognition and 'vacating the field'[33]. We have provided instances where we have recommended the use of these approaches in our **2014 LG Enforcement Review** and **2016 LG Regulatory Burdens Review** in answer to Question 28 above.

In our **2014 LG Enforcement Review** and **2016 LG Regulatory Burdens Review** we also recommended making compliance easier through a 'partnership model', the sharing of data between different levels of government and the use of 'one stop shops', Memorandums of Understanding (MoUs) and technology. For example, we recommended:

- implementing a 'partnership model' between NSW Government regulators and local government to enable more effective regulation and easier compliance (as discussed in response to question 28 above)
- implementing a data sharing model between the Department of Planning and Environment (DPE) and the Australian Bureau of Statistics in relation to building approvals in NSW
- that DPE manages referrals to NSW Government agencies through a 'one-stop shop' in relation to planning proposals (LEPs), development applications (DAs) and integrated development assessments (IDAs)
- using MoUs between State agencies and councils in relation to enforcement and compliance activities (eg, between local police and local council) to facilitate information sharing to achieve better communication and coordination, and

[33] Ie, when it is agreed that regulatory responsibility will be handed over to the States or the Commonwealth.

- enabling building owners to submit Annual Fire Safety Statements online to councils and the Commissioner of the Fire and Rescue Service.

### Recommendations

28 That agencies consider the following approaches to make compliance with regulatory requirements administered by different levels of government easier:

- clear delineation of responsibilities in regulations
- removing overlapping, duplicative or inconsistent provisions
- national harmonisation of regulations
- uniform legislation
- mutual recognition
- 'vacating the field'
- 'partnership model'
- sharing of data
- 'one stop shops'
- Memorandums of Understanding (MoUs) , and
- online provision of information.