

# **Investigation into the burden of regulation in NSW and improving regulatory efficiency**

## **Issues Paper**



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**INDEPENDENT PRICING AND  
REGULATORY TRIBUNAL**  
of New South Wales



# **Investigation into the burden of regulation in NSW and improving regulatory efficiency**

## **Issues Paper**

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**S9-21**

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Submissions are invited from interested parties. Unless confidentiality is sought, the submissions are generally available for public inspection at the Tribunal's offices and will be available on-line in PDF format from the time of processing of the submission until 3-4 weeks after the release of the final report of an inquiry. The Tribunal may exercise its discretion not to exhibit any submissions based on their length or content (containing material that is defamatory, offensive, or in breach of any law).

Submissions should have regard to the specific issues that have been raised. There is no standard format for preparation of submissions but reference should be made to relevant issues papers. Submissions should be made in writing and, if they exceed 15 pages in length, should also be provided on computer disk in word processor, PDF or spreadsheet format.

Submissions from stakeholders must be received by **24 February 2006**.

All submissions should be sent to:     **Regulation Review**  
Independent Pricing and Regulatory Tribunal  
PO Box Q290  
QVB Post Office NSW 1230

Submissions can also be sent via fax (02) 9290 2061 or emailed to the following address:  
[ipart@ipart.nsw.gov.au](mailto:ipart@ipart.nsw.gov.au) (with the subject heading 'Regulation Review').

### ***Registration of interest***

If you are interested in participating in this review, please provide your contact details by email, fax or mail (see details immediately above).

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If you want your submission, or any part of it, to be treated as confidential, please indicate this clearly. The Tribunal may include in its publications a list of submissions received during the course of a particular review or inquiry. It may also refer to submissions in the text of its publications. If you do not want your submission or any part of it to be used in any one of these ways, please indicate this clearly.

A request for access to a confidential submission will be determined in accordance with the *Freedom of Information Act 1989* and section 22A of the *Independent Pricing and Regulatory Tribunal Act 1992*.

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### ***Public information about the Tribunal's activities***

Information about the role and current activities of the Tribunal, including copies of latest reports and submissions, can be found on the Tribunal's website at [www.ipart.nsw.gov.au](http://www.ipart.nsw.gov.au).

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## 1 OVERVIEW

The NSW Government has asked the Independent Pricing and Regulatory Tribunal (the Tribunal) to:

- undertake a public inquiry to identify areas of NSW Government regulation which are imposing a significant, unnecessary burden on business and the community
- determine priority areas where there are good prospects of regulatory reforms which could provide significant immediate gains to business and the community, and
- develop recommendations for Government action to improve the efficiency of regulation and reduce unnecessary burdens, including consideration of non-regulatory or incentive-based options for achieving public policy outcomes.

### 1.1 Timetable for review

The timetable for the review is provided below.

Action	Timeframe
Release of Issues Paper	16 Jan 2006
Public submissions due	24 Feb 2006
Interviews with interested stakeholders	Jan – Mar 2006
Initial Report to Premier identifying priority areas	31 Mar 2006
Public workshop	28 Apr 2006
Release Draft Report	26 May 2006
Public submissions on Draft Report due	9 Jun 06
Final Report to Premier	30 Jun 06

### 1.2 Registration of interest

The Tribunal will be undertaking broad public consultation through the receipt of submissions and individual interviews with targeted stakeholders. The Tribunal is also planning to hold a public workshop to further explore some of the priority area(s) for regulatory reform. If you are interested in participating in this review, please provide your contact details by email to [ipart@ipart.nsw.gov.au](mailto:ipart@ipart.nsw.gov.au) or by fax to (02) 9290 2061 (with the subject heading 'Regulation Review').

### 1.3 Submissions sought

The success of the Tribunal in undertaking this task will depend in large measure on the quality of information provided to it in submissions and in its consultations with stakeholders. The Issues Paper provides a discussion of the background to this review and provides a fuller explanation of the issues the Tribunal is seeking information about. The following box outlines the information being sought. Submissions can address any, all or some of the issues below. Details on how to make submissions are provided at the front of this paper (opposite the table of contents).

***What information is being sought?***

- **Areas of NSW Government regulation that impose unnecessary administrative, compliance or other burdens on business, government or the community?**
  - What is the relevant NSW regulation(s) or area of regulation, and the NSW Government agency(ies) which administers it?
  - If known, what is the underlying objective(s) of the regulation(s)? Does it achieve this objective(s)? Are the objectives still relevant?
- **The way in which the NSW regulation imposes unnecessary burdens?**
  - In what ways does the regulation impose a burden? (For example, difficult to understand and comply with? Imposes redundant requirements? Duplicated by other regulation? Has perverse or unintended consequences? Requires time to meet or process information / paperwork requirements? Requires use of specialised external advisory services? Requires the use of more costly production processes or inputs? Restricts competition? Stifles innovation or investments? Slows technology uptake? Too costly? Too intrusive?)
  - If the regulation is duplicated by or inconsistent with other regulation(s), how does the duplication or inconsistency occur? (For example, are the regulatory requirements replicated or inconsistent at different levels of government – local, state and/or federal? Are multiple agencies from the one government involved in regulating the same matter? Does the same information need to be provided to different regulatory agencies?)
  - Insofar as it can be determined, what is the annual cost imposed as a result of the unnecessary regulation? (Ideally, cost estimates should include an estimate of the dollar cost, but costs may also be expressed in other terms, such as time, 'lost opportunities', etc.)
  - How are these costs paid or who pays these costs? (For example, are costs absorbed by business and passed onto consumers? Does the Government levy a fee through licensing?)
  - In what way is the burden imposed by the regulation unnecessary, or in what way is the regulation unnecessarily complex or inefficient, taking into account the objectives of the regulation? (For example, are there requirements that, if not met, would not affect the success of the regulation? Does the same information need to be provided to different regulatory agencies?)
- **Possible solutions that allow legitimate policy objectives underlying the regulation to be achieved at less cost to business and the community? (Are there more cost effective ways of achieving the desired policy outcome?)**
  - Could the regulation or its administration be reformed or simplified to reduce the burden on business, government or the community, while still allowing the underlying policy objectives to be achieved? If so, how?
  - Could any alternatives (eg, self-regulation, government information campaigns, national uniform regulation, financial incentives, penalties, incentive-based regulation) achieve the underlying policy objective while imposing less of a burden on business, government or the community? If so, how?



## 2 INTRODUCTION

Regulation is one of the central tools used by governments to deliver the social, environmental and economic goals of the community. To do so, regulation must be well designed and targeted. Regulation also imposes administrative and compliance burdens on business, consumers, government and the wider community. Business groups are concerned that efforts are made to minimise unnecessarily costly, excessive or complex regulation.

In response to these concerns, the NSW Government has asked the Tribunal to undertake a public inquiry to identify areas of NSW Government regulation which are imposing a significant, unnecessary burden on business and the community, and determine priority areas in which regulatory reforms could provide significant immediate gains to business and the community. The Tribunal has also been asked to develop recommendations for NSW Government action to improve the efficiency of regulation and reduce unnecessary burdens, including consideration of non-regulatory or incentive-based options for achieving policy outcomes.

### 2.1 Invitation to make submissions

As part of its review, the Tribunal will consult with business and community groups, government and other interested stakeholders. All interested parties are invited to make submissions and to register their interest in relation to the review. Details on how to make submissions and register an interest are provided at the front of this paper (opposite the table of contents).

To help with the preparation of submissions, this paper outlines the Tribunal's approach to the review and discusses some of the key issues it will consider:

- Part 3 describes the Tribunal's approach to the review, including how it interprets its task and how the review will be undertaken
- Part 4 provides the context for the review, including recent concerns about the burden of regulation and related regulatory reviews being conducted in Australia
- Part 5 outlines the important role of regulation in our society in achieving the social, environmental and economic goals of the community
- Part 6 discusses the impacts of regulation, including its direct and indirect costs and benefits
- Part 7 discusses different forms of regulation and alternatives to regulation, including conventional 'command and control' regulation and 'incentive-based' regulation, as well as alternatives such as no regulation or self-regulation
- Part 8 outlines what constitutes best practice regulation and the regulatory process.

In addition to the questions on page 2 (see Box '*What information is being sought?*'), the Tribunal also welcomes comment on issues raised in this paper and any other relevant issues to the review.

### 3 THE TRIBUNAL'S APPROACH TO THIS REVIEW

The terms of reference for this review (see Appendix A) ask the Tribunal to undertake a public inquiry to identify areas of NSW Government regulation which are imposing a significant, unnecessary burden on business and the community. This will include, where relevant, identifying areas that impose significant, unnecessary burdens as a result of overlapping or inconsistent requirements between NSW and other states and territories, or the Commonwealth. In assessing the burdens imposed by regulation, the Tribunal will have regard to any differential impacts across small, medium and large businesses, local government and the community.

This first stage of the Tribunal's review will involve broad consultation with stakeholders through the receipt of submissions and individual interviews with targeted stakeholders to identify these areas. The Tribunal will also review recent and past industry and government reports on identified burdens. At the end of this first stage of the review, the Tribunal aims to determine priority area(s) where there are good prospects of regulatory reforms which could provide significant immediate gains to business and the community.

In the second stage of the review, the Tribunal will conduct a more in-depth inquiry into the priority area(s) and further targeted consultation with stakeholders, including a public workshop.

At the conclusion of the review, the Tribunal aims to develop recommendations for NSW Government action to improve the efficiency of regulation and reduce unnecessary burdens, including consideration of non-regulatory or incentive-based options for achieving policy outcomes. The Tribunal will also examine options such as removing unwarranted or redundant regulatory requirements and streamlining or simplifying regulatory requirements.

The success of the Tribunal in undertaking this review will depend heavily on the quality of participation and information provided by stakeholders.

#### 3.1 What regulation is covered?

For the purpose of this review, the Tribunal is defining regulation to include any NSW laws or other NSW Government 'rules' which directly influence or control the way people and businesses behave. This includes instruments which impose mandatory requirements upon business and the community, as well as voluntary codes and advisory instruments for which there is a reasonable expectation of widespread compliance, such as codes of practice or conduct, standards and accreditation or rating schemes.<sup>1</sup> The box on the following page provides a range of examples of NSW regulation that affects business and the community.

The focus of the review is on NSW regulation. However, federal and other state or territory regulation is also relevant where it overlaps, duplicates or is inconsistent with NSW regulation.

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<sup>1</sup> This is based on the definition adopted in the Council of Australian Governments' *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies*, amended by the Council of Australian Governments (COAG) June 2004, available at: [www.coag.gov.au](http://www.coag.gov.au).

**Some examples of NSW regulations affecting business and the community:**

Building and construction regulation	Local government regulation (including companion animals, planning and development)
Chemicals and pesticides regulation	
Credit regulation	Mining regulation
Child care and protection regulation	Motor vehicle regulation
Duties (including vendor duty, duty on the hire of goods, mortgage duty, duties on insurance premiums, stamp duty)	Native vegetation conservation regulation
Electronic transactions regulation	Occupational health and safety requirements
Environmental protection and pollution control (including waste regulation)	Pawnbrokers and second-hand dealers regulation
Explosive and dangerous goods regulation	Planning and assessment regulation
Fair Trading – consumer protection regulation	Poisons and therapeutic goods regulation
Farming regulation	Privacy and State records regulation
Film, computer game and literature classification regulation	Professional certification, standards and licensing regulation
Fisheries management regulation	Public safety regulation (road safety, etc)
Food handling regulation	Retail leases regulation
Funeral Funds regulation	Retirement village regulation
Gambling, gaming and racing regulation	Shops and industries regulation (permitted opening hours)
Guardianship regulation	Stock control regulation
Heritage conservation regulation (including Aboriginal cultural heritage)	Taxation provisions (including debit tax, land tax, payroll tax)
Industrial relations regulation	Threatened species conservation regulation
Industry codes of practice (fitness industry, entertainment industry, white goods repair)	Timber industry regulation
Land management regulation (including National Parks, reserves, etc)	Trade measurement regulation
Liquor administration regulation	Utilities regulation
	Water management regulation
	Workers' compensation requirements

## 3.2 Interpreting the task<sup>2</sup>

The task of the Tribunal is to seek ways to reduce significant regulatory burdens in NSW, rather than reduce or eliminate regulation per se. That said, regulation that is clearly redundant should be abolished. In undertaking this task, it is important to recognise that regulation is necessary in many cases to achieve the community's social, environmental and economic goals, and hence some regulatory burden on business and the community is unavoidable. For example, regulation can help to mitigate accidents in the workplace, protect human health, limit pollution and prevent crime. In many instances, it will not be possible or desirable to totally eliminate regulation and its costs, rather the aim is to ensure that regulation achieves the desired policy outcome at minimum net cost and maximum net benefit to the community.

Where an area of regulation serves legitimate social, environmental or economic goals, identification of a significant administrative or compliance burden associated with the area of regulation will not in itself be sufficient for the Tribunal to recommend reform in that area. The key question for the Tribunal is whether the regulation or its implementation imposes an *unnecessary*, and therefore avoidable, burden on the community. A burden will be unnecessary where the underlying policy objectives could be achieved more efficiently, at less cost to the community. Some examples of burdens that may be unnecessary could include:

- Where information is required to be provided or records kept on matters that are not necessary for attaining the policy objectives of the regulation.
- Where business or community members are prevented from undertaking certain activities that are not necessary for attaining the policy objectives of the regulation.
- Where alternative approaches to regulation, such as more innovative market-based or incentive-based approaches, less complex regulation, education campaigns or industry self-regulation, could achieve the policy objectives of the regulation more efficiently.

The scope of this review is potentially very broad. However, the Tribunal believes that the greatest gain is likely to come from reform of NSW regulation that is currently adversely affecting the efficiency of industry and has flow-on effects to the wider economy.

In undertaking this review, the Tribunal is not proposing to examine or critique the underlying policy objectives of existing regulations. The underlying policy objectives will be taken as a given. Rather, the aim is to determine the most efficient way of achieving the desired policy outcome. However, this may include examining whether an objective has been superseded or largely achieved in another way, making the regulation redundant.

*The Tribunal seeks comments on this interpretation of its task.*

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<sup>2</sup> Given the similar nature of the task, the Tribunal has taken a similar approach to this review as the federal 'Regulation Taskforce' to its investigation into practical options for alleviating the compliance burden on business from federal government regulation – see Australian Government Regulation Taskforce, 2005, *Regulation Taskforce Issues Paper*, available at: [www.regulationtaskforce.gov.au](http://www.regulationtaskforce.gov.au).

## 4 CONTEXT OF THE REVIEW

In conducting the review and making its recommendations, the Tribunal will need to take into account the particular context of this review. This context includes increasing concerns over growth in regulation and the regulatory burden, key drivers behind regulation in recent times, and related reviews being conducted in Australia.

### 4.1 Concerns over growth in the burden of regulation

An effective regulatory system is an essential part of our society. However, in recent times, business groups have expressed concern that there is too much regulation and that it is too costly. For instance, in May 2005, the Business Council of Australia (BCA) released a report on business regulation, which claimed that:

...regulation at the Commonwealth and State levels is growing at around 10 per cent per annum, more than twice the rate of Australia's economic growth. Much of this regulation imposes costs on businesses and restricts the ability of businesses to respond quickly to market opportunities and threats. These costs are passed on to customers or shareholders, or have to be offset by cost reductions in other areas, such as employment costs.

Many other countries have recognised the need to reform business regulation to keep their businesses competitive. If Australia does not match these efforts, we will fall behind and economic growth will slow.<sup>3</sup>

Other bodies representing industry, including the NSW State Chamber of Commerce<sup>4</sup> and the Australian Chamber of Commerce and Industry<sup>5</sup>, have also recently released reports calling for an easing of the regulatory burden. Industry groups have cited a number of areas/examples where they believe the cost of regulation has risen in recent times. For example, the Australian Industry Group (AIG) found that 85 per cent of manufacturers thought the time spent complying with federal regulation has increased over three years to 2004.<sup>6</sup> Business representatives have reported that costs related to workers' compensation requirements have increased in recent years.<sup>7</sup> Representatives from the financial services sector indicate that the cost of meeting financial sector regulatory requirements had increased '3 to 4 times over the past 5 years'.<sup>8</sup> And it has been reported that the Australian Bankers' Association (ABA) has forecast that the compliance bill for the major banks is likely to increase by \$125 million per year, up 20 per cent in some cases, owing to new governance regulation and financial and accounting reforms.<sup>9</sup>

<sup>3</sup> Business Council of Australia, 2005, *Business Regulation Action Plan for Future Prosperity*, [www.bca.com.au](http://www.bca.com.au), p vi.

<sup>4</sup> State Chamber of Commerce, 2005, *Red Tape Register*, [www.thechamber.com.au](http://www.thechamber.com.au).

<sup>5</sup> Australian Chamber of Commerce and Industry, 2005, *Holding Back the Red Tape Avalanche – A Regulatory Reform Agenda for Australia*, Position Paper, [www.acci.asn.au](http://www.acci.asn.au).

<sup>6</sup> AIG, 2004, *A Survey of Business Priorities in the lead up to the Budget*. This reference is sourced from: Access Economics Pty Ltd, 2005, 'Benefits and Costs of Regulation', Appendix 2 of the Business Council of Australia's (2005) *Business Regulation Action Plan for Future Prosperity*, [www.bca.com.au](http://www.bca.com.au).

<sup>7</sup> Treasury, 2004, *Key themes from the Treasury Business Liaison Program – April 2004*, Australian Government, Canberra, [www.treasury.gov.au](http://www.treasury.gov.au), p 78.

<sup>8</sup> Ibid.

<sup>9</sup> Nicholas N and Buffini F, 2004, 'Backlash against regulation costs', *Australian Financial Review*, 5 July. This reference is sourced from: Access Economics Pty Ltd, 2005 (ibid).

Testing these claims is clearly necessary, however, it is also important to note that it is not possible to assess the merits of the absolute cost or volume of regulation without reference to its benefits and other options available. As discussed in Chapter 3, the key issue is whether regulation is necessary and efficient. That is, are there regulatory requirements that are unduly costly and can we be smarter in how we regulate?

### 4.2 Key drivers behind growth in regulation

The growing concern over regulation follows a period of unprecedented regulatory reform in Australia. Over the last two decades, trade liberalisation, National Competition Policy and a succession of reforms to industrial relations and taxation have helped create a more flexible and responsive economy, which has achieved historically high rates of productivity, income growth and labour utilisation.<sup>10</sup> Moreover, Australia's regulatory reforms have received acclaim from international agencies such as the International Monetary Fund (IMF) and the Organisation for Economic Co-operation and Development (OECD). Recently, the OECD found Australia to have the least market-restrictive regulatory environment among member countries, and it has cited Australia as a role model for other countries.<sup>11</sup>

However, as the regulatory reforms of the last two decades have exposed businesses to much greater competitive pressures, they have also made them more conscious of the need to reduce costs – including the costs of regulation. Also, in many instances, pro-competition regulatory reform did not involve actual de-regulation, but rather the replacement of one set of regulations with another (ie, re-regulation). While regulations to promote competition in industries such as energy, telecommunications and finance have generally brought net benefits to the community, they have also been typically more complex to administer and comply with.<sup>12</sup>

Other key driving forces behind regulation in recent times include:

- as with other advanced economies, rising income levels over time have been associated with increased expectations or demands on governments to meet a range of social and environmental goals (eg, pollution controls, public health and safety, and the preservation of heritage sites)
- the development of new technology and the associated creation of new markets (eg, the internet has produced new regulation to deal with pornography, scams and spam)
- new information coming to hand about the risks and adverse impacts from certain technology and by-products (eg, asbestos, greenhouse gases and other pollutants)
- society's apparent reduced tolerance to risk<sup>13</sup>, and

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<sup>10</sup> Banks G, 2005, 'Regulation-making in Australia: Is it broke? How do we fix it?', *Public Lecture Series, the Australian Centre for Regulatory Economics (ACORE) and the Faculty of Economics and Commerce, ANU*, Canberra, 7 July 2005.

<sup>11</sup> Organisation for Economic Co-operation and Development, 2004, *Economic Survey: Australia*, OECD, Paris. This reference is sourced from Banks G, 2005 (ibid).

<sup>12</sup> Banks G, 2005 (ibid).

<sup>13</sup> The UK Prime Minister, Tony Blair, has recently called for a "sensible debate about risk in public policy making". According to Mr Blair, "In my view, we are in danger of having a wholly disproportionate attitude to the risks we should expect to see as a normal part of life. This is putting pressure on policy-making (and) regulatory bodies.....to act to eliminate risk in a way that is out of all proportion to the potential damage. The result is a plethora of rules, guidelines, responses to 'scandals' of one nature or another that ends up having utterly perverse consequences." Prime Minister's speech ("Common sense

- the tendency for regulation to build on itself - as regulators fail to review/amend existing regulation, or as one regulatory measure leads to an unanticipated response by the regulated entity, which requires a counter measure (and so on).<sup>14</sup>

### 4.3 Other reviews being conducted

In October 2005, the Federal Government commissioned a taskforce to identify practical options for alleviating the compliance burden on business from federal regulation. This taskforce will examine and report on areas where regulatory reform can provide significant immediate gains to business. It will report by 31 January, 2006.<sup>15</sup>

As noted by the federal taskforce, reform of regulation is also currently being examined on a number of other fronts, including via “the Council of Australian Governments’ (COAG) current review of National Competition Policy, the Board of Taxation’s review of aspects of the taxation legislation and the Financial Services Reform Refinements project. In addition, the Australian Government has announced enhanced assessment processes for new regulations, and an annual review of the cumulative stock of Australian Government regulation.”<sup>16</sup>

The Tribunal’s review is focused on NSW regulation and should therefore complement rather than duplicate the work of these other investigations – although regulation by other federal, state and territory governments will be relevant to this review insofar as they overlap or are inconsistent with NSW Government regulation.

The Tribunal will take into account information or findings from other reviews of regulation, as appropriate, in conducting its review.

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culture not compensation culture’) delivered at the Institute for Public Policy Research’s forum on *Future Challenges: Living with Risk*, 26 May 2005.

<sup>14</sup> Banks G, 2005 (ibid).

<sup>15</sup> Australian Government Regulation Taskforce, 2005, *Regulation Taskforce Issues Paper*, [www.regulationtaskforce.gov.au](http://www.regulationtaskforce.gov.au).

<sup>16</sup> Ibid, p 2.

## 5 ROLE OF REGULATION

An effective regulatory regime is necessary to ensure that society's social, environmental and economic objectives are realised. At their most fundamental level, laws – a form of regulation – define and enforce property rights, which are the basis for economic transactions. There are also other strong rationales for regulation. In particular, regulation is often introduced to correct 'market failure'. In such cases, it is argued that in the absence of regulation the 'market' would fail to produce behaviour or results in accordance with the public interest. For instance, when there is market failure it is possible that unregulated markets can produce undesirable outcomes such as environmental degradation, health hazards, excessive prices, and inequity.

Table 5.1 below outlines some 'public interest' reasons for regulating. For example, in recent times regulation has been increasingly used to ensure that businesses factor the costs of their impact on the environment into their commercial decisions, thus helping to ensure that the level of pollution is socially acceptable. Regulation is also frequently used to ensure that scarce natural resources (eg, water and fish stocks) are extracted sustainably; to protect consumers against monopoly power; to facilitate competition; to provide customers with adequate information so that they can make informed decisions; and to ensure that working conditions are safe and fair. In any one sector or industry, the case for regulating may be based on a single or combination of rationales - for example, externalities, information defects, and social policy all relate to the need to regulate the sale and consumption of cigarettes.

As noted by the Business Council of Australia, market failure does not automatically justify regulation.<sup>17</sup> The costs and benefits of a range of potential responses should be considered, including the option of 'no regulation'. The benefits of correcting (or attempting to correct) market failure via regulation should be greater than the costs of this corrective mechanism (ie, regulation is only justified if it results in a net benefit to society). This can depend on how regulations are designed and applied. Different regulatory approaches to the same problem can result in significantly different net costs (impacts) to the regulated entity and society in general. The challenge is to devise regulations that can achieve their objectives efficiently – that is, at least net cost or greatest net benefit to society, minimising burdens on those regulated and any adverse impacts on others.

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<sup>17</sup> Business Council of Australia, 2005, *Business Regulation Action Plan for Future Prosperity*, p 16, [www.bca.com.au](http://www.bca.com.au).



**Table 5.1 Rationales for regulating**

<b>Rationale</b>	<b>Main aims of regulation</b>	<b>Example</b>
Monopolies	Counter tendency to raise prices and lower output.	Regulation of the price and behaviour of monopolies.
Natural monopolies	Facilitate competition, while harnessing benefits of economies of scale, by providing third party access to natural monopoly infrastructure.	The introduction of competition in energy, telecommunications, water and rail, via third party access regimes and other market arrangements.
Externalities	Compel producer or consumer to bear full costs of production or consumption rather than pass on to third parties or society.	Regulation of environmental performance/impact.
Open-access externalities	Create property rights to promote conservation of scarce natural resources.	Tradeable rights to a share of: the total allowable catch of a fishery; bulk water from a dam.
Information inadequacies	Advise consumers to allow informed decisions (and hence the efficient functioning of the market).	Labelling of pharmaceuticals, food, drink, cigarettes, and fuel economy of cars.
Continuity and availability of service	Ensure socially desired level of 'essential' service.	Requirement for minimum transport, telecommunication, energy and water services to remote regions.
Anti-competitive behaviour (eg, predatory pricing, collusion)	Prevent anti-competitive behaviour and protect consumers from the ill-effects of market domination.	Regulation of 'predatory pricing' and collusion.
Unequal bargaining power	Protect vulnerable interests where markets fail to provide for equal bargaining power.	Occupational health and safety regulation.
Scarcity and rationing	Public interest allocation of scarce resources.	Petrol rationing to essential services during a fuel shortage.
Distributional justice and social policy	Distribute according to public interest.	Regulate to redistribute wealth or to transfer resources to victims of misfortune (eg, injured parties).
	Prevent undesirable behaviour or results.	Regulate to prevent discrimination based on race, sex or age.
Planning	Protect interests of future generations. Coordinate altruistic intentions.	Environmental regulation.

Source: Baldwin R and Cave M, 1999, *Understanding Regulation – Theory, Strategy and Practice*, Oxford University Press, UK, p 17.

## 6 IMPACTS OF REGULATION

Regulations have benefits and costs, which need to be weighed against each other when considering the merits of a particular approach. The benefits relate to the outcome that the regulation is intended to achieve (ie, improved environmental, health, social and/or economic outcomes). The direct costs of regulation include administrative costs to government and compliance costs to the regulated entities. Regulation can also have a range of impacts on the wider economy and even some unintended impacts.

As previously discussed, in many instances it may not be desirable or possible to totally eliminate regulation and its costs. Rather, to achieve a particular outcome, the aim should be to ensure that the optimal regulatory approach is adopted. There may be several regulatory options available to achieve a desired outcome. These options may range, for instance, from more prescriptive to less prescriptive approaches, with each option associated with a different level of costs and benefits. (Chapter 7 discusses the different approaches that can be taken to regulation.)

The impacts of regulation are discussed further below.

### 6.1 Direct costs of regulation

Regulation imposes direct compliance costs on business and individuals, and administrative costs on government. Compliance costs can be comprised of 'paper burden', as well as any costs associated with businesses having to change production processes or commercial practices.

#### 6.1.1 Administrative costs to governments

Governments, and hence taxpayers, incur significant costs in designing, implementing and enforcing regulation. For example, federal government agencies with explicit regulatory functions employed approximately 30,000 staff and spent \$4.5 billion in 2001-02.<sup>18</sup> This excludes other government departments that have regulatory functions (including those at the local and state level), as well as ministerial councils, inter-governmental bodies and legal institutions such as courts and tribunals.

#### 6.1.2 Compliance costs

A firm or individual's compliance costs are those resources that it devotes to activities that it would not do if the regulatory requirements did not exist. For example, if, as part of good business practice, a firm would collect certain information and keep accurate records, irrespective of a regulatory requirement to do so, then this is not a cost of regulation. However, if regulation requires the firm to do additional work or carry out this activity in a less efficient way than it would otherwise do, then this incremental expense is a cost of regulation. It can be difficult to estimate the cost incurred in complying with regulation, particularly where some firms are increasingly being subject to non-regulatory pressure to behave in a way that is consistent with some regulatory requirements – for instance, public and/or shareholder pressure on some firms to be 'good corporate citizens' (regardless of

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<sup>18</sup> Banks G, 2003, 'The good, the bad and the ugly: economic perspectives on regulation in Australia', Address to the *Conference of Economists, Business Symposium*, Hyatt Hotel, Canberra, 2 October 2003, p 3.

regulatory requirements to do so), in terms of their treatment of staff, the environment and their procedures in regards to public reporting and transparency.

Costs of complying with regulation include the following:

- staff time needed to comply with regulations, including hiring of additional staff required to meet the administrative burden of regulation
- maintaining and developing new and up-to-date reporting systems
- obtaining advice from lawyers, accountants, arranging and paying for various inspections, etc
- educating/training staff about new regulatory requirements, and
- changing production processes and/or purchasing equipment necessary to comply with new regulatory requirements (eg, the requirement to purchase pollution abatement equipment and/or change production practices to comply with more stringent pollution standards; requirements to install smoke alarms, fire extinguishers and other fire prevention/protection equipment; etc).<sup>19</sup>

Regulations can have varying impacts depending on firm size. For instance, the Australian Chamber of Commerce and Industry (ACCI) argues that small and medium sized enterprises can bear a disproportionate burden of the costs of meeting regulatory obligations, “primarily due to the differential impact of the costs involved with improvements and administrative requirements resulting from the fixed-cost nature of compliance.”<sup>20</sup> On the other hand, larger firms are more likely to be affected by a greater range of regulatory requirements.

Several factors can exacerbate the cost of regulation. For instance, regulation that is overly prescriptive can mean that regulated entities are not free to employ (or discover) the least cost means of achieving the objective of the regulation. Similarly, the more complex the regulation, the more costly it is likely to be for an organisation or individual to comply with. Overlapping regulation and/or regulation that is inconsistent across jurisdictions has also been identified as a characteristic that imposes undue cost on business. Access Economics notes that workers’ compensation and occupational health and safety laws differ between states and territories, despite almost identical objectives, which generates extra compliance costs for national firms with no obvious benefits to the community. It also mentions that new developments may need to comply with environment and planning laws at the federal, state and local government level. Duplication also occurs in the regulation of a range of other areas including film, video, computer games and literature, and the marketing of electricity and gas.<sup>21</sup> Mutual recognition legislation is one means of decreasing costs to industry of different standards or regulations applying in Australian and New Zealand

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<sup>19</sup> Access Economics Pty Ltd, 2005, ‘Benefits and Costs of Regulation’, Appendix 2 of the Business Council of Australia’s (2005) *Business Regulation Action Plan for Future Prosperity*, [www.bca.com.au](http://www.bca.com.au).

<sup>20</sup> Australian Chamber of Commerce and Industry, 2005, *Holding Back the Red Tape Avalanche – A Regulatory Reform Agenda for Australia*, Position Paper, p 37.

<sup>21</sup> For example:

- Films, videos, computer games and literature are classified by the Office of Film and Literature Classification, under Commonwealth Guidelines. However, the sale, hire and advertising of these products are regulated by the states and territories.
- Marketing of electricity and natural gas is regulated by state and territory regulators. While the general purpose of the regulation is common, there are differences in, for example, the permitted times for marketing and content of disclosure documents.

jurisdictions relating to the sale of goods and the registration of occupations (see section 8.3 for further discussion).

According to the ACCI, large numbers of regulators can lead to overlapping and/or inconsistent regulation and higher compliance costs to business.<sup>22</sup> “Multiple regulators can increase the amount of paperwork having to be filed by business, as knowledge of business information already stored by other agencies is often unknown. Furthermore, this leads to the duplication of information requests by agencies and reduces the use of pre-populating forms.”<sup>23</sup>

Depending on the subject or goal of the regulation, appropriate transitional arrangements can minimise the costs to firms or adverse impacts of new regulatory requirements. For instance, such transitional arrangements could involve phasing-in of requirements over a specified time period (eg, two years), to provide individuals or firms with time to adjust to new requirements and a greater opportunity to comply at minimum cost.

Appropriate transitional arrangements may also be required where a change in regulatory requirements impacts on the property rights of individuals.<sup>24</sup> These arrangements could take the form of financial compensation for loss of assets or asset value as a result of the introduction of new regulation.<sup>25</sup> Such compensation would be a financial cost to government, which may need to be considered in reviewing any proposed regulatory change that has the potential to affect the property rights of individuals.

While difficult to estimate with great accuracy the compliance cost of regulation in Australia, researchers have identified a range of indicative examples. For instance:

- a 1998 Productivity Commission study estimated regulatory compliance costs at \$11 billion in 1994-5, 85 per cent of which was borne by small and medium-sized enterprise<sup>26</sup>
- a 2001 OECD study estimated that in 1998 Australian taxation, employment and environmental regulations imposed \$17 billion in direct compliance costs on small and medium enterprises<sup>27</sup>
- the Australian Government’s 1996 Small Business Deregulation Taskforce found that the average small business owner spent 16 hours a week on financial accounts, invoices, tax and other compliance matters.<sup>28</sup>

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<sup>22</sup> Australian Chamber of Commerce and Industry, 2005, *Holding Back the Red Tape Avalanche – A Regulatory Reform Agenda for Australia*, Position Paper.

<sup>23</sup> Ibid, p 35.

<sup>24</sup> For example, in the case of natural resource management, a reduction in the share of water that is available for extraction (which is not provided for in current regulatory arrangements) may adversely affect water access licence holders.

<sup>25</sup> Once regulatory arrangements have created rights (either as formally recognised property rights or ‘quasi-property rights’) it may not be feasible or desirable for governments to remove or diminish these rights without compensation or other transitional arrangements.

<sup>26</sup> Lattimore R, Martin B, Madge A and Mills J, 1998, *Design Principles for Small Business Programs and Regulations*, Productivity Commission Staff Research Paper, AusInfo, Canberra. This reference is sourced from: Australian Government Regulation Taskforce, 2005, *Regulation Taskforce Issues Paper*, [www.regulationtaskforce.gov.au](http://www.regulationtaskforce.gov.au).

<sup>27</sup> Organisation for Economic Co-operation and Development, 2001, *Businesses’ Views on Red Tape: Administrative and Regulatory Burdens on Small and Medium Sized Enterprises*, OECD, Paris. This reference is sourced from Australian Government Regulation Taskforce, 2005 (ibid).

It is important to note that these are gross costs - they fail to take into account the benefits that are the rationale for the regulation. Nevertheless, they do indicate that the benefits from more effective/efficient regulation are potentially substantial.

## 6.2 Economy-wide impacts of regulation

As well as direct impacts on the government and the regulated entity, regulation can also have wider impacts. On the positive side, these wider impacts primarily flow from the correction of market failure or the rationale for the regulation – ie, efficiency gains (in terms of *productive*, *allocative* and *dynamic* efficiency<sup>29</sup>) from more competitive markets, the internalisation of externalities, greater flow of information to consumers, etc.

On the negative side, if applied inappropriately, regulation can unduly increase taxes (to finance administration costs); increase the costs of production and hence prices – and therefore undermine the competitiveness of Australian industry; and distort the allocation of resources.

Depending on how it is designed, regulation can also discourage or promote innovation, and hence dynamic efficiency gains or losses. Highly prescriptive regulation may act to stifle innovation. In contrast, an incentive or outcomes-based approach to regulation can provide an incentive for a firm to discover the least cost means of achieving the desired regulatory outcome, which can lead to innovation and a re-examination of its business processes.

For example, a ‘cap and trade’ or a ‘cap and pay’ pollution scheme provides firms with the flexibility to identify the least cost way to comply with regulatory requirements, as well as an ongoing incentive to reduce pollutant emissions. As well as considering traditional ‘end of pipe’ pollution reduction technology, such a scheme can also provide the impetus for businesses to examine their production processes as a whole (eg, in terms of type and/or amount of fuel or inputs used, use of waste or by-product, etc) in their quest to identify the most cost effective means of reducing emissions – which in turn can lead to efficiency gains. The NSW Department of Environment and Conservation’s (DEC)<sup>30</sup> Load Based Licensing System is one such innovative regulatory scheme. It sets limits on the pollutant loads (air and water) of environment protection licence holders, and links licence fees to pollutant emissions. According to the DEC, this gives licensees the ability to implement cost effective pollution abatement methods, provides incentives for ongoing pollution reduction, and provides the infrastructure for an emissions trading scheme.<sup>31</sup>

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<sup>28</sup> Small Business Deregulation Taskforce, 1996, *Time for Business*, Canberra. This reference is sourced from Australian Government Regulation Taskforce, 2005 (ibid).

<sup>29</sup> *Productive* efficiency is said to be achieved when a given output is produced at minimum possible cost, given available production technology and input prices. *Allocative* efficiency is maximised where resources are allocated so that the value in the use of the product at the margin is equal to the increment in the cost of supply of the product at the margin, including any external costs and benefits from the activity. The necessary rule can be summarised as the application of marginal cost pricing (including all social, environmental and financial costs of an activity). *Dynamic* efficiency relates to processes of technological and managerial innovation – the ability of producers to improve the quality and cost of their goods and services and to respond to emerging market developments.

<sup>30</sup> Formerly the NSW Environment Protection Authority (EPA).

<sup>31</sup> [www.epa.nsw.gov.au/licensing/index.htm](http://www.epa.nsw.gov.au/licensing/index.htm).

### 6.3 Unintended impacts of regulation

Regulation can also have a range of unintended or unforeseen impacts. For example, a number of provisions in federal tax legislation have been identified as creating incentives for activities that are counter to some environmental objectives of state and federal governments. For instance:

- At a time when urban traffic congestion and motor vehicle emissions are major policy concerns for governments, it has been argued that fringe benefits tax provisions provide an incentive for cars to be provided as part of salary packages and for increased use of these cars to achieve lower taxation rates.<sup>32</sup>
- Landcare tax deductions can be claimed by rural businesses for some types of expenditure to combat land degradation, including for 'destroying plant growth detrimental to the land.' However, by creating an incentive for land clearing and the removal of regrowth, this provision may also have unintentionally served to reduce water quality.<sup>33</sup>

There are also some cases where regulatory provisions can undermine the actual objective of the regulation in question. For instance:

- The US Federal Aviation Authority estimated that while a requirement for child safety seats in aircraft could potentially save the lives of 5 infants over 10 years, it would be likely to increase highway fatalities by 20 to 100 - as a result of families choosing to travel by car rather than by plane as ticket prices rose.<sup>34</sup>
- Prior to financial deregulation in Australia, an interest cap was imposed as a measure to assist small business. However, the cap made lending to small business less attractive to banks, given the relative risks involved, resulting in reduced credit availability for those groups and thus undermining the goal of the regulatory measure.<sup>35</sup>
- As a result of the prohibition on the sale of native Australian animals, Earth Sanctuaries Pty Ltd, a private conservation agency based in South Australia, would have to cull rather than sell platypuses that are surplus to a sustainable population - even though offers in excess of \$1 million per animal have been made, and the prohibition of the sale of native animals is aimed at conserving species such as the platypus.<sup>36</sup>

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<sup>32</sup> See:

- Hamilton C, Denniss R and Turton H, 2002, *Taxes and Charges for Environmental Protection*, Discussion Paper Number 46, The Australia Institute, Canberra.
- Hatfield Dodds S, 2003, 'When should we use taxes to address environmental issues? A policy framework and practical agenda for Australia', *Plenary Speaking Notes, Fourth Annual Global Conference on Environmental Taxation Issues*, Sydney, Australia, 5 - 7 June 2003.
- SECITA, 2000, *The Heat is On: Australia's Greenhouse Future*, Senate Environment, Communications, Information Technology and the Arts References Committee, November 2000.

<sup>33</sup> Banks G, 2003, 'The good, the bad and the ugly: economic perspectives on regulation in Australia', Address to the *Conference of Economists, Business Symposium*, Hyatt Hotel, Canberra, 2 October 2003.

<sup>34</sup> Hahn R, 1997, *The Economics of Airline Safety and Security: An Analysis of the White House Commission's Recommendations*. This reference is sourced from: Banks G, 2003 (ibid).

<sup>35</sup> Banks G, 2003, 'The good, the bad and the ugly: economic perspectives on regulation in Australia', Address to the *Conference of Economists, Business Symposium*, Hyatt Hotel, Canberra, 2 October 2003.

<sup>36</sup> Banks G, 2003, (ibid).

These examples highlight the importance of being mindful that regulations can potentially create perverse incentives or result in unintended impacts.

*The Tribunal is seeking information on regulations that impose unnecessary administrative, compliance and other burdens on business, government or the community. Please refer to the questions on page 2 (see Box 'What information is being sought?'), and in responding to these questions please provide specific examples.*

## 7 REGULATION AND NON-REGULATORY ALTERNATIVES

When considering measures to achieve social, environmental and economic objectives, there is a range of actions available to governments and the community. Depending on the nature of the 'problem' to be addressed, options may include some form of regulation (eg, 'command and control' regulation, co-regulation, 'incentive-based' regulation, etc) or alternatives to regulation (eg, self-regulation, education campaigns, etc).

### 7.1 Regulation

Explicit government regulation (often referred to as 'black letter law') consists of primary and subordinate legislation, such as Acts of Parliament, statutory rules or regulations, by-laws and ordinances. Explicit government regulation is the most commonly used form of regulation. However, there is a spectrum of approaches that can be taken to this kind of regulation, from a 'heavy-handed' to a 'light-handed' approach, and including more innovative approaches such as 'incentive-based' or 'market-based' regulation. Each approach has different advantages and disadvantages, and associated costs and benefits.

#### 7.1.1 'Heavy-handed' regulation

Traditionally, explicit government regulation has tended to take the form of '**command and control**' regulation. Regulation of this kind generally attempts to change behaviour by detailing how regulated parties should act under the law, generally relies on government inspectors or monitoring to detect non-compliance, and usually imposes punitive sanctions (such as fines) in instances of non-compliance.<sup>37</sup>

Some strengths of this kind of regulation are that it can provide more certainty (which can lead to lower compliance costs) and greater effectiveness because of the availability of legal sanctions, when compared with other forms of regulation. This type of regulation is generally preferred when dealing with high risk, high impact public issues (eg, public health and safety). However, this type of regulation has also been criticised for being highly prescriptive and therefore inflexible, complex and costly to implement.<sup>38</sup>

#### 7.1.2 'Light-handed' regulation

In recent times, in some circumstances, a more 'light-handed' approach to regulation has been favoured. A common feature of a light-handed approach is that it is less prescriptive, in that it gives greater weight to outcomes than the particular methods of achieving them. Alternatives to traditional 'command and control' regulation - which can be less costly, more flexible and more effective - are outlined below:

- **Co-regulation** refers to the situation where an industry or professional body develops the regulatory arrangements (eg, code of practice, accreditation or rating scheme) and government provides the legislative backing to enable the arrangements to be enforced. Co-regulation is common in relation to professions such as lawyers.<sup>39</sup> An authorised supplier of natural gas in NSW is required, as a condition of authorisation,

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<sup>37</sup> Department of Treasury and Finance, 2005, *Victorian Guide to Regulation*, [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au), p 2-3; and Office of Regulation Review, 1998, *A Guide to Regulation (second edition)*, p E14.

<sup>38</sup> Office of Regulation Review, 1998 (ibid), p E14-E15.

<sup>39</sup> Department of Treasury and Finance, 2005 (ibid), p 2-5; and Office of Regulation Review, 1998 (ibid), p E11.



to participate in an ‘approved scheme’ to develop, administer and implement appropriate business rules and retail market business systems to support full competition in the natural gas retail market in NSW. In December 2000, the Gas Market Company Limited was established by the NSW retail natural gas industry and recognised by the Minister for Utilities as the only approved scheme.

- **Quasi-regulation** refers to the range of rules, instruments and standards whereby government influences businesses to comply, but which do not form a part of explicit government regulation and do not involve a government enforcement role. An example is the Electronic Funds Transfer (EFT) Code of Conduct, which was endorsed by federal, state and territory governments, and applies to financial transactions that are effected through the use of a card and a personal identification number. The Code is monitored by the Australian Securities & Investments Commission, and requires EFT providers to issue customers with certain information and a transaction receipt.<sup>40</sup>

Co-regulation and quasi-regulation have similar advantages and disadvantages. The advantages of these approaches are that they encourage greater industry or professional responsibility for behaviour of its members; reduce the government resources dedicated to regulation of the industry or profession; and, by utilising involvement and expertise of the industry or profession, are more likely to have high acceptance by members. The disadvantages include the danger of raising barriers and costs to entry within an industry or profession - unintended monopoly power gained by market participants could restrict competition or may not sufficiently serve the interests of the community at large.

- **‘Incentive-based’ regulation** can take many forms. The most commonly used are taxes, user charges or subsidies. There are numerous NSW examples of incentive-based regulation. The imposition of a waste levy on the disposal of waste to landfills was introduced in 1996 to encourage recycling and re-use of waste, as well as to minimise waste creation and disposal.<sup>41</sup> A Load Based Licensing Scheme was introduced to provide continuing incentives to encourage licensed industries to reduce pollution in a cost effective and timely manner (*Protection of the Environment Operations (General) Regulation 1998*).

Some of the advantages of taxes or subsidies can be that they allow for low regulator discretion and low intervention in management; they encourage least cost technologies and methods of compliance; and they create economic pressure to behave acceptably. Some of the disadvantages include the need for complex rules to institute the measure; difficulty in predicting outcomes from the given incentive; and there may be a lag in time between the inception of the regulation and the appropriate response by the regulated community (ie, ‘regulatory lag’). A further criticism of taxes is that they can encourage evasion and do not prohibit the undesirable behaviour.<sup>42</sup>

In recent times, regulators have considered other measures directed at rewarding good behaviour (rather than penalising bad behaviour), such as rewarding parties demonstrating a consistent record of compliance with a reduction in licence fees,

<sup>40</sup> Department of Treasury and Finance, 2005, *Victorian Guide to Regulation*, [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au), p 2-4 – 2-5.

<sup>41</sup> The waste levy was first introduced under the *Waste Minimisation and Management Act 1995*, the requirement can now be found in the *Protection of the Environment Operations Act 1997*.

<sup>42</sup> Baldwin R and Cave M, 1999, *Understanding Regulation – Theory, Strategy and Practice*, Oxford University Press, UK, p 44.

licences required, inspections, audits or other regulatory burdens, such as information reporting requirements. These measures can provide economic incentives to encourage compliance. However, if rewards are too generous they could result in market distortions or, as a result of decreased monitoring, could result in greater non-compliance.<sup>43</sup>

- **‘Market-based’ regulation** can take many forms, including allocation of property rights, tradeable permits, performance bonds and competitive tendering. Markets offer the potential for achieving regulatory objectives more efficiently than prescriptive regulations. Regulations of this kind:
  - can allow for the fact that costs and benefits of regulation vary across firms, as well as over time (eg, pollutant discharge trading allows firms that are less efficient at lowering discharges to buy discharge rights from firms that are more efficient)
  - allow firms the freedom to determine what technology is used to achieve a given performance standard or target, thereby encouraging least cost technologies
  - provides incentives to reduce harm to zero
  - can have lower regulatory costs, and
  - are information efficient, not requiring the regulator to know a lot about the technologies or costs of regulated firms. A well designed market creates incentives for individual firms to act on the information they have.<sup>44</sup>

There are some disadvantages with market-based approaches, including potentially acting as a barrier to entry into the market, limiting the number of participants and reducing competition; requiring rules to be put in place and enforced to ensure the integrity of the market-based scheme; and ‘regulatory lag’.<sup>45</sup>

In NSW, there are a number of economic or market-based instruments being used in the environmental area, including the use of tradeable emission permits to limit saline discharges into the Hunter River (*Protection of the Environment Operations (Hunter River Salinity Trading Scheme) Regulation 2002*) and the allocation of tradeable shares of available water under ‘water sharing plans’ made under the *Water Management Act 2000*.

- **Information disclosure** includes product labelling requirements and public information registers (eg, food labelling, details of hazardous substances in use, etc). Information disclosure does not directly seek to prohibit or regulate the consumption of the good or service, but tries to ensure that the public is aware of all the pros and cons of using the product. The advantages of this approach include that it influences behaviour without prohibiting it; facilitates informed decision-making by consumers; promotes high-quality goods and services; and preserves the opportunity for innovation. The disadvantages are that the information may be too technical (eg, information on contents of drugs) to meaningfully inform the public and may not be perceived as responsive enough.<sup>46</sup> Gambling operators in NSW are required to display

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<sup>43</sup> Department of Treasury and Finance, 2005, *Victorian Guide to Regulation*, [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au), p B-5.

<sup>44</sup> Banks G, 2003, ‘The good, the bad and the ugly: economic perspectives on regulation in Australia’, Address to the *Conference of Economists, Business Symposium*, Hyatt Hotel, Canberra, 2 October 2003, p 18.

<sup>45</sup> Department of Treasury and Finance, 2005 (ibid), p B-8; and Baldwin R and Cave M, 1999, *Understanding Regulation – Theory, Strategy and Practice*, Oxford University Press, UK, p 60.

<sup>46</sup> Department of Treasury and Finance, 2005 (ibid), p 2-6.

a range of signs relating to responsible gambling, in addition to signs relating to minors in gaming machine areas and responsible service of alcohol. It has been argued that the number of signs and excessive content result in 'signage fatigue', diminishing their effectiveness. The NSW Government has recently committed to a review of this signage to improve its effectiveness.

## 7.2 Alternatives

There are also a number of alternatives to regulation which can be considered, including:

- no specific action
- public information and education campaigns, including media campaigns and
- self-regulation.

These alternatives also have their strengths and weaknesses, and will only be appropriate in particular circumstances.

- **No specific action** – this relies on the market to provide a solution to the problem, in conjunction with existing laws (such as general liability and insurance laws). This may be an appropriate response where the problem is temporary in nature or may resolve itself (eg, if the market is rapidly changing); where enforcement of existing laws may be sufficient to address the problem; or where the costs of regulatory intervention outweigh the potential benefits.<sup>47</sup>
- **Public information and education campaigns** – an education campaign is likely to be a successful strategy where the problem is a result of misinformation or lack of information and the target can be easily identified and reached economically. Approaches include advertising on television and in newspapers, distributing information brochures, soliciting community groups or associations to disseminate information, or targeted mail-outs to affected groups.
- **Self-regulation** is generally characterised by the development of voluntary codes of practice or conduct by an industry, with the industry solely responsible for enforcement (and no government involvement). It is used in advertising, real estate, by professions and in the financial services sector.<sup>48</sup> Self-regulation may be most appropriate where the problem is of low risk or impact and there is an incentive for individuals and groups to develop and comply with self-regulatory arrangements, such as industry survival or market advantage.<sup>49</sup>

In response to strong government pressure to reduce plastic bag use and increase recycling, the Australian Retailers Association and major supermarkets worked with Environment Ministers to agree to the voluntary Plastic Bag Code. The Code is supported by an industry-level communications campaign to educate consumers and retailers, and promote efficient bag use. The Code contains strong targets, including reducing the number of plastic bags issued by 25 per cent by the end of 2004 and by 50 per cent by the end of 2005.

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<sup>47</sup> Department of Treasury and Finance, 2005, *Victorian Guide to Regulation*, [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au), p 2-7 and B-7.

<sup>48</sup> Department of Treasury and Finance, 2005 (ibid), p 2-3; and Office of Regulation Review, 1998, *A Guide to Regulation (second edition)*, p B3.

<sup>49</sup> Office of Regulation Review, 1998 (ibid), p D4.

*The Tribunal is seeking ideas on how to improve or reform existing regulations to make them more efficient. Are there opportunities for alternative approaches to regulation or 'smarter' regulation? If so, please provide specific examples.*

## 8 BEST PRACTICE REGULATION

In considering whether unnecessary burdens are being imposed by existing regulations in NSW, it is instructive to remind ourselves of what ‘best practice’ regulation would look like. At a general level, good regulation:

1. must be fully justified and effective – directed at solving a problem that cannot be more efficiently or effectively addressed by the market or by individuals acting without government involvement
2. must provide the greatest net benefit or lowest net cost to the community, given its rationale, out of all the options or alternatives available, by being well targeted and minimising any adverse side-effects and compliance costs
3. should be clear and concise – it should be readily accessible or understandable to those affected by it
4. should be consistent with other laws or regulations – inconsistency creates confusion and waste
5. must be enforceable, but should provide incentives or impose disciplines no greater than are necessary for reasonable enforcement - enforcement regimes should be effective and cost efficient and involve adequate resources for the purpose
6. should be administered by accountable bodies in a fair and consistent manner and
7. should not be unduly prescriptive – where possible, it should be specified in terms of performance goals or outcomes and be flexible enough to accommodate different or changing circumstances to enable the most cost effective ways of complying.<sup>50</sup>

### 8.1 Achieving ‘best practice’ regulation

In order to achieve best practice regulation, good process is the key. The elements of good process involve determining that a problem exists for which regulatory action is justified by:

- identifying the problem and the desired objective(s) or outcome(s)
- considering the options (regulatory and non-regulatory) for achieving the desired outcome(s)
- assessing the impacts (costs and benefits) of each option for consumers, business, government and the community
- consulting with those potentially affected and developing the regulatory action with the participation of the community
- deciding among the alternatives, on the basis of transparent criteria and
- developing a strategy to implement, enforce and review the preferred regulatory action and its operation.<sup>51</sup>

<sup>50</sup> Based on Banks G, 1999, ‘Towards Best Practice Regulation: The National ‘Standard’’, Address to ESAA Conference, *Best Practice Regulation for Electricity Supply Businesses*, Savoy Park Plaza Hotel, Melbourne, 23 February 1999, p 3-4; Banks G, 2003, ‘The good, the bad and the ugly: economic perspectives on regulation in Australia’, Address to the *Conference of Economists, Business Symposium*, Hyatt Hotel, Canberra, 2 October 2003, p 16-17; and Banks G, 2003, ‘Reducing the business costs of regulation’, *Address to the Small Business Coalition*, Brassey House, Canberra, 20 March 2003, p 3.

The main process used in Australia to achieve best practice regulation is the Regulatory Impact Statement (RIS). In NSW, a RIS must be prepared when subordinate legislation (ie, regulations, by-laws or ordinances) is made (unless the instrument is excluded or exempted under a ministerial certificate from requiring a RIS).<sup>52</sup> In addition, all subordinate legislation in NSW is subject to automatic repeal after 5 years (although it is possible to postpone the repeal by one year, and to do so up to 5 times).

The NSW RIS requirements incorporate the steps set out above, including consultation on the RIS and proposed regulation.<sup>53</sup> In NSW, the economic and social costs and benefits, both direct and indirect, relating to resource allocation, administration and compliance need to be taken into account, and costs and benefits are required to be quantified wherever possible.

In NSW there is a joint committee of members of Parliament called the Legislation Review Committee which, in relation to subordinate legislation, has the task of considering and reporting on (amongst other matters) whether:

- the regulation trespasses unduly on personal rights and liberties
- the regulation has an adverse impact on the business community
- the objective of the regulation could have been achieved by alternative and more effective means
- the regulation duplicates, overlaps or conflicts with any other regulation or Act and
- whether the RIS requirements have been complied with.

The Committee therefore acts as an independent 'gatekeeper' on the adequacy of NSW regulations and the RIS process, and has the power to recommend to the NSW Parliament that a regulation or portion of a regulation be disallowed.<sup>54</sup>

In NSW there are no formal RIS requirements in relation to Acts of Parliament and instead Cabinet submissions for new Bills must meet best practice requirements.<sup>55</sup> Rural Community Impact Statements are required where rural and regional communities are affected by the proposal. The Legislation Review Committee also has an oversight role in relation to Bills, however it is primarily limited to consideration of whether there has been any undue incursion on personal rights and liberties. There are also no formal RIS requirements in relation to quasi-regulation. RIS requirements in Australian jurisdictions vary in application, as well as approach. For example, as of 1 July 2004, Victoria introduced RIS requirements for Bills with potentially significant effects for business and competition.<sup>56</sup>

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<sup>51</sup> Banks G, 1999 (ibid), p 7 and Banks G, 2005, 'Regulation-making in Australia: Is it broke? How do we fix it?', *Public Lecture Series, the Australian Centre for Regulatory Economics (ACORE) and the Faculty of Economics and Commerce, ANU, Canberra*, 7 July 2005, p 8.

<sup>52</sup> See ss.5-6 and Schedules 3 and 4 of the *Subordinate Legislation Act 1989 (NSW)* – for example, a RIS is not required for matters of a machinery nature, or direct amendments or repeals to subordinate legislation.

<sup>53</sup> See Schedule 2 of the *Subordinate Legislation Act 1989 (NSW)*.

<sup>54</sup> *Legislation Review Act 1985 (NSW)*.

<sup>55</sup> Business Council of Australia, 2005, *Business Regulation Action Plan for Future Prosperity*, [www.bca.com.au](http://www.bca.com.au), Appendix 2, p 33. These 'best practice' requirements are set out in: The Cabinet Office, 1997, *From Red Tape to Results – Government Regulation: A Guide to Best Practice*, NSW Government.

<sup>56</sup> For a discussion and comparison of RIS requirements applicable in Australian jurisdictions see: Business Council of Australia, 2005, *Business Regulation Action Plan for Future Prosperity*, [www.bca.com.au](http://www.bca.com.au), Appendix 2, Chapter 3.

## 8.2 Improving the regulatory process

There have been calls to strengthen ‘best practice’ regulation in Australia from a number of quarters. One suggestion has been to improve the existing RIS process used in Australian jurisdictions to ensure proposed regulations result in net benefits to the community. It has been suggested this process could be improved by:

- requiring a preliminary RIS for all regulatory proposals likely to affect business and a full RIS for all regulatory proposals likely to have a significant impact on business
- preparing RISs earlier in the process to assist decision makers (rather than justifying policy decisions already made)
- strengthening regulatory ‘gatekeeping’ mechanisms, by enhancing existing roles or creating new bodies which are more independent and adequately resourced to oversee the creation of new regulations or provide advice on priorities for regulatory reform
- improving assessment of compliance costs and consultation processes and
- developing a standardised, sophisticated methodology for identifying and measuring likely costs of regulation.<sup>57</sup>

Some industry groups have called for the adoption of the ‘one in, one out’ approach to managing regulation.<sup>58</sup> Under this approach, no new regulation can be introduced by a government department unless an existing regulation is removed. This is intended to ensure that government departments prioritise between new regulations and remove existing regulations where appropriate, thus streamlining the regulatory framework. In a recent report, the Better Regulation Taskforce (established in 1997 by the UK Government) recommended that the ‘one in, one out’ approach to new regulation be adopted in Britain.<sup>59</sup>

## 8.3 Role of mutual recognition

Mutual recognition of regulations is a vehicle for integrating the economies of Australian jurisdictions, as well as the Australian and New Zealand economies.<sup>60</sup> It is one of a number of techniques available to governments to reduce regulatory impediments to goods and services mobility across jurisdictions.<sup>61</sup>

<sup>57</sup> Business Council of Australia, 2005, *Business Regulation Action Plan for Future Prosperity*, [www.bca.com.au](http://www.bca.com.au), p viii; Australian Chamber of Commerce and Industry, 2005, *Holding Back the Red Tape Avalanche – A Regulatory Reform Agenda for Australia*, Position Paper; Australian Industry Group, 2005, *Reducing Regulatory Costs: A Three-Point Plan to Save Time and Money and to Boost Productivity*; and Banks G, 2005, ‘Regulation-making in Australia: Is it broke? How do we fix it?’, *Public Lecture Series, the Australian Centre for Regulatory Economics (ACORE) and the Faculty of Economics and Commerce, ANU, Canberra*, 7 July 2005, p 10-13.

<sup>58</sup> State Chamber of Commerce NSW, 2005, *Red Tape Register*; and Australian Chamber of Commerce and Industry, 2005, *Holding Back the Red Tape Avalanche – A Regulatory Reform Agenda for Australia*, Position Paper.

<sup>59</sup> Better Regulation Taskforce, 2005, *Regulation – Less is More*, [www.brtf.gov.uk](http://www.brtf.gov.uk).

<sup>60</sup> Mutual recognition was progressively adopted by the Commonwealth and all Australian states and territories between 1992 and 1995, and adopted by Australia and New Zealand in 1998. In NSW mutual recognition was adopted under the *Mutual Recognition (New South Wales) Act 1992*.

<sup>61</sup> Productivity Commission, 2003, *Evaluation of the Mutual Recognition Schemes*, Research Report, Canberra, p xv & 1.

In Australia, mutual recognition only applies to regulations affecting the sale of goods and the registration of occupations.<sup>62</sup> It allows goods which meet the regulatory requirements of their home jurisdiction to be lawfully sold in all other Australian jurisdictions and, similarly, for people who meet the registration requirements of their home jurisdiction to be registered for the equivalent occupation in other Australian jurisdictions. It does not extend to the manner of sale, transport, storage, handling, inspection or usage of goods, or to the manner of delivery or the remote provision (across borders) of services. In contrast, the European Union mutual recognition scheme applies to anything that restricts sale.<sup>63</sup>

Prior to the inception of the Australian mutual recognition scheme, businesses trading interstate had to satisfy the multiple regulatory standards of various jurisdictions, package and label goods differently for sale in different jurisdictions, and satisfy product testing requirements of other jurisdictions prior to sale in those jurisdictions. Similarly, the movement of skilled people interstate was being inhibited by the different registration requirements for occupations operating in each jurisdiction.<sup>64</sup>

In NSW, as part of the regulatory process, The Cabinet Office and ministers (where appropriate) are responsible for considering mutual recognition issues and ensuring regulatory proposals are consistent with mutual recognition obligations.<sup>65</sup>

*The Tribunal seeks views on the regulatory process and whether it can be improved.*

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<sup>62</sup> The Australian scheme is also subject to exemptions, for example, film classification legislation and gaming machines.

<sup>63</sup> Productivity Commission, 2003 (op cit), p xv.

<sup>64</sup> Productivity Commission, 2003 (op cit).

<sup>65</sup> Cross-Jurisdictional Review Forum, 2004, *Evaluation of Mutual Recognition Schemes – Report to The Council of Australian Governments and the New Zealand Government*, Appendix G, [www.coag.gov.au/recognition.htm](http://www.coag.gov.au/recognition.htm).



## APPENDIX A TERMS OF REFERENCE

Under Section 9 of the *Independent Pricing and Regulatory Tribunal Act 1992* the following matter is referred to the Independent Pricing and Regulatory Tribunal:

*Review of the burden of existing regulation in New South Wales, identification of priority areas where regulatory reform could provide significant immediate gains to business and the community, and development of recommendations to improve the efficiency of Government regulation.*

Well designed and targeted regulation is one of the central tools used by Government to deliver the social, environmental and economic goals of business and the broader community. However, regulation should only be used where it is needed, and efforts should be made to avoid inefficient regulation and minimise that which may be unnecessarily costly, excessive, or overly complex. Regulations that impose unnecessary burdens can impede competition, productivity, investment and innovation.

The purpose of the review is to:

1. identify areas of NSW Government regulation which are imposing a significant, unnecessary regulatory burden on business and the community; and indicate priority areas in which regulatory reforms could provide significant immediate gains to business and the community; and
2. develop recommendations for Government action to significantly improve the efficiency of regulation and reduce unnecessary regulatory burden on business and the community, including consideration of non-regulatory or incentive-based options for achieving this outcome.

In conducting the review and developing recommendations, IPART is to:

- a) have regard to industry and government reports in this area, and undertake targeted consultation with stakeholders and relevant Government agencies;
- b) identify the areas of NSW regulation and Government requirements that impose the most significant and unnecessary administrative or compliance burden on business, local government and the community;
- c) identify areas of overlapping or inconsistent requirements between New South Wales and other States and Territories or the Commonwealth that result in the most significant and unnecessary administrative or compliance burdens;
- d) identify any differential impacts across small, medium and large businesses, local government and the community; and
- e) examine options for reducing those burdens, including through removing unwarranted requirements, streamlining or simplifying requirements, or introducing regulatory innovations or alternatives to regulation such as incentive-based regulation or increased use of self-regulatory approaches.

The Tribunal is to provide an initial report to the Premier on the priority areas it considers warrant more detailed investigation by 31 March 2006.

The Tribunal is to provide its final report to the Premier by 30 June 2006.