



Small  
Business  
Commissioner



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# Rightsizing regulation

Review of small business experiences with  
regulatory policymaking processes

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OCTOBER 2024



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## Message from the Small Business Commissioner

Small businesses have weathered countless challenges since the COVID-19 pandemic. Business cost pressures and a challenging economic environment remain some of the most pressing challenges for our small business community.

One of the most frequent complaints I hear is the impact of red tape. Our monthly Momentum survey shows that red tape has had the biggest increase in reported levels of concern – outstripping cash flow, customer demand and general business costs. More than half of small businesses responding to this review told us that regulation has become harder to navigate in the past year, while only 2 per cent said it had gotten easier.

From licensing frameworks to impractical food labelling rules and complicated government systems, small businesses face regulations they claim are not designed with them in mind. Just 7 per cent of small businesses surveyed agreed that regulation was designed around the needs of small business.

Improving regulation does not mean sacrificing consumer protection or broader market fairness. In fact, well-crafted regulation benefits everyone – consumers, communities, and businesses alike. Better regulation means designing rules that meet the needs of all stakeholders, including small businesses.

This review found that current approaches, meant to ensure good policy, aren't always doing their job. While they are built on solid principles and reflect best practice, they are not applied consistently.

To change this, improvements to the NSW Regulatory Policy Framework to ensure that impact assessments are both thorough and consistent, and that small business perspectives are considered from the earliest stages of policy design are proposed. One key proposal is the adoption of a formal Small Business Impact Statement to guide regulatory policy.

This report provides 9 recommendations drawn from stakeholder feedback and best practices implemented in other jurisdictions. Modest upfront investment in proper analysis and getting policy design right in the first place, can yield significant benefits, ensuring that regulations are effective, fair and supportive of small business.

At a time of acute cost of living pressures, right sizing and improving the development of regulation presents an enormous opportunity to improve productivity and reduce costs.

Better regulation is as important to small business as it is to consumers.

Ultimately, better regulation involves understanding the real-world impact on our small businesses and designing policies that work for everyone.

I would like to thank all who provided information and support for this Review, especially the NSW Small Business Commissioner Small Business Reference Group.

Chris Lamont  
Small Business Commissioner



## Terms of reference

Review of small business experiences with regulatory policymaking.

### Purpose

This review examines the experiences of small businesses as a key stakeholder group within the regulatory policy development process. The review is intended to inform actions to improve small business policy and reduce red tape and other pain points. This review will make findings about the experiences of small businesses and provide recommendations aimed at ensuring their needs are considered and addressed.

### Scope

The review provides findings and recommendations informed by engagement with small business stakeholders, government agencies and an examination of best practice approaches to regulatory policymaking. The review considered any matter relevant to the purpose of the review, including but not limited to the following:

- Stakeholder consultation and engagement practices.
- Current practices for assessing impacts and the needs of small businesses.
- The NSW Government's Guide to Better Regulation, including application of the better regulation principles and implementation of existing requirements.
- Limitations and opportunities to improve existing practices and processes.
- Use of data and insights.
- Opportunities to embed awareness of the needs of small business within policymaking processes.

Stakeholder views and engagement included the NSW Small Business Commissioner's Small Business Reference Group (SBRG). Members of the SBRG were as follows:

- Luke Achterstraat – CEO Council of Small Business Organisations Australia
- David Mumford – Director, RBK Nutraceuticals
- Yasmin Coe – Founder, Sweet Pea & Poppy
- Todd & Jenny Raffin – Owners, Almighty Industries
- Mark McKenzie – CEO, Australian Convenience & Petroleum Marketers Association
- Tim Burt – Director, Future Skills Organisation
- Kylie Yates – CEO, Civil Contractors Federation NSW
- David Bare – NSW Director, Housing Industry Association
- Amanda Gould – Director, Real Estate Institute of NSW

# List of recommendations

Recommendations	Theme
<p><b>1 Two-stage regulatory impact assessment</b></p> <p>Implementing a requirement in the Better Regulation Framework for a two-stage consultation model. The model would facilitate early engagement with stakeholders before a policy direction has been set. The focus of the model is demonstration of stakeholder consultation at two key stages:</p> <ul style="list-style-type: none"> <li>• <i>Consultation stage 1</i> – Early assessment and problem identification</li> <li>• <i>Consultation stage 2</i> – Final assessment incorporating feedback on the recommended option</li> </ul> <p>This process would require the development of a consultation plan to be reviewed by the NSW Small Business Commission before the commencement of Consultation stage 1.</p> <p>Agencies would be required to demonstrate utilisation of stakeholder feedback and respond to any significant issues raised by the NSW Small Business Commission in relation to impacts on small business identified in stage 2.</p>	<p><b>Oversight and assurance</b></p>
<p><b>2 Tiered regulation by default</b></p> <p>When designing new regulatory requirements, the default approach should be to consider whether alternative approaches are warranted for small businesses. This would require explicit justification for why a requirement should apply to smaller businesses, reversing the current practice of applying regulatory requirements to all businesses and only then considering whether exemptions, tiered or alternative approaches are warranted.</p>	<p><b>Considering small business needs</b></p>
<p><b>3 Small business consultation strategies</b></p> <p>Agencies should develop a small business consultation strategy at the time of commencing a policy project or review where small businesses are likely to represent a significant proportion of impacted stakeholders. This strategy should consider the unique challenges and barriers that may limit small business participation.</p> <p>The NSW Small Business Commission should be consulted on proposed consultation strategies, including methods to engage small businesses.</p> <p>In circumstances where small business impacts are more limited, engagement with the Commission is encouraged to ensure consultation methods represent best practice.</p>	<p><b>Considering small business needs</b></p>

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#### **4 Reporting on stakeholder feedback**

Efforts should be made to engage with stakeholders on their feedback to ensure their feedback is properly understood, and for stakeholders to feel heard and not discouraged from participating in future consultations.

Agencies should communicate how stakeholder feedback influenced decisions and the rationale behind those decisions. This includes explanation of particularly contentious issues, such as where a decision was made to proceed despite the presence of significant stakeholder concerns.

Stakeholder feedback should be reported as part of the *Consultation stage 2* regulatory impact assessment (see Recommendation 1).

**Oversight and assurance**

#### **5 Regulatory impact assessment registry**

All regulatory impact assessments, including BRS and RIS documents, should be publicly available and centrally available on a new regulatory impact assessment registry.

There is an opportunity to leverage existing government platforms, such as the 'Have your say' platform, to establish a centralised information hub for both ongoing and past NSW Government consultation processes. The platform should enable stakeholders to subscribe for updates specific to their industry and receive notifications regarding relevant consultation opportunities.

**Oversight and assurance**

#### **6 Requirement for a Small Business Impact Statement**

A Small Business Impact Statement (SBIS) should be prepared whenever a RIS or BRS is required. The SBIS should require agencies to consider factors such as:

- Whether policy objectives can be met if small businesses are exempted from any new requirements or if the requirements could be scaled according to the size of an enterprise (see Recommendation 2).
- A specific cost-benefit assessment to provide confidence that the benefits of extending the scope of new regulation to small business cohorts exceed any costs.
- An assessment of the cumulative impact of new requirements on small business with existing obligations.
- Potential implementation issues and practical challenges that may be specific to owner operators.
- Implementation considerations, including how small businesses will be supported to comply with any new requirements.
- The unique needs of businesses operated by culturally and linguistically diverse people.

The SBIS should be subject to consultation and review by the NSW Small Business Commission.

**Red tape reduction and small business consideration**



## **7 Post-implementation and ex-post reviews**

**Oversight and assurance**

A post-implementation review (PIR) should be prepared in circumstances where ex-ante regulatory impact assessment did not occur or was not prepared to a satisfactory standard (including in circumstances where there is considerable uncertainty about assumptions used, costs and realised benefits). It is recommended that a PIR be carried out within 18-24 months of implementation where required.

Regular ex-post evaluations of regulatory interventions should be prepared at least every five years, in accordance with NSW Treasury's Evaluation Policy and Guidelines.

## **8 Establish an independent oversight body**

**Oversight and assurance**

An independent oversight body should be established and tasked with the following functions:

- Promote regulatory quality and minimising unnecessary regulatory burden.
- Undertake quality control of regulatory impact assessments by providing advice to the Premier and Ministers on regulatory development process and practice.
- Assess the adequacy of agency assessments and working collaboratively with agencies to ensure sufficiently robust analysis.
- Make recommendations regarding the need to prepare a PIR in circumstances where analysis is incomplete or difficult due to policy uncertainties, and review of PIRs to ensure they are prepared to a satisfactory standard.
- Provide assurance to the Government and the community through a formal reporting role.

The body should be established as an independent Commissioner role with sufficient resources to fulfill its functions. The Commissioner role should report directly to a Minister within Cabinet who is assigned responsibility for ensuring regulatory quality.

## **9 Capability uplift and acquisition of external expertise**

**Oversight and assurance**

The Commission recommends the development of a NSW Government training program to support policy officials to understand the requirements of the Better Regulation Principles and its conceptual foundations.

The Commission also recommends appropriate workforce planning and capability uplift to embed understanding of key conceptual and economic frameworks used to assess policy impacts.

NSW Government procurement policies should play an enabling role in supporting agencies to acquire specialist external expertise to support robust regulatory impact assessment.

## About the NSW Small Business Commission

The Commission provides strategic advice, advocacy and affordable dispute resolution services to small businesses in NSW. The Commission's role includes:

- Encouraging government agencies and larger businesses to enter productive working relationships with small businesses.
- Facilitating and encouraging the fair treatment of small businesses.
- Promoting a fair operating environment in which small businesses can flourish.

In addition, the *Small Business Commissioner Act 2013* provides that it is a function of the Commissioner to advise the Minister, either at the Commissioner's own initiative or at the request of the Minister, on any matter affecting small businesses or that is relevant to the Commissioner's objectives or functions.

## Consultation for this review

This report is informed by engagement with small business, industry associations, peak bodies, government stakeholders and the Small Business Reference Group. The Commission invited written responses to an issues paper released in June and conducted targeted stakeholder meetings in June and July 2024.

The Commission also conducted a survey of small businesses and sought feedback from those who indicated they had engaged in NSW Government regulatory policy development processes. Over 1,000 small businesses participated in the survey.

Stakeholder feedback provided both quantitative and qualitative insights which informed the findings and recommendations of this review. Qualitative feedback was particularly helpful in exploring the experiences of small businesses when engaging in consultation and regulatory development processes.

## Note on terminology

### 'Regulation'

In some contexts, 'regulation' refers to a specific type of statutory instrument. In this report, however, the terms 'regulation' and 'regulatory burden' are used more broadly. This includes the effects of any rule, requirement, or process – whether arising from legislation, regulations, or other rules administered by government agencies – that contribute to compliance or administrative burden.

### 'Agencies'

This report frequently refers to NSW Government agencies as being involved in decision-making, implementation, and the stewardship of regulation. The Commission recognises the roles of agencies can be complex and multifaceted. References to NSW Government agencies are intended to refer to their broader influence as advisors and custodians of regulatory policy, including as champions for best practice, even when they are not the final decision-maker.

# Part I – Small business experiences with regulation

Regulation is an essential tool used by governments to maintain societal interests such as public safety, trade and commerce, consumer rights, and environmental protection. However, small businesses often raise concerns about the impact of regulation, including where it is not fit for their needs or is increasing in scope or compliance burden.

## 1.1 Regulatory burden

Governments are entrusted by the community to maintain laws, rules and other requirements that are in the best interests of society. Regulation, including legislative requirements and other rules, is an important way to achieve outcomes such as ensuring public safety, protecting consumer rights and fostering environmental sustainability.

Although some forms of regulation are generally seen as essential to achieving successful market outcomes, small business stakeholders frequently cite regulatory burden as among their top concerns when operating a small business.

Regulatory burden refers to the administrative and financial costs that businesses or individuals incur due to government regulations and requirements. This can include the time, effort and resources required to understand, implement and comply with requirements. Common examples of regulatory burden include:

- Labour costs associated with administrative activities.
- Costs of obtaining specialist advice.
- Opportunity costs of effort required to understand and comply with obligations.
- Cost of systems or other supports.
- Mental load or stress.

Regulation may also impact businesses through more indirect means, such as limiting market opportunities or reducing consumer demand.

In many cases, regulatory burden is an unavoidable consequence of regulation. Even very well-designed regulation may have some costs and impacts. However, regulation is not always designed in a manner that minimises regulatory burden, and some costs may be either avoidable or greater than any realised benefits of requirements.

Unnecessary regulatory burden may sometimes be referred to as ‘red tape’. Red tape is often used to describe inefficiencies and obstacles that complicate compliance without adding value. It is often associated with requirements that could be removed, or replaced with less costly alternatives, with minimal consequence.

## Feedback suggesting increased regulatory burden

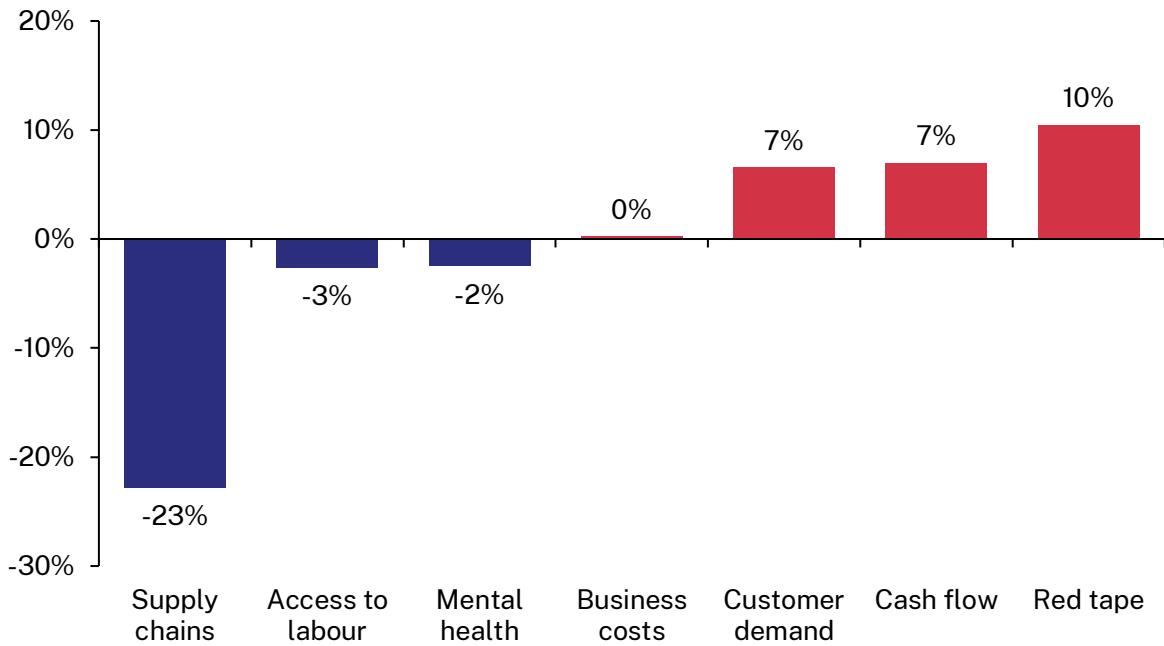
As part of this review, the Commission received feedback from stakeholders reporting significant concerns about the extensive regulatory burdens, cumulative compliance requirements and pervasive red tape issues affecting small businesses in NSW.

Stakeholders identified several areas where regulatory changes have imposed substantial new financial and operational burdens. Stakeholders raised concerns about

the cumulative impact and administrative burden of new or evolving compliance requirements.

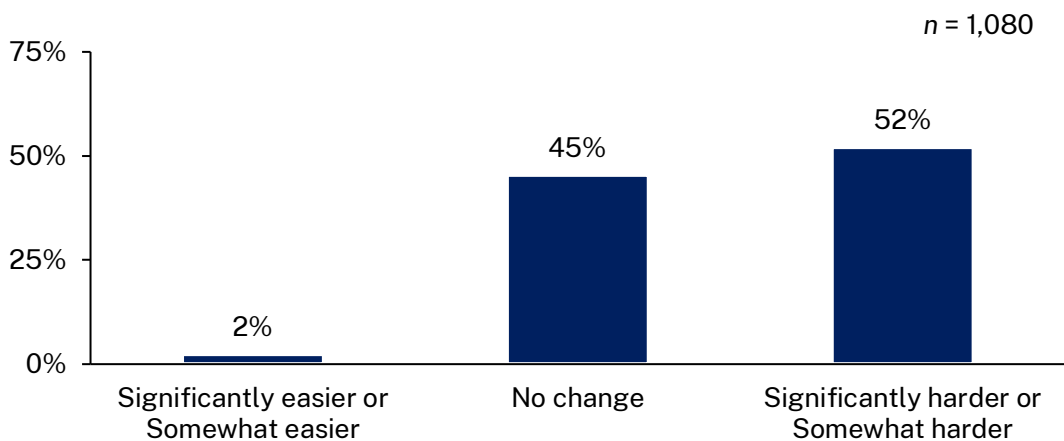
This qualitative feedback is consistent with survey feedback tracked by the Commission over the past several years. Small businesses have consistently reported the increasing burden of regulatory requirements as a key concern when operating a small business. However, in the period between July 2022 and August 2024, small business concerns about red tape have increased more than any other factor assessed in the Commission’s Monthly Momentum survey (see Chart 1).

**Chart 1: Small business concerns - ppt change July 2022 to August 2024**



Survey feedback obtained as part of this review more explicitly demonstrates perceptions of increasing regulatory burden. A majority of respondents indicated their perception that it has become harder to comply with regulatory requirements over the past 12 months, while only 2 per cent indicated it had become easier to comply.

**Chart 2: Extent to which compliance has become easier or harder in the past 12 months**



This survey feedback does not differentiate between regulatory requirements imposed by local, state and the Australian Governments. Survey feedback may also refer to requirements imposed by non-government organisations, such as conditions to meet contractual requirements. It is beyond the scope of this review to consider causes of perceived increases in regulatory burden; however, possible contributing factors could include:

- A return to a post-pandemic operating environment where flexible operating conditions and regulatory leniency have been wound back.
- Several significant new reform agendas changing requirements on small businesses, including employment relations, building and construction.
- Perceptions of a more difficult operating environment due to challenging economic conditions and capacity constraints.
- Challenges related to increasing complexity in operating a business (including managing risks related to cybersecurity, privacy, diversity and inclusion, natural disasters and environmental impact).

## **The nature and magnitude of regulatory burden**

It is difficult to estimate the magnitude of costs associated with regulatory and compliance requirements. While some organisations have developed estimates of the economy-wide cost of regulation, these vary widely and for NSW range between \$11 and \$87 billion per annum.<sup>1</sup> There are additional challenges in estimating other related costs such as second-round economic impacts, as well as any offsetting benefits associated with the regulation itself.

While it is difficult to estimate the economy-wide cost of regulation, the disproportionate impact and administrative burden of regulatory compliance on small business compared to larger enterprises is well documented. The costs of understanding, implementing, and maintaining compliance tend to be greater for small businesses given their lack of scale and specialist expertise. Poorly designed regulation can sometimes inhibit small business growth whereas larger firms can absorb impacts more easily due to their economies of scale.

Some larger firms may even benefit from forms of regulatory arbitrage, leveraging their superior resources and expertise to navigate complex and inefficient regulations more effectively than their competitors, thereby increasing their dominance within the market. Smaller firms, on the other hand, may face significant challenges, leading to closures or consolidation within markets.

## **Time and cost of compliance**

The Commission surveyed businesses to understand the cost and time spent on compliance. Businesses reported average compliance costs of \$16,716 each year and 9.3 hours per week (using a trimmed mean measure).<sup>2</sup>

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<sup>1</sup> NSW Government (2020), [Regulating for NSW's Future](#), NSW Treasury, 1.

<sup>2</sup> The Commission expresses caution when interpreting these results as they do not capture the second-round impacts of regulation and reflect the feedback provided by smaller firms.



**\$16,716**

annual compliance costs\*

trimmed mean (10 per cent)

**9.3 hours**

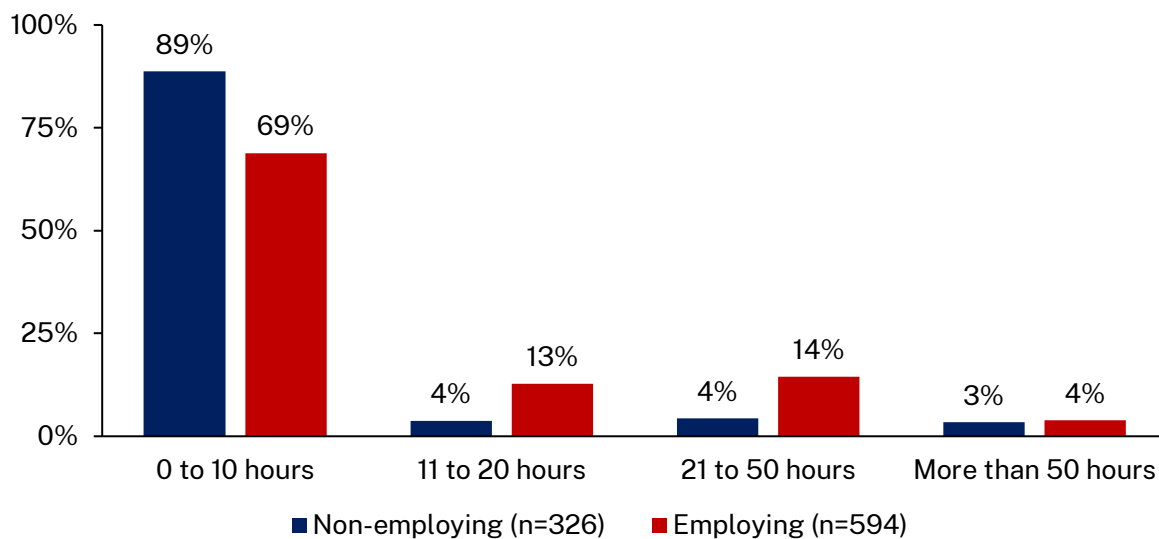
per week\*

trimmed mean (10 per cent)

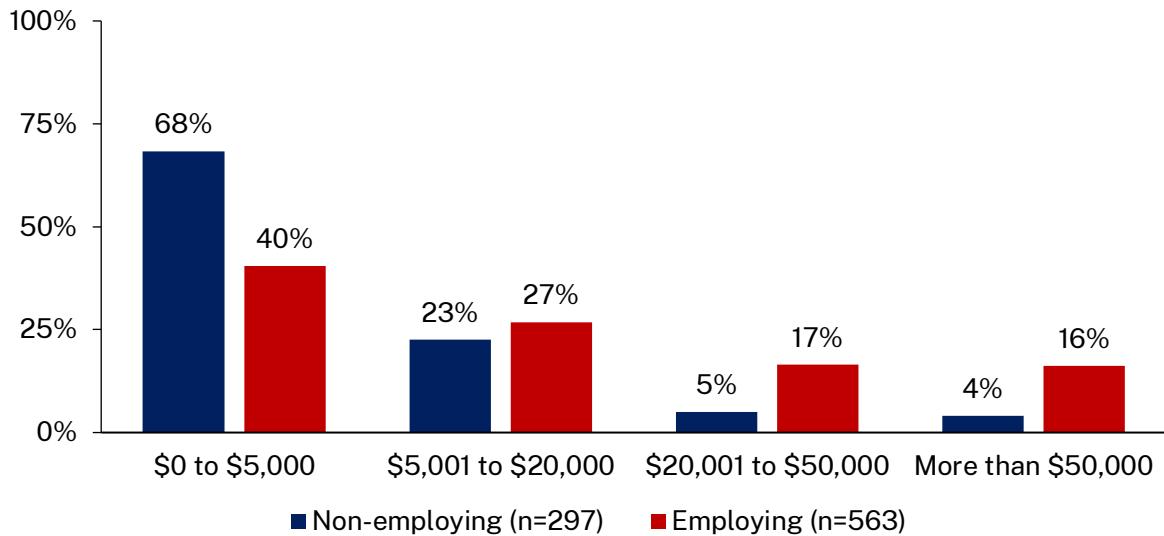
An important observation is that compliance costs can vary significantly depending on the size and nature of a business. While the majority of respondents reported compliance costs of under \$5,000 and less than 10 hours per week, some businesses reported they spent more than 50 hours per week or more than \$50,000 a year on their compliance activities (see Charts 3 and 4).

Compliance costs tend to increase as businesses become more complex. For example, employers will have additional tax and regulatory obligations that non-employers do not need to worry about. For this reason, businesses can face thresholds where compliance costs dramatically increase as they grow and become within scope for new obligations and requirements. However, the impact of compliance costs on non-employing businesses should be considered in the context of their size. For a non-employing business, spending 10 hours a week on compliance could represent around a quarter of their total labour inputs (assuming a 40-hour week), whereas this would typically equate to a lower share for employing firms.

**Chart 3: Approximate average number of hours per week spent on compliance**



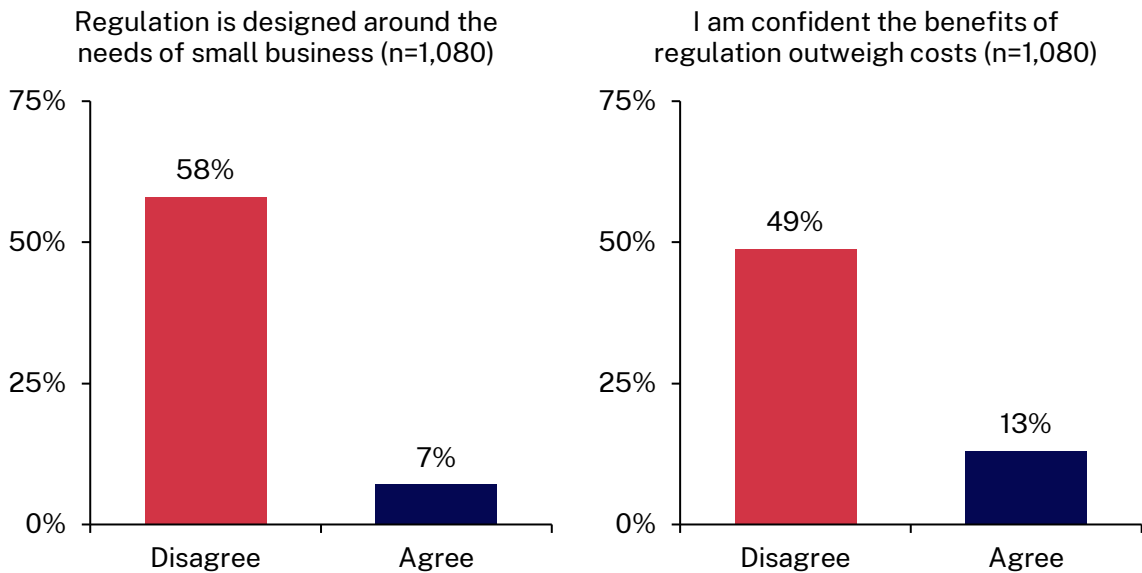
**Chart 4: Estimated annual compliance costs**



**Regulation does not meet small business needs**

Stakeholder feedback generally reflects a perception that current regulation does not adequately meet their needs. Many small businesses feel that regulations are not sufficiently informed on industry issues and there is a strong sentiment that regulatory frameworks are poorly designed. Chart 5 illustrates these concerns, with a significant majority disagreeing that regulation is designed around the needs of small businesses and lacking confidence that the benefits outweigh the costs.

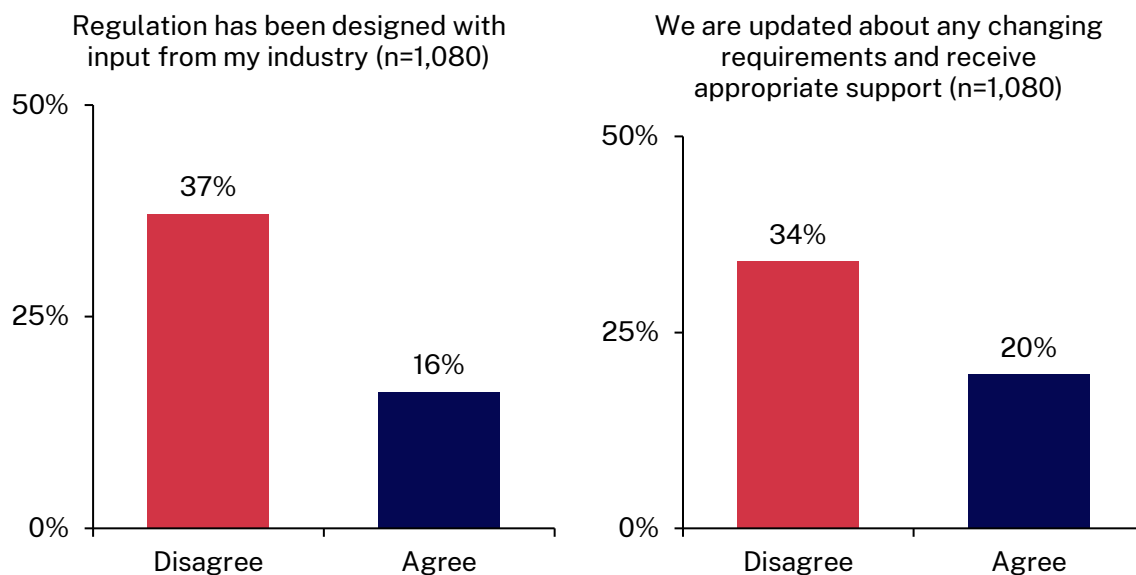
**Chart 5: Business perceptions about regulation**



Note: Responses do not add to 100 per cent.  
Remaining responses indicated 'neither agree or disagree'

Stakeholders expressed frustration with their level of engagement on regulatory matters. As shown in Chart 6, many do not feel that their industry's input is sufficiently considered in regulatory design. Additionally, a notable proportion of respondents indicated they are not adequately informed about changing requirements or provided with the necessary support to comply.

**Chart 6: Business perceptions about regulation**

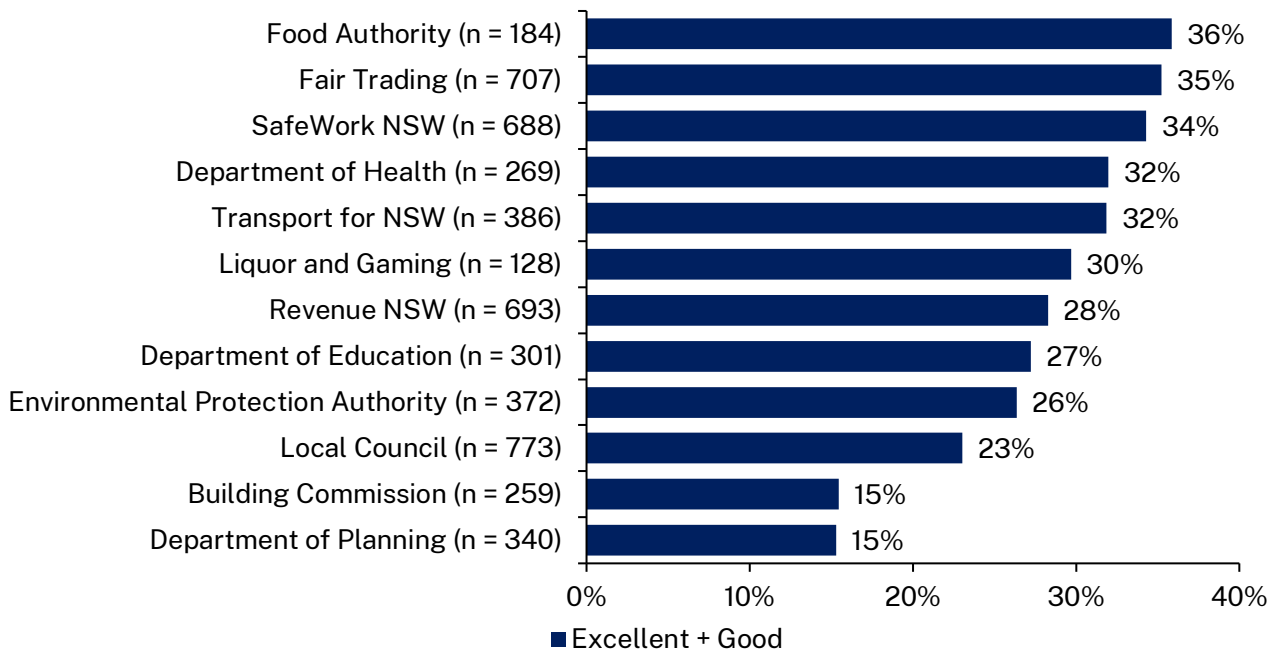


Note: Responses do not add to 100 per cent.  
Remaining responses indicated 'neither agree or disagree'

### NSW Government agency feedback

Survey respondents were invited to provide feedback on their experiences with specific NSW regulatory authorities and rated their experiences if they had dealings with a particular regulatory authority (see Chart 7). Some regulatory authorities performed favourably with only a small proportion of respondents indicating their experiences were poor or very poor. However, in some instances close to half of respondents indicated their experiences were poor while only a small percentage of respondents indicated positive experiences. While it is beyond the scope of this report to assess individual agency performance, the Commission observes that the lowest rated regulatory authorities tended to deal with high-impact matters such as planning approval processes and regulatory frameworks applying to building and construction.

**Chart 7: Regulatory authorities rated 'Excellent' or 'Good'**



## Part II – Regulatory policymaking in NSW

Regulation often involves balancing competing interests. To guide policymakers in making informed decisions while minimising unnecessary impacts, the NSW Government has adopted the Better Regulation Principles. These principles help ensure that regulations are effective, proportional, and based on a clear understanding of costs and benefits.

### 2.1 Better regulation in NSW

Regulation can sometimes involve making decisions involving trade-offs, such as in circumstances where policy objectives cannot be achieved without negatively impacting other groups in the community. In NSW, the Better Regulation Principles are designed to help policymakers implement regulatory requirements in a way that minimises unnecessary impacts and provides greater confidence that policy objectives are likely to be met.

The Better Regulation Principles are:

- **Principle 1:** The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.
- **Principle 2:** The objective of government action should be clear.
- **Principle 3:** The impact of government action should be properly understood, by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options.
- **Principle 4:** Government action should be effective and proportional.
- **Principle 5:** Consultation with business, and the community, should inform regulatory development.
- **Principle 6:** The simplification, repeal, reform, modernisation or consolidation of existing regulation should be considered.
- **Principle 7:** Regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficiency and effectiveness.

### The NSW regulatory policy framework

The NSW regulatory policy framework consists of a broad suite of procedures, processes and requirements to ensure new and existing regulatory requirements adhere to the Better Regulation Principles, or otherwise promote good regulatory outcomes.

The Better Regulation Principles are complemented by the Better Regulation requirements which have been in place since 1 June 2008. As part of meeting the Better Regulation requirements:

1. New and amending regulatory proposals must demonstrate compliance with the Better Regulation Principles.
2. A Better Regulation Statement (BRS) is required for significant new and amending regulatory proposals, and must be published online.



3. The impacts of the proposal must be identified and justified through quantitative and qualitative analysis of all available data. The level of analysis should be proportionate to the significance of the proposal.
4. Opportunities to simplify, repeal, reform or consolidate existing regulation should be considered.
5. Planning for implementation, compliance, enforcement and monitoring must be undertaken as part of regulatory development to improve regulatory design, and avoid unnecessary compliance costs.
6. The options should include digital solutions to make existing, or new requirements, easier to meet.
7. Effective consultation with stakeholders is required to inform the development of regulatory proposals, and to assist the government in thoroughly understanding the impacts.
8. Regular review (using all available data) is required so regulation remains relevant, continues to meet its policy objectives, and does not impose unnecessary regulatory burdens as circumstances change.

The Better Regulation requirements operate alongside the *Subordinate Legislation Act 1989* (the SL Act) which requires the preparation of a Regulatory Impact Statement (RIS) for new statutory rules such as a regulation made under an Act of Parliament.

The NSW Government's '*Guide to Better Regulation*'<sup>3</sup> (The Guide) sets out more detailed information about how agencies can satisfy the requirements under the Better Regulation Principles and the SL Act as well as providing additional guidance to promote best practice.

## Regulatory impact assessment

BRS and RIS documentation are both forms of regulatory impact assessment.<sup>4</sup> While their contents can vary greatly depending on the nature of the regulatory proposal, they are generally prepared with the objective of understanding impacts on the community and providing a supporting case for why a proposed regulatory intervention is the preferred policy response.

## Better Regulation Statement

To justify all significant regulatory proposals, whether new or amending, a BRS must document the analysis undertaken in addressing the Better Regulation Principles. It aims to clearly demonstrate the proposal's impacts, including a thorough understanding of compliance costs. The BRS should be supported by quantitative evidence-based analysis whenever feasible. It also serves as a means of communicating the decision-making process, as well as promoting transparency and accountability.

Under current arrangements, Ministers are responsible for determining whether a proposal is significant for the purposes of determining whether a BRS is required.

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<sup>3</sup> NSW Treasury (2019), [TPP19-01 - NSW Guide to Better Regulation](#), Regulatory policy in NSW, NSW Productivity and Equality Commission.

<sup>4</sup> This report uses the term 'regulatory impact assessment' to inclusively refer to BRS, RIS or other documents which assess regulatory impacts.

However, legislative proposals will generally be subject to additional oversight by Cabinet.

If the introduction of a new, or revised, licence is being considered as part of a regulatory proposal, then the Licensing Framework (developed by the Independent Pricing and Regulatory Tribunal)<sup>5</sup> must be applied to the proposal to determine if a licence is appropriate, well designed, and administered effectively and efficiently. If the licensing proposal is significant then it must be assessed against the Better Regulation Principles through a BRS.

Previous commitments have been made to make BRSs publicly available by the relevant agency on their website, except in limited cases expressly determined by Cabinet. While the NSW Productivity and Equality Commission (PEC) – formerly the NSW Productivity Commission – has previously published BRSs, no statements are available post 2022.

## Regulatory Impact Statement

The SL Act requires all new or amending statutory rules (that is, regulations, by-laws, rules or ordinances) before being made, to undertake an impact analysis in the form of a RIS. The requirements of a RIS mirror those of the Better Regulation Principles and the Better Regulation requirements. Schedule 2 of the SL Act stipulates that a RIS for a proposed statutory rule must include:

- A statement of the **objectives** sought to be achieved and the reasons for them.
- Identification of **alternative options** by which the objectives can be achieved.
- An assessment of the **costs and benefits** of the proposed statutory rule and each alternative option.
- An assessment of which option involves the **greatest net benefit or least net cost** to the community.
- A statement of the **consultation** program undertaken.

Another key requirement of the SL Act is that all statutory rules must be reviewed every five years. By force of the SL Act there is a staged repeal of all statutory rules. A rule will be repealed as of 1 September following the fifth anniversary on which it was published. Under the program of staged repeal, regulations may be re-made with major or minor amendments, allowed to lapse, or have their repeal postponed.<sup>6</sup>

## Cost-benefit analysis

Cost-benefit analysis (CBA) is an important component of regulatory impact assessment. CBA helps policymakers evaluate the economic and social impacts of proposed regulations. CBA is a systematic approach to comparing the costs and benefits of alternative options considered as part of a BRS or RIS and provides additional confidence that the preferred option will lead to a net positive outcome for society.

The NSW Government's CBA Guidelines<sup>7</sup> (the CBA Guidelines) provides guidance to agencies evaluating proposed initiatives, including by exploring methodologies to assist

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<sup>5</sup> PricewaterhouseCoopers and Independent Pricing and Regulatory Tribunal NSW (2013), [PWC - A best practice approach to licensing schemes - Conceptual Framework - March 2013](#), IPART NSW.

<sup>6</sup> NSW Premier (2008), [M2008-01 Staged Repeal of Statutory Rules](#), NSW Department of Premier and Cabinet.

<sup>7</sup> NSW Treasury (2023), [TPG23-08 NSW Government Guide to Cost-Benefit analysis](#).

with evidence-informed decision-making. It also assists agencies to navigate common challenges including addressing distributional effects and dealing with uncertainty.

Importantly, the CBA Guidelines illustrate best practice and the standard of analysis warranted for significant regulatory proposals.

## Red tape reduction

Regulatory burden can be thought of in both ‘stock’ and ‘flow’ terms. At any given point in time there are requirements that businesses must comply with (which can be thought of as the ‘stock’ of existing requirements). However, additional requirements may be added in response to emerging issues or in response to changing policy objectives (which can be thought of as a ‘flow’ of new requirements).

Initiatives to address regulatory burden will typically target either the stock or flow of regulation. For example, red tape reduction initiatives will typically encourage the repeal or relaxation of existing requirements whereas best practice policymaking procedures will focus on ensuring new regulatory proposals minimise any unnecessary regulatory burdens.

There have been various initiatives introduced to reduce regulatory burden for small business, including Commonwealth and NSW Government initiatives.<sup>8</sup> In NSW, the deregulation agenda most recently involved red tape savings targets and a ‘one on, two off’<sup>9</sup> initiative. Red tape savings aimed to reduce regulatory costs by \$750 million by June 2015, while the ‘one on, two off’ measure applied between 2011 and 2015.

In 2024, the NSW Government launched the Charter for Small Business,<sup>10</sup> underpinned by principles including stronger engagement on new policy and regulation, as well as a commitment to strengthen responses to red tape and other pain points.

## 2.2 Strong foundations, inconsistent application

The NSW regulatory policy framework, including the Better Regulation Principles and requirements, as well as the requirement to prepare a BRS or RIS for any significant new regulatory proposals are generally in line with widely accepted best practice.

The purpose of this review is to examine the experiences of small businesses as a key stakeholder group within the regulatory policy development process. Feedback to the review, as well as the Commission’s own observations, suggests the NSW regulatory policy framework is not consistently implemented. Some agencies apply the framework effectively to help guide their policy development and advice. However, in some other cases, core requirements of the framework have not been met. Some observed inconsistencies include, but are not limited to:

- Minimal effort to define or offer evidence of the problem or state the objectives of government action.

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<sup>8</sup> Red tape reduction initiatives include: The NSW Better Regulation Office introduced in 2008; the NSW Red Tape Reduction Taskforce launched in 2011; and the Federal Government’s Cutting Red Tape initiative (2013) and the Deregulation Agenda (2014).



<sup>9</sup> ‘One on, two off’ refers to a strategy where two regulatory instruments must be removed for everyone added.

<sup>10</sup> NSW Government (2024), [NSW Charter for Small Business](#).

- Propensity for outcomes to be predetermined without following a proper policy development process.
- Failure to genuinely consider and assess the merits of alternative options to achieve policy objectives.
- Poor quality impact assessment, including whether appropriate data and insights are leveraged to support preferred policy options.
- Opportunities to consider stakeholder perspectives earlier during policy development to improve the design of policy options and stakeholder buy-in.
- Lack of effort to understand unique needs and impacts, such as those for small businesses.
- Inadequate consultation where a diversity of perspectives are not proactively sought or factored into decision-making.
- Lack of transparency with an inconsistent approach to publishing regulatory impact assessments and limited opportunity to comment on final policies.

To illustrate, the Commission identified some best practice examples of regulatory policy development where the regulatory policy framework was applied, and others where inconsistent application resulted in poor experiences and outcomes (see Table 1).

**Table 1: Examples of application of the regulatory policy framework**

<b>Example</b>	
	<p><b>Summation of proposal / information presented in a clear accessible format</b></p> <p>As part of a consultation process a supplementary ‘<i>overview document</i>’ was made available in addition to the main paper. The overview document highlighted the proposals put forward for consultation, referencing page numbers for further information within the main paper.</p> <p>This summary of information reduces complexity and allows stakeholders, particularly small businesses to allocate their time and resources efficiently to consider proposals that may have a greater impact on their business.</p>
	<p><b>Defining the problem and the need for regulation</b></p> <p>As part of a regulatory proposal an agency on its website succinctly identified the problem via four distinct ‘<i>why it matters</i>’ statements, supported by key facts. This approach clearly articulated the problem that required regulation.</p> <p>The consultation paper explored the issues explaining the objective of government action. Three mandated proposals were detailed, their potential effects on all impacted stakeholder cohorts and the scale of those effects on each group.</p>



### **Diverse and accessible consultation**

A consultation process sought to achieve feedback from stakeholders via a variety of avenues.

There were numerous roundtables that were specific to each impacted stakeholder group (including cultural and linguistically diverse, and First Nations people). These were offered through in-person and virtual sessions, making the consultation process as flexible as possible.

The agency understood the drawbacks of a 'one-size fits all' approach and sought a diverse range of views and separated stakeholders according to their interests, to inform the policymaking process.



### **Transparent assessment of impact on local businesses**

As part of a vast infrastructure project an agency employed a business impact assessment framework and rating scale.

This assessment process involved the identification and evaluation of effects or impacts on local businesses. The tool assessed the degree of impact (ranging from largely negative to largely positive) and the likelihood of the impact occurring ('Not expected to ever occur' to 'Almost certain').

This framework demonstrated a transparent and clearly identifiable way to show the degree of impact the project would have on affected stakeholders and the corresponding mitigating strategies in response.



### **Clear consideration of options**

As part of a consultation process, a Review of Environmental Factors (REF) was prepared that clearly identified the purpose of the review, as well as a transparent discussion of the explored options.

The consideration of options included an analysis of the associated impacts if no action were to be taken, in comparison with an alternative course of action. The REF provides extensive justification for the selected preferred options and provides an in-depth analysis of the potential impacts.



### **Complicated and overwhelming material**

An agency undertaking an ambitious reform agenda issued three RIS that were each over 60 pages in length yet did not present any detailed analysis of the key impacts of proposed reforms. Each subsequent RIS required comprehension of issues that were previously discussed.

Small businesses impacted by this policy felt overburdened and unable to meaningfully engage given the complexity and coverage of the reforms. The approach to consultation did not consider small business having a lack of time and resources to comprehend and analyse potential impacts.





### **Limited options analysis and predetermined policy outcomes**

An agency issued a discussion paper that only offered one proposal to a policy problem. There was no analysis of alternative options, including the status quo or non-regulatory alternatives. Stakeholders perceived policy outcomes to be predetermined.

Small business stakeholders were not engaged to help inform the discussion paper. Due to the lack of small business perspectives, there was no assessment of possible impacts on small businesses. The impact of additional administrative burdens was not considered resulting in unnecessary complexities and poor policy outcomes.



### **Inadequate consultation to assess the need for regulation**

An agency undertook limited consultation on an issue that was of great concern for a small pocket of a local community. Those that were aggrieved by the issue were the only stakeholders consulted, skewing the assessment of the problem and need for regulatory action.

A regulation first approach was undertaken with no consideration of alternative options such as voluntary schemes or incentive-based approaches. This led to additional costs and added red tape.



### **Insufficient stakeholder engagement during the policy development phase**

In response to the challenges faced by consumers and businesses altering or changing travel plans during the COVID-19 pandemic, a state-based information standard was proposed.

The information standard was proposed as a singular option to address a bespoke issue that arose during a national pandemic. No other options or non-regulatory options to address the issue were considered and there was no consultation with the industry to inform options development. As a result, the proposed policy was unworkable and neglected to consider the practical challenges faced by small businesses that would have to meet obligations under the information standard.

## Review of the regulatory policy framework

In 2017, the NSW Government commissioned an Independent Review of the NSW Regulatory Policy Framework (the 'Regulation Framework Review').<sup>11</sup> The review was initiated following the outcomes of the NSW Auditor-General's performance audit on 'Red Tape Reduction'.<sup>12</sup> The Auditor-General's report found the Government's initiatives and processes between 2012 and 2015 to prevent and reduce red tape were not effective. Key findings from the Regulation Framework Review include<sup>13</sup>:

- A better approach to reducing red tape was needed.
- Often the problem is not regulation itself, but people's experience of that regulation.
- Many aspects of the Regulatory Impact Assessment framework that existed at the time became a 'tick the box' exercise that added limited value to the regulatory and policy development process.
- The framework lacked sufficient rigour in how regulation is managed, or safeguards to prevent a 'regulation first' response to public policy issues.

In response to the Regulation Framework Review, the NSW Government acknowledged the central recommendations of assigning responsibility for regulatory policy to a senior Minister, who would be supported by a Commissioner that holds responsibility for better regulation and productivity. In February 2018, the Government assigned responsibility for regulatory policy to the Treasurer, and appointed a NSW Commissioner for Productivity. The Productivity and Equality Commissioner was tasked with shaping the Government's productivity agenda as well as advising on the best way to implement a new regulatory policy framework for NSW.

While some improvements have been made, some key recommendations from the Regulation Framework Review were not implemented, including a proposed overhaul of existing regulatory impact assessment requirements.

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<sup>11</sup> The Hon. Nick Greiner AC, Su McCluskey, Martin Stewart-Weeks (2017), [NSW Regulatory Policy Framework: Independent Review](#), New South Wales Treasury.

<sup>12</sup> NSW Auditor-General (2016), [New South Wales Auditor-General's Report: Performance Report, Red tape reduction](#), Audit Office of New South Wales.

<sup>13</sup> The Hon. Nick Greiner AC, Su McCluskey, Martin Stewart-Weeks (2017), [NSW Regulatory Policy Framework: Independent Review](#), New South Wales Treasury, 5-6.

## Part III - Small businesses and the regulatory policy framework

Small businesses play a crucial role in the NSW economy accounting for approximately 97 per cent<sup>14</sup> of all businesses. They contribute over \$535 billion to annual sales and services income and pay \$75.9 billion in annual wages and salaries.<sup>15</sup> However, their unique characteristics – such as limited resources, managerial capacity, and specialised expertise – mean they often experience regulatory requirements differently and more acutely than larger enterprises.

### 3.1 Small business as regulatory stakeholders

Small businesses have distinctive characteristics that set them apart from larger enterprises. These characteristics can mean they experience regulation differently to other businesses, and in many cases will incur more significant impacts than larger firms relative to their size.

#### Unique characteristics and challenges

There are multiple definitions used to identify whether a business is a small business. These include both employee and turnover-based definitions. For example, the Australian Bureau of Statistics defines a small business as one with fewer than 20 employees. The Australian Taxation Office often applies turnover-based definitions to determine eligibility for administrative or tax arrangements intended for small businesses. In NSW, the NSW Treasury guidelines<sup>16</sup> (for defining a small business for the purposes of policies or programs) are generally flexible, but outline two preferred definitions which include:

1. Aggregated annual turnover less than \$10 million, and
2. Fewer than 20 full-time equivalent employees.

The Commission observes there is no definitive way of defining small businesses and definitions such as those previously provided are arbitrary in many ways. Instead, when designing regulation, policymakers should be mindful about the unique characteristics and challenges common to smaller businesses when developing regulatory options.

In the context of regulation, there are some common features of small businesses that require careful design and attention, including but not limited to:

- Limited managerial capacity, with owners often performing multiple roles, making it challenging to meet new requirements or obligations.
- A lack of specialist expertise, particularly in legal, compliance, or financial matters, complicating regulatory navigation.
- Constrained resources, leading to difficulties in securing finance or hiring staff to handle specialised tasks or compliance.

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<sup>14</sup> Australian Bureau of Statistics (Jul 2020-Jun 2024), [Counts of Australian Businesses, including Entries and Exits](#), ABS Website.

<sup>15</sup> Estimated from Australian Bureau of Statistics (2022-23), [Australian Industry](#), ABS Website.

<sup>16</sup> NSW Treasury (2022), [TPP22-08 Small Business Definition](#).

- Limited economies of scale, making compliance costs disproportionately burdensome compared to larger firms.
- Reliance by local communities, especially in regional or remote areas, where they provide essential services and economic opportunity.
- Significant financial exposure for owner-operators, who depend on the business for both labour income and investment returns.
- Weaker bargaining power with suppliers and customers, increasing vulnerability to market fluctuations and economic changes.

For these reasons, small businesses may experience impacts related to new regulatory requirements that are disproportionately higher than for other larger businesses. If they are not considered as part of regulatory design, policy outcomes may be suboptimal.

### **Small business feedback on regulatory policymaking**

The Commission engaged small business stakeholders across a wide range of industries, including individual small businesses and industry associations, to gather information and feedback regarding their experiences with regulatory policymaking. Stakeholder feedback has indicated that the unique characteristics of small businesses are often overlooked in the policymaking process:

*‘There’s this idea that all businesses are big business and making money all the time.’*

*(Source: Comber Consultants)*

*‘Greater weight should be given to the interests of small business rather than those of large companies’*

*(Source: Survey respondent)*

While a diverse range of perspectives were provided, the Commission has identified areas of feedback where improvement could be made (see Box 1). These include:

- Insufficient understanding of small business and their operational realities.
- Incomplete foundational work undertaken for policy proposals and poor outcomes from ineffective policy development.
- Lack of effective and authentic consultation.
- Poor understanding and inconsistent application of the Better Regulation Principles and requirements.
- Stakeholder fatigue and limited capacity for engagement.
- Cumulative regulatory burden on small businesses.
- Need for clear compliance frameworks for small business.
- Ineffective government processes and misdirected assistance.
- Absence of evaluation or post-implementation review.

This feedback implies opportunities for improvement in the approaches taken to develop policy solutions. In some cases, these may reflect deficiencies in broader approaches to define a problem and determine whether regulatory or non-regulatory solutions are appropriate. Consistent and proper application of the Better Regulation Principles as

part of the policy development cycle, to the standards described in official guidance,<sup>17</sup> would go some way to addressing many of these concerns.

### Box 1: Stakeholder feedback: Opportunities for improvement



#### Limited resources for small businesses

Small business stakeholders highlighted that they lack the resources – such as time, expertise, and legal knowledge – to keep up with regulatory changes.



#### Lack of foundational work

Feedback expressed that the problem or issue had not been clearly defined and that many policies were ‘rushed’ and implemented without the proper groundwork.



#### Lack of authentic consultation

Stakeholders reported instances where they were not consulted at all, or where consultation felt like a ‘tick the box’ exercise where feedback was not considered.



#### Ex-post evaluation and review

Stakeholders reported ineffective regulation, with no control measures in place to re-evaluate unintended consequences.



#### Lack of oversight of the Better Regulation Framework

While the Better Regulation Framework is valuable, its application is inconsistent leading to suboptimal policy outcomes.



#### Poor understanding of the Better Regulation Principles

Feedback suggested the Better Regulation Principles are not consistently applied or observed.



#### Stakeholder fatigue

Some stakeholders reported being engaged in multiple simultaneous reform agendas and priorities which made it difficult to meaningfully engage.



#### Cumulative burden

Concerns about cumulative regulatory burden was consistently expressed, with businesses hampered by the weight of multiple or overlapping regulations.



#### Clear compliance frameworks

Stakeholders reported complex administrative arrangements which made it harder rather than easier to comply (such as reporting obligations or systems).



#### Misdirected assistance

Small business feedback expressed areas where government had provided incentives or assistance in one area of a sector, but failed to anticipate the negative implications this may have in other areas.

<sup>17</sup> Including NSW Treasury (2019), [TPP19-01 - NSW Guide to Better Regulation](#), Regulatory policy in NSW, NSW Productivity and Equality Commission.

## 3.2 Experiences throughout the policy development cycle

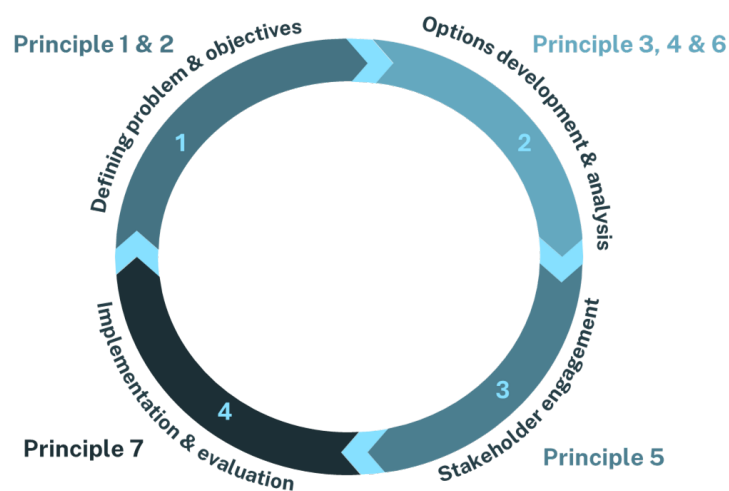
The Better Regulation Principles identify four key stages of policy development:

1. Definition of the problem and government objectives
2. Analysis and development of policy options
3. Stakeholder engagement
4. Implementation and evaluation.

Each of the seven Better Regulation Principles should be specifically addressed throughout the policy development cycle, including through application of the Better Regulation requirements (see Figure 1).

Although the policy development cycle is typically conducted as a linear process, stakeholder engagement is important to informing each of the four stages. Ongoing communication, consultation, and engagement enable governments to gather valuable information and resources, enhance compliance, and mitigate uninformed opposition. This approach fosters greater transparency and trust in government.

**Figure 1: The policy development cycle**



### Definition of the problem and government objectives

A clear definition of the problem and government objectives is required by Principles 1 and 2 of the Better Regulation Principles.

It is at this stage that policymakers and agencies consider the nature of a problem (including community impacts), causes, whether government action is warranted and associated objectives.

Gathering diverse perspectives enhances the depth of analysis and understanding of the problem. This in turn informs a deeper understanding of what factors contribute or exacerbate negative impacts, and possible pathways to improve outcomes. When government agencies have a clear understanding of the issue at hand and the objectives they aim to achieve, the focus shifts toward outcome-based solutions and identifying the most effective options, rather taking a ‘regulation by default’ approach. By properly designing and articulating the problem statement, agencies can engage with all relevant

stakeholders, ensuring a comprehensive understanding of small business operational realities and needs.

Stakeholder feedback expressed perceptions that consultation at this stage is often limited, hindering a proper understanding of the problem, its causes and what objectives are appropriate. For example, Consult Australia noted that policies are sometimes thrown into practice without a clear understanding of the issues they aim to address, which can result in ineffective and burdensome regulations.

Many stakeholders indicated they were often first consulted with pre-formulated policies, without being provided the opportunity to contribute feedback or evidence relating the problem and policy objectives.

*'Don't throw something out there and see how it works, that's not how policy is designed. First identify the problem.'*

*(Source: Consult Australia)*

*'Insight into real-world workings of a regulation can be gained through well-designed and continuous consultation including early integration of impact analysis work...'*

*(Source: The Law Society of New South Wales)*

A stakeholder from the early childhood education and care sector cited an instance where insufficient early engagement and the abrupt implementation of a policy increased the regulatory burden on their business. The stakeholder noted that changes to 'Transition to School Statements' rendered the statements mandatory for students attending government schools, while remaining voluntary for private schools. The rationale for this change was not communicated and it was suggested that for some operators the time required to complete each statement had doubled. Consequently, this resulted in significant additional compliance burden each week.

*'The NSW department will sometimes engage with us but it's never really about our opinion and I feel our voice is never heard - Example the school transition statements are a waste of time and a huge burden on my business and my workforce.'*

*(Source: Survey respondent)*

## **Development of policy options and impact assessment**

Analysis and development of policy options is required by Principles 3, 4 and 6 of the Better Regulation Principles.

Once policy objectives are identified, alternative policy options should be contemplated to determine possible approaches to achieving desired outcomes. In doing so, impact assessment, including examination of the costs and benefits of each option, is essential to determine both whether government action is appropriate and which among the options would maximise net benefits. An effective cost-benefit analysis, in alignment with Better Regulation Principles, requires attention to the affected groups and ensuring the scope of the regulatory proposal is proportionate to the severity of the problem.



## Options analysis

Identification of alternative options is crucial for several reasons, including:

- It demonstrates genuine consideration of alternative pathways to address a problem and assures stakeholders that a policy proposal is not a solution in search of a problem.
- It supports policy development and consultation, including by enabling stakeholders and policymakers to amend options if hybrid approaches would better meet stakeholder needs.
- It provides additional confidence that the preferred or recommended option not only has net benefits, but that it has higher net benefits compared to alternative approaches, including non-regulatory options.

It is not uncommon for stakeholder consultation and impact analysis to occur only for a single policy option, with limited analysis or consultation on alternative approaches. A single or limited number of options may sometimes only be compared against the status quo, with limited genuine assessment of non-regulatory options.

In the *Review of housing supply challenges and policy options for NSW*, the NSW PEC, referring to the building standards in Australia which are regulated under the National Construction Code (NCC), noted the challenge for policymakers is to strike a balance between competing social objectives. PEC referred to an example of a regulatory impact statement prepared for changes to the NCC which found the preferred option would increase construction costs to an extent greater benefits, even though lower cost options were available.<sup>18</sup> PEC also noted awareness of instances where recent reforms have not undergone a proper cost-benefit analysis through a formal Better Regulation Statement or RIS, and where no non-regulatory options were considered and no cost-benefit analysis attempted.<sup>19</sup>

It may also be good practice to consider the viability of industry-led regulation as a response to an identified problem. The Australian Travel Industry Association (ATIA), emphasised the success of industry-led approaches, highlighting the importance of supporting and strengthening industry-led regulation and accreditation schemes. Industry-led regulation is typically more flexible than government regulation and can quickly evolve and respond to emerging challenges. Industry-led approaches can also be more effective if they are well designed and are self-enforcing, accompanied by effective internal and external dispute resolution frameworks.

The Commission has also identified cases where the core issue stems from non-compliance with existing requirements and existing obligations if enforced would address the concerns raised. In such instances, maintaining the current regulations, while enhancing education and compliance efforts, should be considered – especially since there is no assurance that new regulatory measures would achieve better compliance.

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<sup>18</sup> NSW Productivity and Equality Commission, [Review of housing supply challenges and policy options for NSW](#), 60.

<sup>19</sup> *Ibid.*, 62.

## Consideration of small business impacts

The focus on macro impacts in regulatory assessments often do not consider impacts for specific groups, with the ability for larger businesses to generally absorb compliance requirements sometimes obscuring the unique needs of small and micro businesses. For instance, a policy option may have net benefits overall, but the costs imposed on smaller businesses may exceed any benefits associated with their compliance.

The Guide to Better Regulation notes that the burden of regulation can disproportionately impact small businesses, as they have less resources and the ability to absorb compliance costs or keep pace with the cumulative burden of regulation.<sup>20</sup>

While guidance encourages consideration of impacts on small businesses through BRS and RIS documentation, the NSW regulatory policy framework does not formally distinguish between different groups of stakeholders, including distinctions between small and larger businesses. Instead, small businesses are generally considered as part of the broader cohort of businesses impacted by a regulatory proposal. In some cases, impacts on small businesses may be considered as part of distributional analysis, however detailed analysis does not appear to be commonplace.

While small business impacts are not always specifically considered, recent updates to impact assessment guidance have stressed the importance of considering their unique needs. The PEC's 2023 guide to '*Determining the Significance of a Regulatory Proposal*'<sup>21</sup> further explains the challenges faced by some small businesses:

*"...small businesses can be disproportionately affected by proposals as they generally have a narrower revenue base over which to spread the fixed costs of compliance; may not have in-house regulatory expertise to assist with compliance; and may find it challenging to keep abreast of regulatory developments..."*<sup>22</sup>

This supplementary guidance recommends analysis of the impacts on small business when assessing whether a policy proposal is significant. Decision makers are encouraged to evaluate whether a measure would disproportionately impact small businesses by posing the following questions:

1. Does the measure require substantial time or effort for a small business to become aware of their obligations?
2. Would a small business be required to engage a contractor or external advisor?
3. Would the measure impose on a small business variable cost for which it may be difficult to plan or prepare?
4. Would the measure materially increase the frequency and time spent on compliance activities?

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<sup>20</sup> NSW Treasury (2019), [TPP19-01 - NSW Guide to Better Regulation](#), Regulatory policy in NSW, NSW Productivity and Equality Commission, 12.

<sup>21</sup> NSW Treasury (2023) [Determining the Significance of a Regulatory Proposal](#), Regulatory policy in NSW, NSW Productivity and Equality Commission.

<sup>22</sup> NSW Treasury (2023), [Guidance for determining the significance of a regulatory proposal](#).

### **Case Study 1: Poor policy design**

The travel industry faced significant challenges related to widespread cancellations during the COVID-19 pandemic. During this period, many travel agents worked diligently with customers to secure refunds. However, in many cases, securing refunds proved difficult because funds were held by other entities, such as airlines or accommodation providers, beyond the agents' control.

To address these issues, a commitment was made to ensure consumers purchasing travel products had clearer information about their refund rights. This stemmed from concerns that many consumers were unaware of their refund entitlements at the time of purchase. In response, an information standard was proposed, requiring travel service providers to provide customers with prescribed information on refund policies.

However, the proposed information standard was poorly conceived and failed to accommodate the operational realities of travel service providers, who typically do not set refund terms and conditions. Travel agents often resell products from a wide range of suppliers, including international entities that are not subject to NSW Government rules and requirements. As a result, the proposed standard would have imposed an undue compliance burden, particularly on smaller travel agents.

The proposed information standard was developed as a solution to a temporary issue unlikely to persist beyond the initial wave of cancellations caused by government-imposed travel restrictions. It failed to adequately balance the costs and impacts on the travel services sector and was not backed by sufficient evidence to justify its implementation.

Fortunately, the proposed standard did not proceed. However, the outcome reflects a missed opportunity. Earlier and more meaningful engagement with the travel industry could have led to better-designed policy options that more effectively addressed long-term goals without imposing unnecessary burdens on businesses.

### **Stakeholder experiences with impact assessment**

Only 13 per cent of survey respondents who had participated in a NSW Government consultation indicated they agreed that small business perspectives had been properly assessed (see Chart 8).

Stakeholders raised the disproportionate regulatory burden that small businesses face when regulations are designed with a one-size-fits-all approach. During consultations with Consult Australia, it was noted that registration processes for engineers vary significantly by state, requiring extensive time commitments that are impractical for small businesses which do not have the same resources and administrative support available to larger enterprises.

Stakeholders also noted that the continuous accumulation of regulatory requirements, even if well-designed, can overwhelm small businesses. CPA Australia noted that new regulations can add additional complexity to the regulatory environment.

## **Case Study 2: Cumulative impact of regulatory burden on clubs**

NSW clubs operate under a highly regulated framework, governed by state and Federal laws, including the *Registered Clubs Act 1976*. These regulations impose accountability, transparency, and integrity standards on club operations to ensure they meet public and community expectations.

While the regulatory framework ensures clubs meet minimum standards, many have cited the cumulative impact of additional requirements - including new reporting requirements, governance standards and operational restrictions - as impacting their ability to remain operational.

Approximately 78 per cent of clubs in NSW have an annual turnover below \$10 million, exhibiting characteristics that are common to small businesses. Many of these small clubs are volunteer-run and lack the resources of larger entities, which make additional or changing compliance obligations particularly problematic.

New standards have improved governance cultures for many clubs, however for many smaller clubs, particularly those in regional areas, meeting new obligations can be difficult given their lack of resources and reliance on volunteers. Increasing compliance costs have placed significant financial strain on some small clubs.

Faced with escalating compliance costs and financial difficulties, an increasing number of small clubs have sought amalgamation with larger clubs to alleviate administrative burden.

This is an unintended consequence associated with the cumulative impact of regulatory requirements. While a specific or individual requirement may be considered necessary, the combined impact when considered alongside other requirements may threaten the ability of smaller scale entities to operate.

Impact assessment does not always consider where compliance costs are non-linear, with new requirements having a greater cost as more are added. For example, a small business operator may have sufficient capacity to ensure compliance with their existing obligations, but as new requirements are added, they may need to obtain specialist advice or acquire new staff or systems.

CPA Australia suggests the NSW Government add a principle to its Better Regulation Principles, requiring agencies to evaluate the cumulative impact of new regulations alongside existing ones. This approach would ensure that businesses are not disproportionately burdened by overlapping or conflicting regulatory requirements.

CPA Australia also proposes more regular reviews of existing regulations to identify opportunities for simplification and improvement to remove outdated or unnecessary regulations and refine those that are still relevant to reduce the overall regulatory burden on small businesses. Regular reviews can help maintain a regulatory framework that is fit for purpose and responsive to the needs of small businesses.

The feedback emphasises the need for a holistic approach to regulatory design, where agencies consider new regulations within the context of the broader regulatory landscape.

Unlike the Commonwealth,<sup>23</sup> NSW guidance materials have only limited information to assist with consultation strategies for engaging small business feedback as part of regulatory impact assessment. In addition, guidance does not offer insights as to how regulatory proposals could be tailored or better designed to meet the needs of small businesses.

## Cost-benefit analysis

Small businesses expressed a view that cost-benefit assessments required more rigorous scrutiny, citing instances where analysis did not properly justify the case for regulatory approaches. A key concern was that it was not uncommon for regulatory interventions to occur without a proper CBA. This includes instances where:

- No assessment of any kind has been undertaken to assess costs and benefits.
- Analysis of costs and benefits is limited to qualitative discussion or vague estimates of the amount of time or cost associated with complying with requirements.
- Analysis is incomplete, whereby it is impossible to determine whether a regulatory proposal has a benefits-cost ratio (BCR) of more than one.

Even where more robust attempts were made, stakeholders remain sceptical of CBAs. There is broadly a perception that CBAs are prejudiced to favour predetermined outcomes and it is near impossible to shift momentum if an approach is preferred prior to conducting the analysis.

For example, stakeholders expressed concern that the costs estimated in CBAs are often underestimated. For example, in the case of the Building Sustainability Index (BASIX) standards, stakeholders associated cost increases were significantly underestimated. While the analysis suggested an average cost increase of \$7,152 for new homes, the industry claimed the true cost was between \$15,000 and \$40,000.

Similarly, the benefits calculated to support a policy option were criticised as being often overinflated or failing to account for scenarios to test whether a recommended option would remain preferred if intended outcomes were not realised. In some examples, regulatory solutions were assumed to fully eliminate harmful conduct without evidence as to how a particular requirement would address or change market outcomes.<sup>24</sup>

The assumptions used in CBAs were also criticised, being viewed as overly simplistic, failing to account for the complexity and diversity of business operations, including by relying on national or overseas data that does not align with local conditions.

Overall, the feedback highlighted a need for more accurate, comprehensive, and inclusive approaches to conducting cost-benefit analyses, with a particular emphasis on addressing the specific challenges faced by small businesses. This would involve not only improving the accuracy of cost and benefit estimations but also ensuring

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<sup>23</sup> The Office of Impact Analysis (2024), '[Impacts on Small Businesses](#)', Guidance on Assessing Impacts, Office of Impact Analysis.

<sup>24</sup> For example, where Continuing Professional Development (CPD) requirements are imposed as a solution to improving market conduct without analysis of whether CPD materially improves outcomes.

meaningful stakeholder engagement and considering the diverse impacts on businesses of different sizes and sectors.

### Independent oversight

Unlike the Commonwealth's Office of Impact Assessment (OIA), which serves as an independent body responsible for overseeing and guiding the development of regulatory impact assessments, the NSW regulatory policy framework does not have a dedicated independent oversight role.

In NSW, the responsibility for determining the adequacy of regulatory impact assessment rests primarily with individual agencies and their respective Ministers. Under the SL Act and the NSW Government's Guide to Better Regulation, Ministers have discretion to determine what is considered acceptable or sufficient, without the need for an independent assessment to validate whether regulatory proposals meet appropriate standards.

This approach contrasts with best practice recommendations from the OECD,<sup>25</sup> which advocate for an independent body to review regulatory impact assessments to ensure they adhere to rigorous standards and provide unbiased oversight.

### Stakeholder engagement

Principle 5 of the Better Regulation Principles requires consultation with business, and the community, to inform regulatory development. Stakeholders reported concerns over both the way they were consulted as well as whether their feedback was genuinely sought to refine and develop outcomes.

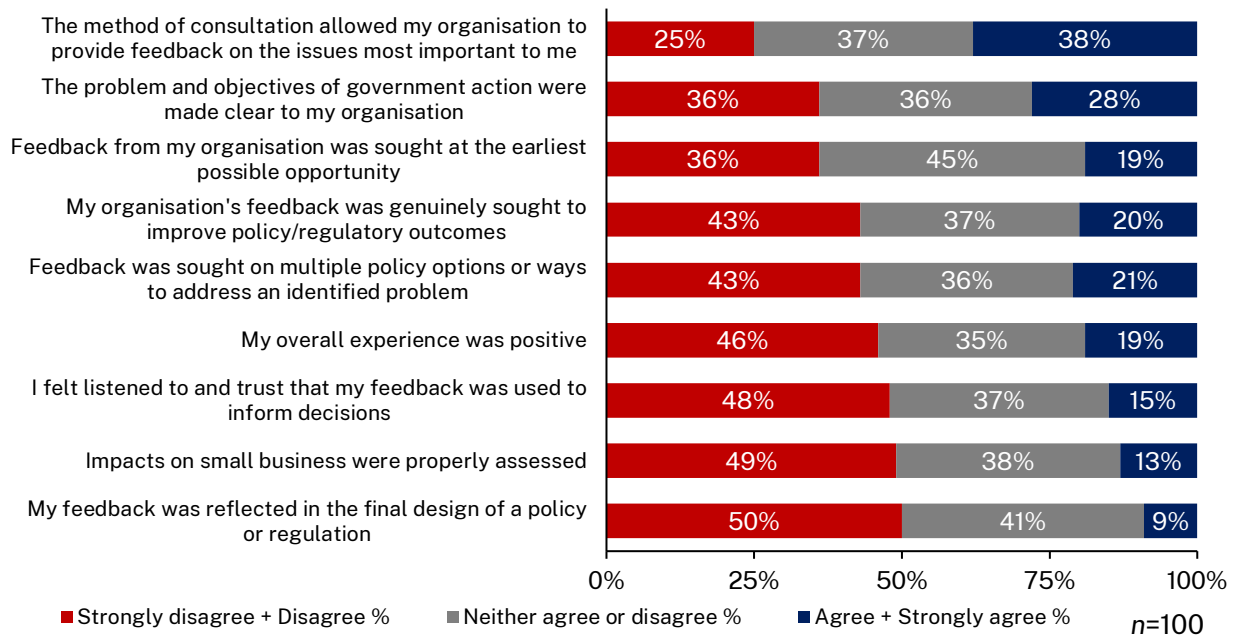
As part of this review, the Commission surveyed small business stakeholders to better understand their experiences when being engaged as part of a NSW Government consultation. Respondents were asked to express their level of agreement or disagreement with various statements regarding a positive attribute associated with their experiences with NSW Government consultations (see Chart 8).

Feedback was generally unfavourable, with fewer than half of respondents agreeing to each of the favourable attributes assessed. Only 19 per cent of survey respondents agreed their overall experience was positive. The survey results highlight significant concerns regarding the perceived lack of incorporation of stakeholder feedback into decision-making processes and the absence of such feedback in the final design of policies or regulations.

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<sup>25</sup> OECD (2020), [Regulatory Impact Assessment](#), OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris.

**Chart 8: Small business participation in NSW Government consultation.**



Survey respondents also provided suggestions to improve stakeholder participation in consultation processes, including:

- Prioritising genuine engagement with stakeholders, particularly small businesses, and incorporating their feedback into decision-making.
- Utilising varied communication methods, such as direct contact and surveys.
- Ensuring consultations are authentic, not just procedural, and establishing clear contact points for proposals and feedback.
- Promoting transparency by providing clear explanations for decisions, even when feedback is not adopted, and acknowledging all submissions.
- Encouraging government-industry collaboration through site visits to better understand small business operations.
- Improving access to government representatives and recognising the time constraints faced by small businesses.
- Establishing contact points for proposals and feedback to facilitate open communication.

### Genuine engagement

Small businesses and representatives cited a lack of effective and genuine stakeholder engagement during the policy development cycle. Feedback from the majority of businesses consulted during the review indicated that the consultation process often felt like a mere formality or ‘tick the box’ exercise, if it occurred at all. Only 15 per cent of survey respondents indicated they felt listened to and trusted their feedback was used to inform decisions.

While stakeholder engagement should occur throughout the policy development cycle, only 19 per cent of survey respondents indicated feedback from their organisation was sought at the earliest possible opportunity. Feedback suggested a tendency for



stakeholders to be engaged only after policy solutions have been developed and are approaching implementation.

Stakeholders frequently reported that consultation processes often feel like a formality, with feedback perceived as being ignored or undervalued. Consult Australia expressed that feedback often ‘falls on deaf ears’ as agencies approach consultations with pre-determined policies rather than genuinely seeking input to shape new policies.

Stakeholders reported a lack of transparency in how feedback is used to inform policy decisions. There is often no clear indication of how stakeholder input influences the final regulatory outcomes, leading to a lack of trust in the process. This lack of follow-up discourages small businesses from participating in future consultations, as they do not see the value in providing feedback that is seemingly ignored.

Some small business stakeholders have criticised use of more simplistic consultation methods which elicited only superficial feedback and is not conducive to informed policymaking. For example, a simple poll which asks consumers and businesses whether they support a new consumer right will usually receive majority support, even if it is poorly designed and strongly opposed by business, merely because there are many more consumers than businesses.

### **Case Study 3: Pre-determined policy outcomes**

During the consultation on the proposed country of origin labelling (CoOL) requirements for seafood in hospitality settings, the NSW Small Business Commission raised concerns about the feasibility and costs of the new regulations. Hospitality businesses, particularly small ones, faced significant challenges in keeping up with menu changes due to varying seafood sources. Seasonal availability, market pricing, and supply chain volatility meant that businesses would frequently need to update their menus, incurring substantial costs.

The model could discourage businesses from choosing Australian seafood due to additional costs associated with frequent menu changes. Survey data suggested the average estimated cost for businesses to make substantial changes to physical menus was approximately \$2,820, with some businesses expecting costs exceeding \$10,000.

The NSW Small Business Commission further noted that the consultation lacked adequate evidence of consumer benefits to justify the proposed changes. The case for mandating CoOL requirements appeared to be based on assumptions about consumer preferences without compelling data on the actual demand for such information or documented consumer complaints.

Throughout the consultation process, some stakeholders perceived the implementation of CoOL requirements was a predetermined policy outcome with limited opportunity to change course.

The Commission urged for further targeted engagement and data collection to assess the real impact on businesses and consumers before proceeding with any regulatory intervention.

## Improving stakeholder experiences

Enhancing the engagement process also requires a better understanding of the most effective methods to connect with small businesses, including consideration of timing issues, such as appropriate response timeframes, managing consultation fatigue, as well as ensuring acknowledgment and consideration of stakeholders' views.

There are a diverse range of factors that need to be considered as part of a stakeholder engagement plan. These include factors such as personalities and power dynamics within group settings if group consultation methods are used, and the accessibility of consultation methods for culturally and linguistically diverse communities.

One of the most frequently raised concerns was the issue of unrealistic consultation timeframes. The NSW Guide to Better Regulation<sup>26</sup> stipulates that the minimum consultation period for draft regulations is 28 days, although longer periods may be appropriate for more significant or complex proposals, or when considering the needs of specific stakeholders. While 28 days may be adequate for some stakeholders, others may need additional time particularly if their industry is subject to multiple challenging and complex reform agendas.

In many cases, small businesses rely on industry associations to represent their interests during consultations. However, discussions with industry associations indicate they can be subject to capacity constraints. Additionally, because some industry associations represent businesses of varying sizes and backgrounds, they can sometimes have diverse or even competing perspectives from across their membership.

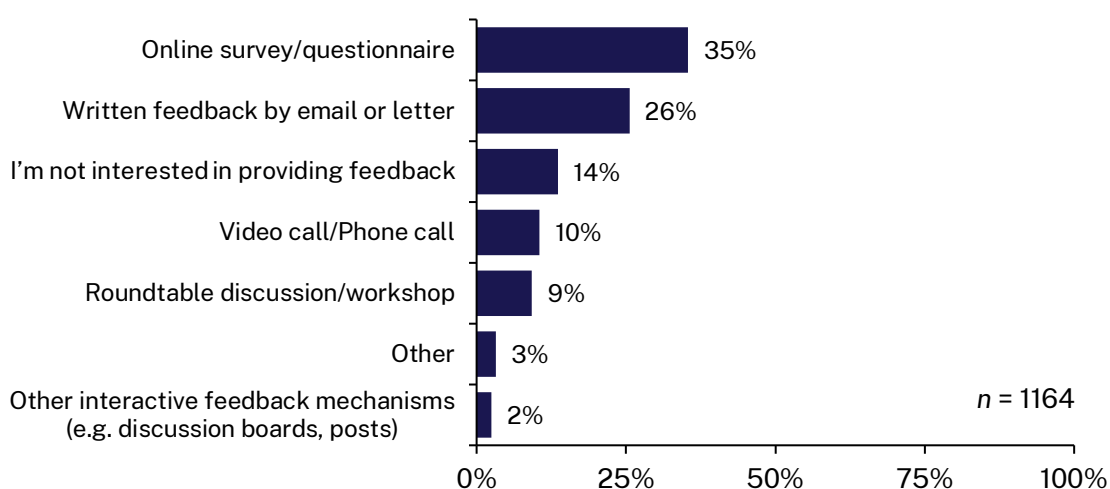
The timing of consultations can also pose challenges for small businesses, which often have limited time and resources to engage. For example, the Caravan and Camping Industry Association (CCIA NSW) noted that some consultations occur during peak business periods, making it difficult for small businesses to participate.

As part of this review, the Commission surveyed small business stakeholders to identify their preferred methods for providing feedback. They identified online surveys/questionnaires, written feedback and participation through video or phone calls as their most preferred options (see Chart 9). Some of these methods, and others, can be facilitated through the NSW Government's 'Have Your Say' platform (See Box 2), however it is up to agencies to determine the appropriate consultation methods and there is no standardised approach across the NSW Government.

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<sup>26</sup> NSW Treasury (2019), [TPP19-01 - NSW Guide to Better Regulation](#), Regulatory policy in NSW, NSW Productivity and Equality Commission.

**Chart 9: Preferred method of providing consultation feedback**



The Commission observes that a diverse range of consultation methods can assist in supporting a diverse range of feedback. The complexity and technical nature of some regulatory proposals can make it hard for small businesses to understand how they will be impacted. Consultation documents are often lengthy and small businesses often lack the legal expertise to interpret the effect of proposed requirements. In some more egregious examples, stakeholders have been expected to provide feedback on draft legislation without explanatory materials or further information about what the changes will mean for them.

External consultants and facilitators can also assist to engage a diverse range of perspectives, including through both their stakeholder engagement and analytical capabilities. Some stakeholders reported a perception that external consultants are unable to influence policy outcomes and are merely engaged as part of a public relations strategy. Where they are used, it is important for their activities to be embedded as part of the policy development cycle rather than as a separate process.

In 2020, the Australian Government issued a Best Practice Consultation Guidance Note<sup>27</sup> which emphasised the need to ensure consultations are not overly burdensome. The guidance specifies that consultation timeframes should be realistic and allow sufficient time for stakeholders to provide thoughtful responses. It also highlights the importance of considering holiday periods and peak times, particularly when stakeholders include small businesses and individuals.

### Proactive solicitation of small business perspectives

One in ten survey respondents indicated they had previously participated in a NSW Government public consultation relating to a new policy or regulatory proposal (see Chart 10). For some of the reasons discussed, it can be hard to obtain input from small business stakeholders even if they are given the best possible chance to engage. For this reason, it is important to do more than simply providing opportunities for small businesses to engage. To address this issue a greater onus on policymakers to actively engage small business representatives and seek small business perspectives is required.

<sup>27</sup> Office of Best Practice Regulation (2020), [Best Practice Consultation Guidance Note](#), Department of Prime Minister and Cabinet.

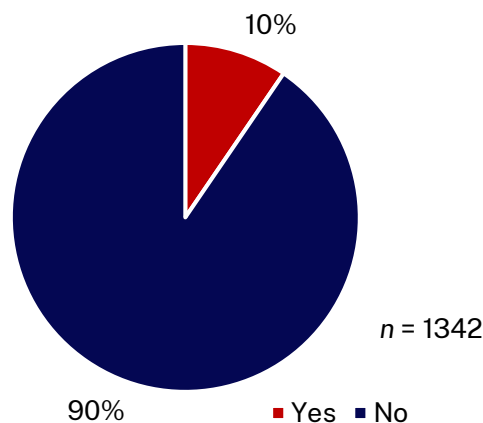
## Box 2: The 'Have Your Say' platform

The NSW Government's 'Have Your Say' website is a central platform designed to facilitate public engagement in the development of government policies, projects, and regulations. Its primary purpose is to provide businesses, community members, and stakeholders with the opportunity to participate in consultations, share feedback, and contribute to decision-making processes. Through various tools like surveys, discussion boards, and public submissions, the platform aims to increase transparency, gather diverse viewpoints, and ensure government decisions are informed by those affected.

The platform advertises current consultations and allows agencies to customise the consultation methods used. The platform is useful as a central platform for those interested in engaging with the NSW Government as well as providing agencies with tools and capabilities to conduct more effective consultation. The platform has enabled agencies to make decisions about how to best engage stakeholders, including through traditional means as well as more novel methods such as quick polls and public discussion boards.

Small businesses and other stakeholders can search the 'Have Your Say' website to identify current and ongoing consultations. Not all NSW Government agencies use the 'Have Your Say' platform for their consultations. While the platform is a central hub for public engagement, individual agencies can choose their preferred methods for consultation and may use other tools or platforms to engage with stakeholders. This can result in some inconsistencies in how consultations are conducted across different agencies.

**Chart 10: Proportion of respondents who had participated in a NSW Government public consultation relating to a new policy or regulatory proposal**



By far the single biggest reason why small businesses do not participate in consultations is because they are unaware of the opportunity to do so. However, different businesses face different barriers to involvement, such as time constraints or concerns about whether their input will be valued. As shown in Chart 11, common reasons for not participating in NSW Government consultations include a lack of awareness (60 per cent), limited time or resources (30 per cent) and doubts about being heard

(26 per cent). A well-designed engagement plan should address these varied barriers to encourage broader and more meaningful participation.

By understanding these factors, the plan can include tailored strategies such as targeted awareness campaigns, simplifying the consultation process, offering flexible participation methods and clearly demonstrating how stakeholder feedback will influence decision-making.

**Chart 11: Top reasons for not participating in a government consultation**



## Targeted consultation

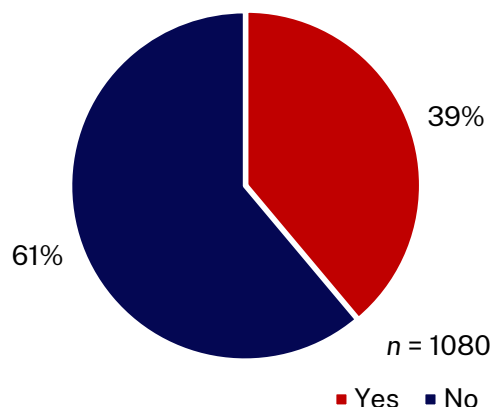
Targeted consultation may sometimes be used as part of a lighter touch approach to engaging stakeholders. Targeted consultation involves contacting industry associations or other identified stakeholders to seek their views on a policy proposal. However, targeted consultation can sometimes be conducted in lieu of public consultation which risks excluding other important perspectives. For this reason, targeted consultation is better used in conjunction with public consultation so that engagement efforts can be prioritised to solicit meaningful feedback while affording all stakeholders the opportunity to engage.

Sometimes targeted consultation occurs through industry bodies or advocates. However, only a minority of survey respondents indicated they were represented by an industry body (see Chart 12). Even where there is strong industry representation, capacity constraints and other factors can mean perspectives are missed. Some peak industry bodies explained they can be thinly stretched, making it difficult to provide meaningful feedback across a broad range of policy areas. Other respondents noted that approaching industry peak groups on industry issues may not provide policymakers with an informed understanding of requirements given market segmentation and specificity of the proposed regulatory measure.

It is not uncommon for stakeholders to overlook significant new requirements, particularly where policy agendas are complex and involve many constituent parts. For this reason, the absence of feedback on a particular aspect of a policy agenda does not mean its impacts are minimal or won't be of significance to stakeholders once

implemented. The onus is on policymakers to ensure they have considered how final policy design may impact small businesses, even if they have had minimal feedback regarding the proposal.

**Chart 12: Proportion of small businesses represented by an industry body**



## Implementation and evaluation

Small businesses may also have specific needs which should guide policy implementation. By offering flexible compliance options and tailored guidance, regulatory costs can be reduced, leading to improved compliance and maximising the overall benefits of the regulation.<sup>28</sup>

It is also best practice to review implementation to examine whether regulatory changes are meeting objectives and whether improvements could be made. Over longer periods of time, ongoing review may be necessary to identify opportunities for modernisation, reform or simplification. Opportunities to repeal unnecessary requirements should also be considered if policy objective are no longer relevant.

## Flexible implementation and small business support

Negative impacts associated with regulatory requirements can be mitigated through flexible implementation strategies and tailored guidance and other supports designed for small businesses. Flexible and tailored implementation approaches could include the following strategies:

- **Tailored education and guidance:** Developing customised educational materials, such as specific forms and factsheets, to help small businesses better understand their compliance obligations.
- **Appropriate compliance and enforcement frameworks:** Favouring education and awareness over more heavy-handed approaches such as penalties or fines.
- **Alternative reporting and recordkeeping requirements:** Implementing flexible compliance reporting and recordkeeping arrangements tailored to the capacity of small businesses.

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<sup>28</sup> Bickerdyke and Lattimore (1997) cited in Productivity Commission (2013), [Regulator Engagement with Small Business](#), Productivity Commission (Cth), Completed Inquiries.

- **Transitional arrangements or temporary exemptions:** Allowing small businesses additional time to understand and meet new requirements, especially if there are significant upfront costs or complex implementation challenges.

These strategies can help reduce the upfront impacts of new regulatory requirements and can support small businesses to understand their obligations over a longer period.

#### **Case Study 4: Regulatory burden associated with administrative arrangements**

In 2016, Revenue NSW introduced the Purchaser Declaration and the Foreign Resident Transfer Duty Surcharge as part of the Commonwealth Government's enhanced information requirements. While aimed at increasing transparency and ensuring foreign residents meet their obligations, the rollout of these reforms was marked by significant regulatory and compliance challenges, particularly for professionals in the conveyancing and legal sectors.

The introduction of the Foreign Resident Transfer Duty Surcharge required conveyancers and legal practitioners to navigate new forms and definitions of foreign residency. However, the forms were not user friendly and ambiguous, causing widespread confusion among professionals tasked with ensuring compliance. Furthermore, the rules defining foreign residency were revised within 12 months of the initial rollout, compounding the complexity and uncertainty.

In 2021, Revenue NSW commenced compliance activities to determine whether the rules surrounding the Foreign Resident Transfer Duty Surcharge were being followed. This compliance check resulted in the discovery of widespread non-compliance, much of which stemmed from the initial confusion over the forms and definitions.

The compliance activities triggered approximately \$7 million in claims under the NSW Licensed Conveyancers' Professional Indemnity Insurance Master Policy. This surge in claims caused a 59 per cent increase in professional indemnity insurance premiums, which not only imposed significant financial burdens on conveyancing professionals but also heightened anxiety and stress within the industry.

### **Ex-post assessment**

Post-implementation reviews (PIRs) are recommended by the Organisation for Economic Co-operation and Development (OECD) in circumstances where ex ante regulatory assessment was deemed inadequate. This could include circumstances where there was significant uncertainty about impacts or benefits such that they could not be properly assessed or where regulatory intervention could not be delayed, such as to avoid public harm.

PIRs form part of a “portfolio” of approaches used to assess and optimise regulatory policy settings. Other review types include reviews triggered by sunseting rules (where regulations expire after a set period), statutory reviews (where a review requirement is enshrined in legislation), and other ad-hoc reviews.<sup>29</sup> The purpose of these reviews is to ensure that original assumptions or factors that supported the case for regulation continue to do so.

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<sup>29</sup> OECD (2020), *Reviewing the Stock of Regulation*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris.



It is not common practice for formal PIRs to be prepared in circumstances where there is limited ex-ante impact assessment, and they are not generally part of the NSW regulatory policy framework.

### **Case Study 5: Regulation that is no longer fit for purpose**

The NSW biofuels mandate requires service stations to blend biofuels, such as ethanol and biodiesel, with traditional petrol and diesel.

There are some grounds to exempt smaller service stations located in regional or remote locations, however the exemptions process is perceived as onerous for some small businesses. The exemption process involves submitting detailed applications to NSW Fair Trading, which must be done periodically even if business circumstances have not changed. For small service station operators, this process is both time-consuming and costly, diverting attention and resources away from their business.

Preparing exemption applications often requires hiring consultants or legal professionals to assist with the documentation, which adds to the financial strain. This is particularly burdensome for small businesses with tight margins and limited resources.

In addition to the costs of compliance, the uncertainty surrounding exemption approvals can delay business planning and investment decisions. Service stations looking to invest in new technologies, such as EV fast chargers, may find themselves constrained by the need to ensure compliance with biofuels regulations, even though the market for biofuels is declining and consumer demand for these products is waning.

The continued enforcement of the biofuels mandate, despite broader trends towards electrification, demonstrates an example of where regulation has not been updated in response to changing circumstances and trends.

## **Regulatory stewardship**

While PIRs are not generally part of the NSW regulatory policy framework, Principles 6 and 7 of the Better Regulation Principles requires regulation to be periodically reviewed, and if necessary, simplified, repealed, modernised either as part of an existing reform process or through periodic review.

The principle of regulatory stewardship involves monitoring regulations throughout their lifecycle and ensuring the stock of regulation is monitored in a transparent, targeted and holistic manner. Under the stewardship model, responsible agencies should manage and improve regulations over time, passing them on in better condition for future generations. Agencies should ideally establish periodic regulatory review plans, offering advance notice of upcoming review areas and providing stakeholders with sufficient time to offer feedback. This systematic approach fosters a culture of continuous evaluation, enhancing both capability and the quality of the reviews themselves.

Regulatory stewardship may also include incentives and other mechanisms to encourage active attempts to make it easier to comply with regulatory requirements. This could include red tape reduction targets or strategies to reduce the costs of complying with existing regulatory requirements (such as through improved service delivery).

### **Case Study 6: Consideration of small business needs during implementation**

The NSW Fuel Check website, operated by NSW Fair Trading, provides real-time fuel price information to consumers across the state. The tool allows motorists to locate the cheapest fuel in their area and helps service stations promote their prices.

However, the procedures used to list service stations on this platform have created unintended adverse effects for small businesses. For example, service stations with fewer than ten sites are not permitted to display their brand logo on the platform. Instead, a generic logo is used, which has the potential to create marketing disadvantages for smaller operators.

The platform was recently extended to include price and availability information for AdBlue, a diesel exhaust fluid. Unlike other fuels, which are dispensed at pumps and can be easily tracked, AdBlue is often sold as shelf stock in varying quantities. This makes it difficult for retailers to monitor and report real-time price and availability information accurately. Small fuel retailers, who may only sell limited quantities of AdBlue, are disproportionately affected by this requirement, as they lack the resources to manage constant updates.

While the reporting of fuel prices has been a standard requirement under the Fuel Check regulations, the expansion to AdBlue was made with limited consultation with the fuel retail industry according to industry stakeholders. This undermines collaboration between the regulator and industry stakeholders and has led to confusion and operational difficulties for small businesses.

For small businesses, this adds an unnecessary administrative burden, diverting time and resources from their core operations. Larger operators may be better equipped to handle the reporting requirements, but smaller retailers struggle to keep pace with the added complexity of reporting a product like AdBlue, which is not a primary focus for many of them.

Stakeholders have proposed that compulsory AdBlue reporting requirement should be replaced with voluntary reporting of AdBlue price and availability information. This would allow small businesses to contribute to consumer transparency without being burdened by impractical compliance requirements.

### **Responding to emerging regulatory challenges**

Feedback from small businesses consistently identified a significant disconnect between their operational realities and policymakers' understanding of the challenges they face. Without understanding these issues, regulation may be poorly designed or unintentionally exacerbate the difficulties faced by small businesses.

Some stakeholders suggested there was a need for stronger partnerships and ongoing dialogue with government agencies and regulators to better understand and adapt requirements to small businesses' needs. Importantly, this dialogue should be sustained rather than limited to one-off consultations at a time when a new requirement is being considered.

Regular feedback mechanisms and open lines of communication are essential to bridging the understanding gap and ensuring that policies and initiatives remain responsive to the evolving needs of small businesses. There are a range of

methodologies and approach which can be adopted to improve ongoing communication (for example, see Box 3). This iterative process would allow agencies to refine their approaches based on real-world input, while also empowering small businesses to play a more active role in shaping the regulatory environment that affects them. Ultimately, fostering a genuine partnership could lead to more effective, pragmatic solutions that benefit both small businesses and the broader economy.

### **Box 3: The Business Insights Initiative**

The NSW Small Business Commission actively engages with small businesses to identify emerging challenges through the Business Insights Initiative (BII). The BII is a stakeholder engagement program aimed at collecting insights and building a robust evidence base to better understand the issues impacting small businesses. It involves regular interaction with individual businesses, industry associations, chambers of commerce and subject matter experts.

The BII plays a key role in identifying both opportunities and challenges for small businesses, providing the Commission with a comprehensive view of current and emerging issues.

To encourage open and honest feedback, the BII's participant list remains confidential, however feedback is collated for distribution to internal government stakeholders. The Commission also uses BII feedback to raise regulatory matters with other government agencies.

## Part IV – Think small first: Rightsized regulation: A roadmap

During this review, small business stakeholders raised concerns about the design and implementation of regulation. Feedback highlighted that many small businesses perceive regulatory frameworks to be overly complex, burdensome, and disconnected from their operational realities. This perception is reinforced by data showing a lack of confidence in the benefits of regulation and a feeling of exclusion from the policymaking process.

To address these issues, the Commission proposes a roadmap to embed a ‘think small first: rightsized regulation’ approach, drawing on international best practices to ensure regulations are fit for purpose and consider small business perspectives from the outset.

### 4.1 International approaches and best practice

The OECD has published guidance material on best practice for factoring in SMEs perspectives in regulatory development. Below are examples of how countries have built frameworks into their policymaking processes to consider and assess proposals impacting small business.

These approaches are focussed on small business impacts and operate alongside existing regulatory impact assessment frameworks which assess broader impacts on community stakeholders (including larger enterprises and the non-commercial sector).

#### OECD – ‘The SME test’

The OECD Recommendations on *Regulatory Policy and Governance*<sup>30</sup> emphasise the need to undertake an "SME test" to ensure proposed and existing regulations are designed with SMEs' interests and needs in mind.

OECD guidance<sup>31</sup> states policymakers should carry out the SME test to assess the proportionality of impacts on smaller entities and to consider exemptions, mitigating measures, or adaptable schemes to minimise negative effects on SMEs. Ultimately, the test ensures that regulations are designed with the specific needs of SMEs in mind. The test comprises of four main stages:

1. **Before the test** – This involves understanding and defining the identity of an SME population within the country.
2. **Considerations for the design and implementation** – Policymakers should involve SMEs early in the decision-making process. The test should be applied in all draft and existing regulations but using a proportional approach by introducing pre-set thresholds to determine the degree of effort required when assessing impacts.
3. **Conducting the SME test** – During this stage consideration should be focused on the relevance of SMEs to achieving the policy objectives. Proactive consultation should occur with potentially affected groups. Policymakers need to evaluate

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<sup>30</sup> OECD (2012), *Recommendation of the Council on Regulatory Policy and Governance*, OECD Publishing, Paris.

<sup>31</sup> OECD (2022), *The SME Test: Taking SMEs and entrepreneurs into account when regulating*, OECD Publishing, Paris.

costs, benefits and other impacts. They also need to consider the cumulative impact on SMEs and minimise disproportionate impacts.

4. **After the test** – During the final stage, an independent oversight entity or person should review whether all elements of the SME test are considered and addressed properly and objectively. The results must be used to inform decision-making and have a real effect on the final outcome. Policymakers will also benefit from creating a system that monitors the performance and results of any alternative policy scheme created for SMEs.

## European Union (EU) – ‘Think small first’

The ‘Small Business Act’<sup>32</sup>, sets out 10 principles to guide the conception and implementation of policies to create a level playing field for SMEs and to improve the business environments in which they operate.

One of the essential guiding principles was to design rules according to the ‘think small first’ principle<sup>33</sup>. It acknowledges that a ‘one-size-fits-all’ approach is often unsuitable, advocating for regulations to be designed primarily with small businesses in mind, particularly their capacity to comply. If higher compliance standards are expected of larger firms, this should be explicitly reflected in regulatory design.

The method for anchoring the ‘think small first’ approach in policymaking is the implementation of the SME test. The EU’s SME test is an adaptation of the OECD principles with four similar steps, (1) identification of affected businesses; (2) consultation of SME stakeholders; (3) assessment of the impact on SMEs; and (4) minimising negative impacts on SMEs.

## United Kingdom (UK) – ‘Exempt by design’

The UK introduced the Small and Micro Business Assessment (SaMBA)<sup>34</sup>, which has the default position to exempt SMEs from the requirements of new regulatory measures.

If exemptions are not feasible, the SaMBA assesses the regulatory impact on small businesses to determine if the burdens are disproportionate. This assessment is proportional, considering the sector, number of businesses affected and their market share. If total exemptions are not possible but disproportionate burdens are identified, mitigating measures are considered, such as partial or temporary exemptions, extended transition periods, different requirements by firm size, financial and information aids, and voluntary opt-in arrangements.

Policymakers must also weigh the costs of exempting small and micro businesses against policy objectives. The SaMBA guidelines emphasise the assessment should explain the overall cost to small businesses when exemptions are not granted. This approach ensures regulatory impacts on small businesses are carefully considered.

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<sup>32</sup> Communication from the Commission of the European Communities (2008), [“Think small first, A Small Business Act for Europe”](#).

<sup>33</sup> European Commission (2008), [“Think Small First”: A Small Business Act for Europe](#), Press Corner, European Commission.

<sup>34</sup> UK Government (2019), [RPC case histories - Small and Micro Business Assessment](#), Regulatory Policy Committee, London.

## United States of America – ‘Regulatory flexibility’

Since 1980, the Regulatory Flexibility Act<sup>35</sup> requires regulations to include an impact assessment focused on small entities. The assessment entails an in-depth economic analysis that must be undertaken for proposals that are expected to have a significant economic impact on a substantial number of small entities.

When conducting the assessment, an agency is responsible of ensuring that small entities have been given an opportunity to participate in the rulemaking process. It should first provide advance notice of upcoming consultation for the proposed rule, indicating if it is expected to have a significant economic effect on SMEs.

To make sure that impacts on small businesses are not disproportionate, the proposing agency should consider significant alternatives. Measures that should be considered include the establishment of different compliance and reporting requirements, use of performance rather than design standards and the possibility to fully or partially exempt small entities.

## Canada – ‘Small business lens’

The small business lens was introduced in 2012 under the Cabinet Directive on Regulatory Management. When there is a new regulatory proposal or a regulatory amendment, federal regulators must determine whether it might affect small business, in which case the small business lens is triggered.

There is a threshold test that determines the type of assessment to be conducted based on the expected impact of the proposal. Regulations are triaged as significant when they exceed more than one million Canadian dollars in cost per year nationwide.<sup>36</sup>

Under the small business lens, federal regulators must identify and count all benefits and costs, including administrative and compliance costs associated with the proposal on small business. For this, regulators can use the Regulatory Cost Calculator. They also must consider flexible regulatory options that reduce costs to small businesses.

Regulators must then report on results of the assessment to an oversight body that oversees implementation of the small business lens. The report must explain the impacts and how the proposed regulation addresses small business needs. It must separately present a characterisation of anticipated impacts on small businesses, the estimated administrative and compliance costs, and details of stakeholder consultations, including changes resulting from received feedback or alternative compliance options.

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<sup>35</sup> U.S Small Business Administration, Office of Advocacy (2013), [The RFA in a Nutshell: A Condensed Guide to the Regulatory Flexibility Act](#), Office of Advocacy, Washington DC.

<sup>36</sup> Government of Canada (2024), [Cabinet Directive on Regulation: Policies, guidance and tools](#), Government of Canada website.

## 4.2 Embedding small business perspectives

As described above, it is not uncommon for other jurisdictions to have mechanisms that embed small business perspectives into regulatory policy design.

It is also reasonable for small businesses to expect NSW Government agencies to be held to the same standards and requirements as they are when making far less significant decisions as part of their business. For example, it is not uncommon for small businesses to incur tens of thousands of dollars in studies and impact assessments when undertaking relatively minor changes such as installing a sign or altering outdoor dining arrangements (see Figure 2).

**Figure 2: Illustrative outline of requirements for some business decisions**

	<b>Business decision (example 2)</b>	<b>Business decision (example 2)</b>	<b>Regulatory Development</b>
<b>Description</b>	Development Application to install six new umbrellas to increase patron capacity of a café.	Development Application to retain existing top of building signage.	Additional operating restrictions on retail shops in NSW
<b>Impact</b>	Limited: local impacts only	Limited: local impacts only	Major: Statewide
<b>Consultation</b>	Public exhibition and notification to surrounding neighbours and property owners	Public exhibition and notification to surrounding neighbours and property owners	Limited consultation
<b>Requirements</b>	All publicly available: <ul style="list-style-type: none"> <li>▪ Architectural Plan</li> <li>▪ Development Cost Report</li> <li>▪ Building Code Australia compliance report</li> <li>▪ Plan of Management</li> <li>▪ Statement of Environmental Effects</li> <li>▪ Waste Management Plan</li> </ul>	All publicly available: <ul style="list-style-type: none"> <li>▪ Development Control Plan Compliance Report</li> <li>▪ Statement of environmental effects</li> <li>▪ Signage plans</li> </ul>	Unpublished RIS
<b>Complexity</b>	6 specialist consultant reports	3 specialist consultant reports	Limited analysis

The Commission maintains our recommendations, informed by stakeholder feedback as well as widely accepted best practices and solutions adopted in other jurisdictions, strike a reasonable and fair balance. In many cases, our recommendations do not introduce new requirements but rather establish mechanisms to ensure accountability and adherence to existing obligations and widely accepted best practices.



## Recommendations

The overarching objective of the Commission's recommendations is to make it easier to do business by embedding a small business perspective into regulatory policymaking. This is primarily achieved in three distinct areas, including:

- Driving initiatives to actively reduce regulatory burden where it makes sense to do so, including through ongoing evaluation and red tape reduction.
- Improving assurance, so that policymakers can be confident that regulatory solutions are in the best interests of the community.
- Ensuring small business needs are taken into consideration as part of both policy design and during impact assessment.

To achieve these objectives, the Commission's nine recommendations set out a range of proposed requirements for NSW Government agencies to follow. The recommendations are targeted at embedding small business perspectives into regulatory policymaking and are informed by stakeholder feedback to this review, as well as consideration of approaches taken in other jurisdictions.

The NSW Government's Charter for Small Business recently committed to strengthen responses to business concerns around red tape and other pain points.<sup>37</sup> The Charter's Action Plan committed to remove legacy red tape requirements through legislative reform.

Meeting commitments under the Charter will require further development and implementation of strategies aimed at actively identifying, reforming and repealing unnecessary or poorly designed regulation. At this time, the Commission is unaware of any systemic efforts to actively drive and promote regulatory reform, though the commitments under the Charter offer the foundations required for a new red tape strategy which could include implementation of the recommendations of this report.

### Two-stage regulatory impact assessment

High-quality, well-informed regulatory impact assessments are essential for accurately estimating changes in the regulatory landscape and for supporting best practice policy development that minimises unnecessary impacts.

Stakeholders expressed frustration when they are unable to draw attention to practical challenges or concerns before policy proposals become more fully formed. Early engagement benefits policymakers as it assists in mitigating potential risks and opposition to policy proposals, as well as ensuring proposals address the most important issues and concerns.

While a variety of methods can be used, consultation will only be successful if engagement materials elicit appropriate feedback and if feedback is genuinely sought, in good faith, to inform policy development. If stakeholder feedback is limited to superficial feedback channels (such as "ideas boards") or forums where stakeholder feedback is ignored, these channels may exacerbate stakeholder perceptions that they are not being properly engaged.

The Commission observes that some of these issues may be addressed if consultation early and ongoing, preferably before a clear policy direction has been set. Consultation

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<sup>37</sup> NSW Government (2024), [NSW Charter for Small Business](#).

models which facilitate early and iterative feedback allows stakeholders to provide feedback on the extent and nature of the problem, the objective of government intervention and alternative options that could meet policy objectives.

The Commission also observes that consultation experiences would be greatly improved if policy development was compliant with the NSW Government's Guide to Better Regulation.<sup>38</sup> The Commission strongly supports guidance contained within this guide, particularly as it relates to Principle 5 of the Government's Better Regulation Principles:

*"The government is committed to consulting on all regulatory proposals. Consultation should be applied at all relevant stages of the regulatory development process."*<sup>39</sup>

In consideration of these two observations, it is proposed that a formal two-stage regulatory impact assessment approach be adopted as part of the NSW regulatory policy framework, including for both BRS and RISs. A possible model is outlined in Box 4.

The Commission accepts that in some instances it would be disproportionate to conduct comprehensive two-stage regulatory impact assessments for all new regulatory proposals. Consistent with the current approach, the nature of assessment required at each stage should be proportionate to potential impacts. For example, for some lower impact proposals it may be suitable to conduct more informal targeted consultation to inform early stages of policy design before preparing a final regulatory impact assessment. However, even if the first stage of assessment is less rigorous, it is still reasonable for stakeholders to have the opportunity to contribute their perspective before preferred solutions are identified.

The Commission notes that it is not uncommon for agencies to conduct forms of two-stage impact assessment. However, the model proposed in Box 4, if adopted, would provide more structure and consistency across the NSW Government.

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<sup>38</sup> NSW Treasury (2019), [TPP19-01 - NSW Guide to Better Regulation](#), Regulatory policy in NSW, NSW Productivity and Equality Commission.

<sup>39</sup> NSW Treasury (2019), [TPP19-01 - NSW Guide to Better Regulation](#), Regulatory policy in NSW, NSW Productivity and Equality Commission, 18.

#### **Box 4: Two-stage regulatory impact assessment**

##### *Consultation Stage 1 – Early assessment and problem identification:*

Stakeholder feedback is obtained early in the policy development process, including at the stage where objectives and policy options are being assessed and should:

- Be publicly available for all stakeholders to comment on.
- Clearly define the problem, its cause, and document any preliminary evidence of its magnitude while inviting stakeholders to provide additional evidence.
- Cite an objective, ensuring it relates to a desired outcome rather than a means to achieving that outcome (e.g. “reduce road fatalities” instead of “reduce speeding”).
- Include at least three genuine options to achieving objectives, including sub-options in circumstances where different policy design parameters could be adopted.
- Provide preliminary analysis on the costs and benefits of each option, and be quantified where possible, while inviting stakeholders to provide further feedback to inform an assessment.
- Be open to alternative approaches proposed by stakeholders, including non-regulatory options.

##### *Consultation Stage 2 – Final assessment and recommended option*

Stakeholders are provided a final opportunity to give feedback on the recommended option with transparency about why it is preferred to other options considered. Provides a final feedback opportunity in case major concerns remain and should:

- Be publicly available for all stakeholders to comment on.
- Amend any features of options deemed unsuitable or unnecessary because of stakeholder feedback from Stage 1.
- Present final analysis of costs and benefits of alternative options (once stakeholders have been provided an opportunity to provide views and feedback on assumptions).
- Indicate a preferred option and include analysis explaining why it is the preferred option (an option should only be preferred if the benefits clearly outweigh costs, and if it is superior to the alternative options assessed).
- If regulatory or legislative in nature, present draft legislation where available (if unavailable, then additional consultation on draft legislation may be warranted).
- Allows stakeholders to provide final feedback considering the preferred option recommended at Stage 2.
- Respond to any significant issues raised by stakeholders before final advice is delivered to regulatory decision-makers.

### **Recommendation 1 – Two-stage regulatory impact assessment**

Implementing a requirement in the Better Regulation Framework for a two-stage consultation model. The model would facilitate early engagement with stakeholders before a policy direction has been set. The focus of the model is demonstration of stakeholder consultation at two key stages:

- *Consultation stage 1* – early assessment and problem identification
- *Consultation stage 2* – Final assessment incorporating feedback on the recommended option

This process would require the development of a consultation plan to be reviewed by the NSW Small Business Commission before the commencement of Consultation stage 1.

Agencies would be required to demonstrate utilisation of stakeholder feedback and respond to any significant issues raised by the NSW Small Business Commission in relation to impacts on small business identified in stage 2.

### **Rightsized regulation**

Regulation does not always meet the needs of smaller businesses. Even if requirements and obligations can be easily implemented by larger businesses, this may not be true for smaller owner-operated firms with fewer resources available.

When contemplating policy objectives, as well as costs and benefits, it may be inappropriate to extend certain obligations to smaller businesses. This could include a requirement to comply with a new regulatory framework in its entirety, or certain requirements such as record keeping. There may be little to be gained by requiring small businesses to comply with requirements when policy objectives can mostly be achieved by limiting the scope of regulations to larger businesses. This is certainly the case in circumstances where a cost-benefit ratio of expanding the scope of new requirements to small businesses comply is less than one.

A scaled approach to regulation should be a default consideration when designing new regulatory requirements. The Commission notes this is the approach adopted in the UK, and it is to be included as part of SaMBA assessments.

Under the default approach, there should be a clear justification if regulatory requirements are extended to small businesses. The intent of this approach is to reverse the onus, often placed on less-resourced stakeholders, to justify why they should be exempt. It would not prevent policymakers from applying regulatory requirements on small businesses where there is a clear and compelling case for it to apply to all businesses, however changing the default would:

- drive culture change with agencies compelled to specifically consider impacts on small businesses
- reduce instances of small businesses being unintentionally caught up in regulatory requirements intended for larger businesses
- require more explicit consideration of whether the benefits of extending the scope of requirements to small businesses exceed any costs.

Under a scaled approach, regulation could also be tailored with the goal of minimising unnecessary impacts. For example, simplified and less stringent rules could be used in circumstances where regulation is warranted but where smaller firms present a lower risk.

As with other forms of regulatory impact assessment, the extent of analysis should be proportionate to the nature of impacts.

### **Recommendation 2 – Tiered regulation by default**

When designing new regulatory requirements, the default approach should be to consider whether alternative approaches are warranted for small businesses. This would require explicit justification for why a requirement should apply to smaller businesses, reversing the current practice of applying regulatory requirements to all businesses and only then considering whether exemptions, tiered or alternative approaches are warranted.

### **Consultation strategies**

The Commission regards the Better Regulation Framework (including the principles and requirements) to represent a clear and easy to understand articulation of best practice. However, feedback to this review suggests consultation does not always occur in a manner consistent with this framework.

A particular concern raised by stakeholders was that they were typically only engaged towards the later phases of the policy development cycle. Agencies should engage with stakeholders, including small businesses, from the earliest stages of proposal development. Engaging a diversity of perspectives encourages stakeholder buy-in and ensures operational needs are taken into account from the earliest opportunity.

Part III of this report summarises a range of feedback and perspectives provided by small business stakeholders on their preferences for consultation. It is difficult to identify a single strategy or approach that works in all cases as every regulatory proposal will be different. However, small businesses are often left underrepresented in policymaking due to their size, lack of ability to engage in complex policy discussions or their lack of engagement.

It is important that consultation methods used do not exacerbate these inherent challenges. For this reason, the Commission recommends that agencies consult with our office, to determine an appropriate consultation strategy that will ensure small business perspectives are heard. This mirrors the approach taken by the Commonwealth Government, where agencies are advised to consult with the Australian Small Business and Family Enterprise Ombudsman.<sup>40</sup>

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<sup>40</sup> Office of Best Practice Regulation (2020), [Best Practice Consultation Guidance Note](#), Department of Prime Minister and Cabinet.

### **Recommendation 3 – Small business consultation strategies**

Agencies should develop a small business consultation strategy at the time of commencing a policy project or review where small businesses are likely to represent a significant proportion of impacted stakeholders. This strategy should consider the unique challenges and barriers that may limit small business participation.

The NSW Small Business Commission should be consulted on proposed consultation strategies, including methods to engage small businesses.

In circumstances where small business impacts are more limited, engagement with the Commission is encouraged to ensure consultation methods represent best practice.

Many small businesses and industry bodies cited a lack of follow-up questions or engagement as suggesting their feedback is typically ignored. This has the potential to establish a chilling effect on engagement, whereby small business stakeholders refrain from participating because they are not confident their feedback can make a difference to policy outcomes.

It is reasonable for stakeholders to expect some degree of visibility over how their feedback is used. It can take considerable time and effort to prepare written submissions or attend consultation meetings and there is sometimes little offered back in return. This can be frustrating for stakeholders, particularly if their core concerns are unaddressed in subsequent policy design and it is unclear whether this is intentional or an oversight.

There are numerous ways that this feedback loop can be closed, including through the *Consultation stage 2* regulatory impact assessment outlined in Recommendation 1. Interim stakeholder feedback reports issued prior to any final reports are another mechanism that can be used to report back key insights from stakeholders.

### **Recommendation 4 – Reporting on stakeholder feedback**

Efforts should be made to engage with stakeholders on their feedback to ensure their feedback is properly understood, and for stakeholders to feel heard and not discouraged from participating in future consultations.

Agencies should communicate how stakeholder feedback influenced decisions and the rationale behind those decisions. This includes explanation of particularly contentious issues, such as where a decision was made to proceed despite the presence of significant stakeholder concerns.

Stakeholder feedback should be reported as part of the *Consultation stage 2* regulatory impact assessment (see Recommendation 1).

### **Improved transparency and consistency**

A key observation as part of this review is the lack of consistent consultation and impact assessment across different policy areas. Some agencies will typically perform more rigorous and disciplined impact assessments, while others will take an ad hoc or light touch approach.

A first step towards greater consistency could be to establish a centralised resource containing all relevant information relating to RISs, BRSs and other consultations. This would allow agencies to model best practice and provide greater visibility and transparency in circumstances where analysis is not undertaken to a sufficient standard.

Importantly, improved transparency would require all regulatory impact assessments to be made publicly available, including supporting analysis. This is consistent with best practice applied in other jurisdictions.

The 'Have Your Say' platform has the potential to serve as an effective tool for stakeholders to access consultation information and documentation, including historical information. However, the platform does not currently fulfill this function and some changes to its design may be required.

The Commission recommends enhancing the 'Have Your Say' platform to serve as a centralised hub for government consultations, where small businesses and other stakeholders can subscribe to receive updates relevant to their industries. This platform should house all related documents, such as discussion papers and issue summaries, for easy access. A subscription or mailing list feature would improve access for small businesses, alerting them when relevant consultations are published and reducing their reliance on industry bodies for information.

#### **Recommendation 5 –Regulatory impact assessment registry**

All regulatory impact assessments, including BRS and RIS documents, should be publicly available and centrally available on a new regulatory impact assessment registry.

There is an opportunity to leverage existing government platforms, such as the 'Have your say' platform, to establish a centralised information hub for both ongoing and past NSW Government consultation processes. The platform should enable stakeholders to subscribe for updates specific to their industry and receive notifications regarding relevant consultation opportunities.

### **Small Business Impact Statement**

Small businesses have different needs to larger businesses. While regulatory impact analysis should consider impacts on all stakeholders, outcomes for small business could be improved if agencies were required to explicitly consider the needs of small business.

The Commission proposes the concept of a Small Business Impact Statement (SBIS) to ensure small business impacts are properly considered. The SBIS adapts models implemented in other jurisdictions, including the SaMBA assessment in the UK. While precise requirements of the SBIS requires further development, as a baseline the SBIS should require agencies to considered factors such as:

- whether policy objectives can be met if small businesses are exempted from any new requirements or if the requirements could be scaled according to the size of an enterprise (see Recommendation 2)
- a specific cost-benefit assessment to provide confidence that the benefits of extending the scope of new regulation to small business cohorts exceed any costs



- an assessment of the cumulative impact of new requirements on small business with existing obligations
- potential implementation issues and practical challenges that may be specific to owner operators
- implementation considerations, including how small businesses will be supported to comply with any new requirements
- the unique needs of businesses operated by culturally and linguistically diverse people.

A SBIS should not duplicate existing impact assessment and is not an alternative to the requirements of a RIS or BRS. Instead, a SBIS could be completed as part of this existing documentation, for example, as a standalone chapter or annexure to existing impact assessment. The intention of the SBIS is to ensure proper assessment of impacts on small businesses and to ensure their needs are factored into policy design. Existing impact assessments conducted in this manner would be compliant with SBIS requirements.

The quality of SBISs could be monitored and improved through close engagement with the Small Business Commission. The Commission should have a role in reviewing SBIS to provide feedback and ensure they meet the required standards.

#### **Recommendation 6 – Requirement for a Small Business Impact Statement**

A Small Business Impact Statement (SBIS) should be prepared whenever a RIS or BRS is required. The SBIS should require agencies to consider factors such as:

- Whether policy objectives can be met if small businesses are exempted from any new requirements or if the requirements could be scaled according to the size of an enterprise (see Recommendation 2).
- A specific cost-benefit assessment to provide confidence that the benefits of extending the scope of new regulation to small business cohorts exceed any costs.
- An assessment of the cumulative impact of new requirements on small business with existing obligations.
- Potential implementation issues and practical challenges that may be specific to owner operators.
- Implementation considerations, including how small businesses will be supported to comply with any new requirements.
- The unique needs of businesses operated by culturally and linguistically diverse people.

The SBIS should be subject to consultation and review by the NSW Small Business Commission.

## Post-implementation and ex-post reviews

As previously noted, PIRs do not play a formal role as part of the NSW regulatory policy framework. Consistent with best practice, there is an opportunity for PIRs to be applied in circumstances where regulatory impact assessment could not occur to a sufficient standard prior to implementation.

PIRs should not be viewed as an alternative to proper ex-ante assessment of impacts. However, it is preferable to conduct ex-post impact assessment than to potentially prolong the harmful impacts of regulation which is not optimally designed. PIRs are also an important accountability mechanism to ensure the value of regulation is demonstrated, if not ex-ante, then ex-post.

The Commonwealth Government has a framework for conducting PIRs could be adopted as part of the NSW regulatory policy framework. In most cases, they include mandating a PIR to be conducted within two years of implementation (see Table 2). It is noted that the Commonwealth Office of Impact Assessment (OIA) also has a role in reviewing ex-ante impact assessment, and a PIR may be required if analysis is assessed as insufficient. The Commission proposes a similar function be established in NSW (see Recommendation 8).

**Table 2: Post-implementation review timeframes: Commonwealth Government**

<b>Reason for PIR</b>	<b>PIR required to be completed within:</b>
Substantial or widespread impact on the Australian economy	5 years of implementation
Impact Analysis not prepared for a final decision on a regulatory change	2 years of implementation
Impact Analysis not assessed by the OIA prior to a final decision	2 years of implementation
Impact Analysis assessed by the OIA as insufficient	2 years of implementation
Prime Minister's exemption from the need to prepare Impact Analysis	2 years of implementation

Source: Australian Government (2024), [Post-implementation Reviews](#), Office of Impact Analysis.

A related matter is inconsistency in the approach taken to evaluating regulation. NSW Treasury's Evaluation Policy and Guidelines<sup>41</sup> set out mandatory requirements to plan for and conduct the evaluation of policies, projects, regulations, and programs. However, as with the relevant guidelines related to ex-ante regulatory impact assessment, implementation can be inconsistent.

The Commission therefore proposes consideration be given to PIRs in the context of the broader portfolio of approaches that can be used to assess and optimise regulatory policy settings, and not just in circumstances where there is incomplete or impartial regulatory impact assessment. The Commission's view is that all material regulatory interventions that impact small businesses should be subject to review at least every five years. Reviews of this nature should be conducted in accordance with NSW Treasury's Evaluation Policy and Guidelines.

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<sup>41</sup> NSW Treasury (2023), [TPG22-22 Policy and Guidelines: Evaluation](#).

## Recommendation 7 – Post-implementation and ex-post reviews

A post-implementation review (PIR) should be prepared in circumstances where ex-ante regulatory impact assessment did not occur or was not prepared to a satisfactory standard (including in circumstances where there is considerable uncertainty about assumptions used, costs and realised benefits). It is recommended that a PIR be carried out within 18-24 months of implementation where required.

Regular ex-post evaluations of regulatory interventions should be prepared at least every five years, in accordance with NSW Treasury’s Evaluation Policy and Guidelines.

### Appoint an independent oversight body

The Regulation Framework Review and OECD principles on regulatory policy<sup>42</sup> both recommend the establishment of an oversight body to ensure a sustainable effort by the public sector to meet the objectives of sound regulatory policy.<sup>43</sup> These oversight functions include:

- Promoting regulatory quality and minimising unnecessary regulatory burden.
- Undertaking quality control of regulatory impact assessments by providing advice to the Premier and Ministers on regulatory development process and practice.
- Independently assessing the adequacy of agency assessments and working collaboratively with agencies to ensure sufficiently robust analysis.
- Making recommendations regarding the need to prepare a PIR in circumstances where analysis is incomplete or difficult due to policy uncertainties, and review of PIRs to ensure they are prepared to a satisfactory standard.
- Providing assurance to the Government and the community through a formal reporting role.

The Commission does not propose an independent oversight body would have any powers to limit or curtail decision making authority. Instead, the body would have an advisory role and would make recommendations, which would be adhered to by consent. While there are varying options and approaches to implementing such a body, the Commission observes the value of the independent oversight body would be to partner with agencies to improve regulatory outcomes rather than to obstruct or hinder policy development.

At this stage, the Commission does not propose a specific model or part of government within which the body should sit. However, the Commission recommends it be established as an independent Commissioner role with sufficient resources to fulfill its functions. The Commissioner role should report directly to a Minister within Cabinet who is assigned responsibility for ensuring regulatory quality.

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<sup>42</sup> OECD (2012), *Recommendation of the Council on Regulatory Policy and Governance*, OECD Publishing, Paris, recommendation 3.

<sup>43</sup> The Hon. Nick Greiner AC, Su McCluskey, Martin Stewart-Weeks (2017), *NSW Regulatory Policy Framework: Independent Review*, New South Wales Treasury, recommendation 25.

### **Recommendation 8 – Establish an independent oversight body**

An independent oversight body should be established and tasked with the following functions:

- Promote regulatory quality and minimising unnecessary regulatory burden.
- Undertake quality control of regulatory impact assessments by providing advice to the Premier and Ministers on regulatory development process and practice.
- Assess the adequacy of agency assessments and working collaboratively with agencies to ensure sufficiently robust analysis.
- Make recommendations regarding the need to prepare a PIR in circumstances where analysis is incomplete or difficult due to policy uncertainties, and review of PIRs to ensure they are prepared to a satisfactory standard.
- Provide assurance to the Government and the community through a formal reporting role.

The body should be established as an independent Commissioner role with sufficient resources to fulfill its functions. The Commissioner role should report directly to a Minister within Cabinet who is assigned responsibility for ensuring regulatory quality.

### **Building public sector capability**

Regulation can sometimes be viewed as the quickest and easiest way of resolving a problem from the perspective of a regulator (or other stakeholders). However, regulatory solutions do not always maximise public value, even if they are effective.

Regulatory impact assessment is crucial for promoting accountability, transparency robust evidence-based policymaking and avoiding poor regulatory outcomes and detrimental impacts to small businesses who are increasingly subject to the cost of regulatory burden.

In many ways, regulatory impact assessment mirrors the approach that should be taken when considering any form of policy problem whether it leads to a regulatory intervention, or other responses such as public expenditure on public infrastructure. Being able to conceptualise and articulate concepts such as market failure require knowledge and experience applying conceptual and economic frameworks which are not universally understood across the public service, including by those working in policy roles.

Robust regulatory impact assessment also requires a multi-disciplinary approach that includes economic analysis, legal expertise, policy analysis, social science, data analysis and stakeholder engagement. In some cases, specialist expertise may be warranted depending on the type of regulatory proposal including financial analysts, psychology, public health, urban and regional planning, and environmental science. It is often impractical or cost-prohibitive for agencies to maintain these capabilities in-house.

The Commission's view is that policy agencies have a responsibility to establish and possess deep subject matter expertise and should also have an embedded understanding of the conceptual and economic frameworks used to assess concepts such as public value. However, it should also be possible for agencies to utilise external

expertise where specialist capabilities are needed. It is important that procurement and other related protocols do not have a chilling effect on the ability or willingness of agencies to obtain the expertise required to undertake appropriate regulatory impact assessment.

In the medium-to-longer term it may be preferred for the NSW Government to improve and build these capabilities for deployment across government. This is a role that can be supported by the independent oversight body (see Recommendation 9).

In the near term, the Commission recommends the development of a NSW Government training program to support policy officials to understand the requirements of the Better Regulation Principles and its conceptual foundations.

### **Recommendation 9 – Capability uplift and acquisition of external expertise**

The Commission recommends the development of a NSW Government training program to support policy officials to understand the requirements of the Better Regulation Principles and its conceptual foundations.

The Commission also recommends appropriate workforce planning and capability uplift to embed understanding of key conceptual and economic frameworks used to assess policy impacts.

NSW Government procurement policies should play an enabling role in supporting agencies to acquire specialist external expertise to support robust regulatory impact assessment.



# Small Business Commissioner

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