SERVICE PRIORITY REVIEW

BACKGROUND PAPER

BEST PRACTICE REGULATION
This background paper was authored by the Service Priority Review secretariat in consultation with, and to inform the work of, the Service Priority Review Panel. Every effort has been taken to ensure accuracy, currency and reliability of the content. The paper is not intended to be a comprehensive overview of the subject nor does it represent the position of the Western Australian Government. Changes in circumstances after the time of publication may impact the quality of the information.

The following background papers are published in full on the Department of the Premier and Cabinet website: [www.dpc.wa.gov.au](http://www.dpc.wa.gov.au)

1. Agency capability reviews
2. Best practice regulation
3. Overview of the budget process
4. Counterproductive rules and processes
5. Digital transformation
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Best practice regulation

Regulation generally

Nature of regulation and the regulatory process

Regulation is a core function of government. By making rules, governments can intervene in economic and social activities to achieve public policy outcomes for the benefit of the community.

The public sector has an influential role to play in terms of developing both primary legislation (that is, Acts of Parliament) and subsidiary legislation made under Acts (in Western Australia, usually made by the Governor on the advice of the Executive Council, and in the form of regulations, but also including rules, codes and other instruments). While primary legislation can be made in respect of any subject for which the Parliament has constitutional power to enact a law, subsidiary legislation can only be made to the extent that an Act of Parliament provides for it.

Public sector legal, policy and regulatory specialists play key roles in the process of both primary and subsidiary legislation by developing and assessing legislative and regulatory proposals, advising ministers and ministerial staff, instructing legislative drafters, and undertaking the various procedural steps to ensure legislation is properly made. In particular, although subsidiary legislation cannot be drafted or made without the agreement of the relevant minister, to a large extent responsibility for its form and content is delegated by the Parliament to the executive arm of government.

Governments cannot regulate without legal authority to do so. However, instruments with a regulatory character are not limited to rules and laws. Regulatory practices are undertaken by actors within a broad governance network — direct, law-based regulatory mechanisms are the tools of government, while indirect mechanisms (such as industry standards, guidelines, and codes of practice) can be implemented by non-government players in the regulatory arena. There is also a range of non-legislative intervention options that governments can use to change behaviour or bring about desired outcomes.

Local governments also have a broad capacity to regulate with direct effects on communities and industry in terms of land use planning and development approval.

Justification and need for regulation

Government intervention in economic and social activities is warranted in the public interest. Regulation is one way by which government can meet public expectations about law and order, public and workplace health and safety, natural resource management, a clean environment, and a fair, predictable and stable commercial and financial system.
Industries whose operations affect communities – for instance, the resources industry – depend, for ongoing legitimacy, on ‘social licence to operate’. The concept of social licence acknowledges that communities, as much as regulators, are part of industry’s broader authorising environment. Stakeholders can very effectively threaten corporate capacity to operate1 and have a legitimate interest in protecting their own private interests and the public interest more generally. All aspects of industry interaction with affected communities can contribute to the social acceptance, or otherwise, of industry operation2. The role of the regulator in this space is not limited to granting legal licence to operate3. Communities expect robust, transparent and fair regulatory frameworks, and regulated industries rely on community confidence in the regulatory environment as part of the trust bargain they strike with stakeholders.

**Regulation in Western Australia**

**Economically significant WA regulatory schemes**

WA’s historical economic reliance on the resources sector and its consequent exposure to price volatility and the cyclic nature of that sector demonstrates the need for economic diversification. To support a diverse economy, the State Government must strike a balance between the need to regulate business and industry in the public interest and the need to ensure the cost of compliance with regulatory requirements does not inhibit economic growth.

Some areas of regulation are of particular significance to the WA economy because they apply to business and industry in the State. To summarise very generally:

- **Health and safety regulation** under the *Occupational Safety and Health Act 1984* and the *Mines Safety and Inspection Act 1994* applies in all workplaces and at all mine sites and generally requires a risk- and outcomes-based approach to managing workplace safety.

- **Environmental regulation**, under the *Environmental Protection Act 1986*, involves a system of ministerial approvals (following environmental impact assessment by the Environmental Protection Authority), licensing and permits for certain industries or activities, and detailed requirements are set out in regulations made under the Act for specific industries.

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• **Natural resources allocation regulation** exists in a number of forms, the most economically significant for WA being mining and petroleum legislation. Mining legislation allows for the exploration and extraction of minerals under spatially defined mining tenements of various kinds, with environmental approvals (separate from, but consistent with, approvals required under the Environmental Protection Act) required before certain activities can be undertaken. Petroleum legislation allows for exploration and production leases over blocks covering large geographical areas, and specific, outcomes-based safety and environmental regulatory requirements apply to operations undertaken on these leases. Beyond WA’s coastal waters, the Commonwealth Government has jurisdiction, and some petroleum projects fall across jurisdictional boundaries.

Although native title legislation is a Commonwealth rather than a State responsibility, it directly affects resources projects in WA. State-based approvals, particularly those that play out sequentially, need to account for native title notification and negotiation processes.

• **Business regulation generally:** businesses in WA are subject to a range of regulatory approval requirements at both State and local government level. As well as local government and sometimes State planning and development approval requirements, specific statutes require permits and licences of various types. Health and safety regulation applies to all workplaces; environmental regulatory approvals, or compliance with specific environmental standards and requirements, may also be needed.

**Outcomes-based requirements and risk-based decisions**

It is widely accepted that outcomes-based and risk-based regulation is more efficient and effective than ‘command and control’ systems for both regulators and regulated entities.³

• A **risk-based approach to regulation** focuses on the risks associated with non-compliance with rules. A risk-based regulator identifies and assesses risks to inform its decision-making on regulatory matters, including decisions about compliance and reporting requirements. Risk-based approaches can reduce regulatory burden for compliant entities and should lead to efficient resource allocation by the regulator.

• **Outcomes-based** (or ‘performance based’) regulatory frameworks specify required outcomes rather than prescribe the means by which they must be achieved. Outcomes-based regulation allows regulated entities to determine how best to allocate resources to achieve compliance and encourages innovation.

While some agencies in WA have made considerable progress towards implementing risk-based and outcomes-based approaches, there is no central mandate to do so.

**Stakeholder experiences**

The Service Priority Review (the review) has heard from stakeholders:

- Approvals reform remains a priority. Historically, industry has complained about lack of alignment between safety, environmental and natural resources regulatory approval processes, and lack of transparency, causing serious inefficiency for major projects in the State. Stakeholders have told the review that although progress has been made in tracking applications, agency performance reporting and developing outcomes-based conditions on approval, there is significant room for improvement.

- Stakeholder involvement is important to business and industry; this includes consultation when developing regulation,\(^5\) and involvement in condition-setting for resources projects.

- Industry and the not-for-profit sector seek outcomes-based regulation, and both sectors report issues with burdensome reporting requirements.

- Regulatory burden negatively affects the business climate which, in turn, affects the State’s community. Some regulatory regimes, such as rules affecting business trading hours, are unduly restrictive and impose unnecessary cost burdens.

- Regular review and strong cost-benefit analysis is required.

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**Good practice regulation and regulatory behaviour**

**Requirements on regulatory agencies in Australia**

Australian jurisdictions have implemented a variety of requirements on regulatory agencies with the intention of reducing the regulatory burden on businesses and individuals. These approaches can generally be divided between inward-directed governance requirements about operational practices to be undertaken by regulatory agencies, affecting how regulations are implemented; and outward-directed requirements, affecting how regulations are designed.

**Requirements about how regulations are designed**

Table 1 illustrates ways in which Australian jurisdictions, overall, impose requirements aimed at managing the quality and quantity of regulatory instruments.

All jurisdictions require some form of regulatory impact assessment (RIA) before new or amending regulation is introduced. Most publish guidance documents for RIA purposes expressing principles of best practice regulation, and some impose requirements on managing the stock of existing regulation.

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\(^5\) Chamber of Commerce and Industry of Western Australia. 2017. *Submission to the Service Priority Review.*
### Table 1. Regulatory design requirements

<table>
<thead>
<tr>
<th></th>
<th>Functional or central lead</th>
<th>RIA/regulatory design guidance</th>
<th>Sunsetting /review</th>
<th>Other red tape initiatives</th>
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<tbody>
<tr>
<td><strong>CTH</strong></td>
<td>Office of Best Practice Regulation within Department of the Prime Minister and Cabinet</td>
<td>Australian Government Guide to Regulation(^6) and Regulatory Burden Measure (^7)</td>
<td>Most sunset 10 years after commencement</td>
<td>Annual red tape reduction reports (2015 and 2016 only) Deregulation units within each agency</td>
</tr>
<tr>
<td><strong>NSW</strong></td>
<td>Better Regulation Division within Department of Finance, Services and Innovation</td>
<td>Guide to Better Regulation (^8) IPART Licensing Framework (^9) (to be applied where regulatory proposals involve licensing)</td>
<td>- In accordance with s.10 Subordinate Legislation Act 1989</td>
<td>Red Tape Reduction Target: commitment to reduce regulatory costs by 20 per cent before 20 June 2015 (^11)</td>
</tr>
<tr>
<td><strong>QLD</strong></td>
<td>Office of Best Practice Regulation within the Queensland Productivity Commission</td>
<td>Queensland Government Guide to Better Regulation (^12)</td>
<td>Not mandatory</td>
<td>Better Regulation Taskforce (replacing former Red Tape Reduction Advisory Council)</td>
</tr>
<tr>
<td><strong>SA</strong></td>
<td>Department of Treasury</td>
<td>Better Regulation Handbook (^13)</td>
<td>5-yearly review</td>
<td>Simpler Regulation Unit within Department of Treasury and Finance</td>
</tr>
<tr>
<td><strong>VIC</strong></td>
<td>Office of the Commissioner for Better Regulation</td>
<td>Victorian Guide to Regulation</td>
<td>Most sunset 10 years after commencement</td>
<td>25 per cent red tape reduction target</td>
</tr>
<tr>
<td><strong>WA</strong></td>
<td>Better Regulation Unit and Red Tape Reduction Unit within Department of Treasury</td>
<td>Regulatory Impact Assessment Guidelines (^14) and forthcoming support material</td>
<td>Not mandatory Review clauses included in most new Acts</td>
<td>See specific discussion below</td>
</tr>
</tbody>
</table>


\(^11\) ibid.


The draft report of an independent review of the New South Wales regulatory policy framework\textsuperscript{15} was published in May 2017. Among other things, the draft report critically assesses and makes preliminary findings about the regulatory process and function generally, the value of the RIA process in NSW, the roles of regulators and end-users, and considers a new operational regulatory policy model. The report contains some criticism of the NSW regulatory process and framework, suggesting that RIA in NSW has become a ‘box ticking’ exercise, and that red tape reduction exercises are characterised by diminishing returns. It proposes a ‘regulatory stewardship’ approach and proposes that reform focus should be on a better framework for making and managing regulation, rather than aiming at diffuse and difficult to meaningfully quantify ‘red tape reduction’ targets. It also proposes full use of technology, data and non-regulatory options, greater transparency around decision making, fewer touchpoints with government, more rigorous review and analysis, and stronger accountability of regulators.

More generally, some red tape reduction initiatives have had limited success in other jurisdictions and may create perverse consequences (for instance, ‘one in, one out’ policies can distort regulatory decision-making). NSW targets around dollar savings from red tape reduction have been questioned by auditors.

Requirements about how regulations are implemented

Table 2 shows those Australian jurisdictions which impose mandatory requirements on how regulators are to undertake their functions.

Table 2. Regulatory governance requirements

<table>
<thead>
<tr>
<th></th>
<th>Functional or central lead</th>
<th>Requirements on regulators</th>
</tr>
</thead>
<tbody>
<tr>
<td>CTH</td>
<td>Office of Best Practice Regulation within PMC</td>
<td>Regulator Performance Framework 2015</td>
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<td></td>
<td>Deregulation unit in each portfolio</td>
<td></td>
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<tr>
<td>NSW</td>
<td>Better Regulation Division within NSW Department of Finance</td>
<td>Quality Regulatory Services Initiative</td>
</tr>
<tr>
<td>VIC</td>
<td>Department of Treasury and Finance</td>
<td>Statement of Expectations Framework</td>
</tr>
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</table>

Commonwealth: Following a 2014 Productivity Commission report\textsuperscript{16}, the Commonwealth Government introduced a performance framework for Australian government regulators\textsuperscript{17} with effect from mid-2015. The framework requires regulatory agencies to report against key performance indicators of good regulatory practice, covering reducing regulatory burden, communications, risk-based approaches, efficient and coordinated monitoring, transparency and continuous improvement.

\textsuperscript{14} Department of Treasury. 2010. \textit{Regulatory Impact Assessment Guidelines for Western Australia}. Government of Western Australia. Perth, Australia.


\textsuperscript{17} Australian Government. 2014. \textit{Regulator Performance Framework}. Canberra, Australia.
NSW: In 2012 the NSW Government endorsed an outcomes and risk-based approach to regulation, badged as the ‘Quality Regulatory Services’ initiative\(^{18}\). A 2014 Department of Premier and Cabinet Circular\(^{19}\) requires regulators to implement and report on their progress toward a outcomes and risk-based approach to regulation. Appendix 1 shows progress towards the required goals by NSW regulators to 2016.

VIC: The Statement of Expectations Framework for Regulators\(^{20}\) requires regulators to assess their performance against key elements of good regulatory practice, including mandatory elements of timeliness, risk-based regulation, and compliance-related assistance and advice; to create ‘Good Regulatory Practice Plans’ to assist in implementation, administration and enforcement; and to undertake mandatory evaluation. In practice, a Statement of Expectations is issued every two years to regulatory agencies by the responsible minister, requiring an ongoing assessment, evaluation and reporting process. Regulators report individually on performance against statements of expectations.

Other jurisdictions, including WA, do not impose whole-of-government requirements on regulators as to their operational or policy practices, although many individual regulatory agencies manage their business along best-practice and risk-based principles.

Comments on WA system

Regulatory impact analysis

The Western Australian Regulatory Impact Assessment (RIA) system involves two stages, consistent with COAG’s proposed leading practice\(^{21}\). Agencies must, under Premier’s Circular 2009/06, prepare a preliminary impact assessment (PIA) to determine impacts of non-exempt regulatory proposals on business, consumers or the economy. If the PIA identifies significant impacts, a more rigorous Regulatory Impact Statement (RIS) must be prepared.

Stakeholders raised with the review Panel the need to ensure rigorous cost-benefit analysis of proposed new or amending regulation. While the RIA process requires quantification of costs and benefits, at least in an RIS, anecdotal experience is that the underlying assumptions on which the initial quantification is made can be vague and are often not rigorously substantiated. Introducing further rigour by mandating use of the State’s Regulatory Burden Measurement Tool\(^{22}\), or formal cost benefit analysis for significant proposals, may improve the process.


\(^{19}\) ibid.


One stakeholder proposed transferring the regulatory reform and gatekeeping functions to an independent body under ministerial direction and suggested the Economic Regulation Authority of Western Australia (ERAWA). The ERAWA has functions under the Economic Regulation Authority Act 2003 and other Acts, including issuing licences and approving contracts and pricing arrangements in relation to gas, electricity and water, pipelines and rail access. The ERAWA also conducts independent inquiries into economic issues on request of the Government.

While it appears that the ERAWA’s independence and its specific economic expertise would be advantageous, there may be reluctance from agencies to share Cabinet confidential material with a statutory authority. The ERAWA lacks an apparent education and training mandate and would require resources to match the support the Regulatory Gatekeeping Unit (RGU) provides to policymakers. Any use of the ERAWA’s resources would need to consider apparent conflict between that use and its role as an economic regulator, and consideration would need to be given to its capacity, skills and resourcing.

WA’s Regulatory Impact Assessment Guidelines, last formally updated in 2010, are currently undergoing review by the Better Regulation Unit (BRU), previously known as the RGU, including extensive agency consultation. New process guidelines, and a suite of accompanying fact sheets addressing various matters to do with best practice regulatory design, are anticipated to be in place before the end of 2017. It is noted that the BRU has been transferred to the Department of Treasury from the Department of Finance following the 2017 Machinery of Government changes.

Red tape reduction

The previous WA Government had a clearly articulated regulatory reform policy, (Appendix 2). Initiatives included a ‘Repeal Week’, which provided dedicated Parliamentary time for legislative reform and progressive deregulation that might otherwise have been low-priority; annual central reporting of red tape reduction efforts with six-monthly Cabinet oversight; identified priority areas; and requirements embedded in CEO performance agreements. The Minister for Finance was designated as the lead minister for the reform agenda, and a dedicated unit within the Department of Finance had functional responsibility for its delivery.

Red tape reduction initiatives undertaken by the Department of Finance included ‘90-Day Regulatory Mapping and Reform’ projects, which involved dedicated resources from the department and line agencies, in collaboration with stakeholders. The projects examined specific regulatory frameworks and, among other things, prepared process maps to clarify regulatory approvals sequences for business, identify the main challenges and make practical recommendations for change. Limited information as to practical implementation outcomes of these projects is available.

23 Chamber of Commerce and Industry of Western Australia. 2017. Submission to the Service Priority Review.
The regulatory mapping approach, and particularly the model of supporting agencies to achieve reform by providing centrally located expertise, has clear merit. However, there is potential to redesign the approach by ensuring there is appropriate expertise in contemporary regulatory mechanisms, including in designing and implementing interventions that do not rely on formal written regulation.

The red tape reduction function has now been transferred to the Department of Treasury, along with the BRU. The Government has not yet publicly articulated an ongoing policy around red tape reduction. The 90-day mapping projects are continuing, with current focuses on the home building processes and coronial investigations.24

Approvals reform

Stakeholders have, in their response to the review and consistently over time, raised the need for more closely integrated sequential approvals processes. Sequential approvals often involve planning, environmental and natural resources allocation approvals and licences, and may also need to account for Commonwealth native title processes. Processes involving different statutes, often with inconsistent objectives, different decision makers, departmental cultures, reporting requirements and IT capabilities create ongoing regulatory burden for businesses. The Government has undertaken a number of reviews aimed at reducing the burden25 and has implemented a variety of measures, including agency reporting on timeframes and a ‘Lead Agency Framework’ for coordinating major projects.

While the economic significance of the resources industry in WA points to the need for ongoing approvals reform for resources projects, economic diversification relies on WA offering an attractive regulatory environment for businesses in other sectors. The efforts made by the Department of Finance (and now the Department of Treasury) in regulatory mapping of approvals processes suggests there are gains to be made in this area.

Consideration could be given to the potential for assigning formal functional leadership for approvals regulatory reform with a mandate to drive progress towards aligning regulatory processes.

Options for reform

Options for red tape reduction

1. Support, resource and assign functional leadership for ongoing red tape reduction and quality regulation design approaches.

2. Identify areas of focus for red tape reduction approaches.

3. Consider mandating a five-year red tape reduction target.

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25 Including the 2009 Industry Working Group Report
**Options to improve regulatory governance**

4. Require agency heads to take stewardship approach to managing regulation.

5. Mandate a risk-based approach to regulatory governance for regulatory agencies and require immediate benchmarking and regular reporting against progress, including actions to reduce regulatory overlap between agencies and between levels of government.

6. Consider implementing a ‘sun-setting’ program under which existing regulatory instruments will be repealed by an identified future date unless the agency responsible has identified an ongoing need. Once the initial program has completed, consider ways in which ongoing regulatory renewal can be embedded in WA.

**Options to improve regulatory design**

7. Require regulatory agencies to review their stock of regulation and identify when and how it will be revised to give effect to:
   (a) any relevant findings of a regulatory mapping and reform project
   (b) an outcomes-based framework
   (c) the need to integrate processes that link up with regulatory responsibilities managed by other agencies
   (d) effects on competition.

8. Require regulatory agencies to immediately benchmark and regularly report against their progress, including adoption of digital technology.

9. Consider machinery of government changes to bring common approval or decision-making functions together.

10. Embed a presumption of lawful sharing of data between agencies and with the public, supported by comprehensive easy to access data registers.

11. Evaluate WA’s RIA program against applicable best practice guidelines, and implement any changes identified.

12. Provide central expertise to departmental officers in contemporary policy and regulatory design.
References


Appendix 1

Progress towards an outcomes and risk-based approach by NSW regulators 2014-2016
