

# Independent Review of the NSW Regulatory Policy Framework

Submission to the Independent Review Panel

December 2016

## **Introduction and overview**

The NSW Business Chamber (the Chamber) welcomes the opportunity to respond to the *Independent Review of the NSW Regulatory Policy Framework*.

As you may be aware, the Chamber is one of Australia's largest business support groups, with a direct membership of more than 19,000 businesses and providing services to over 30,000 businesses each year. The Chamber works with businesses spanning all industry sectors including small, medium and large enterprises. Operating throughout a network in metropolitan and regional NSW, the Chamber represents the needs of business at a local, State and Federal level.

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## **Business' concerns about regulation and the Chamber's 2016 Red Tape Survey**

Excessive and bureaucratic regulation is consistently cited as one of the top impediments to business growth and success. Tackling the issue of red tape is not about letting businesses do whatever they want, but rather it is about reducing costs that are unnecessary and can be avoided. With current levels of regulatory burden ranking Australia 80th out of 140 countries (according to the Global Competitiveness Index 2015-16)<sup>1</sup>, the Chamber believes that more must be done to ensure it is easier to do business in NSW.

In 2016 the Chamber surveyed its members to gather views on the regulatory challenges facing NSW businesses. A copy of the survey results can be found at **Attachment A** to this submission. From this survey, we estimate that NSW businesses are weighed down by around \$10.6bn in compliance costs each year. We cannot expect all of these costs to be removed, but governments can make things better by applying best practice regulation design and getting rid of unnecessary complexity.

The Chamber is hopeful that this review provides an opportunity to correct institutional settings so that the operating environment can be improved for NSW businesses.

*Are things getting better or worse?*

While businesses remain concerned about the burden of red tape, we are pleased that the 2016 survey suggests that they are less pessimistic when compared with earlier surveys conducted by the Chamber. This is an encouraging result in relation to efforts already taken to reduce compliance costs, especially the Service NSW initiative which makes transactions with government agencies and start-up processes for businesses much easier (Case study 1 refers).

### **Case study 1: Service NSW**

The Chamber is strongly supportive of the Service NSW initiative with our red tape survey indicating it to be the easiest government agency to deal with across all levels of government. In addition, regulators with functions delivered through Service NSW showed improvements in their performance relative to 2014 levels.

Feedback from members indicates that Service NSW is making a significant difference by simplifying the front end of regulatory interactions. Adopting seemingly obvious principles such as 'ask once, use many times', Service NSW has worked to reduce the number of steps required to do tasks such as registering a new business.

Central to the success of Service NSW is to view regulated entities as customers and using 'design thinking' to consider ways to make regulatory processes easier to interact with.

Service NSW is a highly effective reform initiative which reduces the costs of interacting with government. The Government should be making investments in areas that improve efficiency and Service NSW is an exemplary model of how this can be achieved. The Chamber considers that the initiative should be appropriately resourced over the longer term.

However, the Chamber is cautious when interpreting the results of the survey. A general uplift in economic conditions may have impacted on respondents' sentiments about the challenges they face while there is not sufficient historical data to confidently infer any trends.

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<sup>1</sup> See <http://reports.weforum.org/global-competitiveness-report-2015-2016/>

Irrespective of whether there has been an improvement or not, the 2016 survey reveals business perceptions of a 'culture of compliance'<sup>2</sup>, increasing concerns about record keeping obligations and continued challenges around finding information and understanding regulatory requirements, particularly for smaller businesses.

Further, there continues to be examples where regulation is designed to meet policy objectives without considering the impact and practical implications for the businesses affected (Case study 2 refers).

We believe that a system-wide approach to driving cultural change and identifying unnecessary regulatory burden could tackle some of these issues in NSW.

### **Case study 2: Scrap Metal Industry Act 2016**

On 21 September 2016, the NSW parliament passed the *Scrap Metal Industry Act 2016*. The proposed commencement date for the Act is 1 March 2017. The Act imposes a number of measures upon scrap metal business owners and operators to achieve its policy objective of making "a serious difference in helping prevent property crime across New South Wales, whether it be opportunistic or well organised<sup>3</sup>."

Generally speaking, the scrap metal industry supports this initiative, and sees it as a way to help eliminate the stigma associated with unscrupulous operators. In attempting to limit the scope of criminal activity within the scrap metal industry, the legislation contains some sensible and straightforward requirements. For example, in circumstances where a scrap metal dealer suspects that scrap metal has been obtained as a result of criminal activity, the dealer is required to notify the police and is prohibited from proceeding with the transaction of buying or selling that scrap metal.

However, the legislation also contains a number of provisions that appear to be an attempt to create a paper trail to help police investigate the alleged criminal activity. It appears that much thought has gone into evidence gathering techniques, but little or no thought has been given to the practicality of imposing such obligations on a small to medium sized business.

For example, regardless of whether or not the dealer suspects criminal activity, it will be an offence to use cash, cheque or barter as methods of payment for its business transactions. Apart from being a questionable restriction on the use of this type of legal tender, it will mean that all dealers will need to obtain the necessary technology in order to conduct an electronic transfer of funds. In order to effect such a transfer, a scrap metal dealer will often need to obtain (and maintain) each customer's bank account details. This raises privacy issues which, depending upon its previous business practices, the scrap metal dealer may not be familiar with.

In addition, a scrap metal dealer must obtain, create and maintain extremely detailed customer records. Photographic identification must be sighted and details such as the name, residential address and date of birth of the customer must be recorded and kept. If a corporation is involved in the transaction, the dealer must also obtain a signed statement from the corporation that it consents to the transaction. The signatory must be either an executive officer or an employee authorised by an executive officer to sign it. It is unclear whether or not a scrap metal dealer will be expected to satisfy itself that the signatory is in fact an executive or a duly authorised agent.

This mandatory change in business practice (which is complex and costly to administer) may compromise the viability of a number of smaller-sized operators.

<sup>2</sup> Whereby regulators do not see compliance as subordinate to the ultimate policy objective such that regulatory efforts are not targeted to where the risks are greatest.

<sup>3</sup> Second reading speech, Mr Troy Grant (Dubbo – Deputy Premier, Minister for Justice and Police, Minister for the Arts, and Minister for Racing)  
<https://www.parliament.nsw.gov.au/bills/DBAssets/bills/SecondReadSpeechLA/3324/2R%20Scrap%20Metal.pdf>.

## **What needs to be done and the structure of this submission**

Upon releasing the 2016 Red Tape Survey the Chamber also released a *Making it Easier to do Business Action Plan* (the Action Plan), also included at **Attachment A**.

The Action Plan broadly sets out some of the institutional settings that require adjustment to prevent the build-up of unnecessary or poorly designed regulation while identifying steps that could be taken to reduce burdens from the existing stock of regulation. In particular the Action Plan recommends that Government:

1. make information across government more open and accessible;
2. commit to system-wide targets and goals for reducing the impact of red tape;
3. take a strategic approach to identifying reform opportunities to make it easier for both new and existing businesses;
4. embrace a 'light touch' culture by creating a coordination point for a whole-of-government approach to regulatory reform; and
5. ensure that regulation is effective and proportional to risks faced by the community when compared with alternative approaches that could be taken.

The Action Plan's five top-level recommendations were accompanied with issues and actions that apply to the NSW context. For example, the Chamber recommended that a central oversight body be empowered to take forward these recommendations including by taking on a gatekeeper role in verifying the quality of regulatory impact analysis.

This submission builds on the Action Plan by making further recommendations about the regulatory policy framework. In doing so this submission will consider the NSW Government's current regulatory policy framework, explore practices to manage the stock and flow of regulation, and consider how the quality of regulation can be improved.

## **The NSW Government's Better Regulation Principles and best practice regulatory policy**

While the Chamber welcomes the stated objectives of NSW regulatory policy, it endorses concerns raised by the NSW Auditor General's Performance Audit into Red tape reduction (the Auditor General's Report)<sup>4</sup>. Indeed, the Chamber raised a number of these same concerns when it was consulted by the NSW Audit Office during the preparation of that report. In particular, the Chamber agrees with that report's principal findings that:

- a new red tape reduction framework is required;
- regulatory impact assessments do not consistently demonstrate that red tape reduction principles have been applied;
- there is no designated oversight function for red tape reform or red tape reduction; and
- regulatory decisions are not transparent.

Despite these areas where improvements could be made, the Chamber supports the NSW Government's Better Regulation Principles and the broad approach taken by frameworks used to assess new regulatory burdens. Further, the Chamber considers that a number of comprehensive reviews and studies have refined best practice approaches to regulatory policy in both international and Australian contexts.<sup>5</sup>

For these reasons the Chamber encourages the Review Panel to focus primarily on how these principles and practices are implemented within the NSW context rather than the merits of an alternative set of principles or practices (though the toolsets used to achieve these objectives should encompass innovative and evolving solutions).

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<sup>4</sup> See [http://www.audit.nsw.gov.au/ArticleDocuments/757/01\\_Red\\_Tape\\_Reduction\\_Report\\_Full\\_Report.pdf.aspx](http://www.audit.nsw.gov.au/ArticleDocuments/757/01_Red_Tape_Reduction_Report_Full_Report.pdf.aspx)

<sup>5</sup> Including the IPART *Investigation into the Burden of Regulation in NSW and Improving Regulatory Efficiency* (see <https://www.ipart.nsw.gov.au/Home/Industries/Special-Reviews/Reviews/Burden-of-Regulation/Investigation-into-the-Burden-of-Regulation-in-NSW-and-Improving-Regulatory-Efficiency>) and the PC *Research Report into Identifying and Evaluating Regulation Reforms* (see <http://www.pc.gov.au/inquiries/completed/regulation-reforms/report>)

## Managing the stock and flow of regulation

As the Issues Paper points out, the burden of regulation can be thought of in both stock and flow terms. This section will consider strategies for managing the overall burden of existing regulation while ensuring that new regulatory burdens are reasonable.

### What is 'red tape' and where should efforts be prioritised?

The Chamber emphasises that it is not concerned with regulation per se. Indeed, the Chamber acknowledges that regulation can enhance the efficiency of markets and is required to address broader community interests as diverse as (but not limited to) safety, consumer protection and tax integrity.

The Chamber is concerned about and considers that the focus of regulatory policy should be on regulatory burdens which are unnecessary, hereafter referred to as red tape, either because they:

- exist to achieve redundant<sup>6</sup> policy objectives;
- do not represent the most efficient approach to achieving a particular outcome;
- do not appropriately optimise the balance of risks and costs associated with a policy response; or
- are poorly coordinated such that the viability of an industry or activity that benefits the community is harmed (even if each individual regulatory burden may be individually justifiable).

As earlier noted, we estimate that NSW businesses are weighed down by around \$10.6bn in compliance costs each year. It is important to note that this estimate does not include costs associated with activity forgone. Regulatory burdens that squeeze businesses out of the market (either at the margin or an industry as a whole) results in unemployed people, unsatiated consumers and unpaid investment returns. While regulatory burden stocktakes can capture observable costs, it is these unobservable costs which have the potential to be the most pervasive.

### Recommendation 1

The Chamber supports an approach that does not hinder the Government's ability to impose or maintain well-designed and proportionate policy responses while giving greater scrutiny to regulatory burdens which do not meet this standard.

The Review Panel should consider the costs of activity forgone where regulatory burdens challenge business viability (either at the margin or an industry as a whole).

### The stock of regulation

While the primary focus of the review appears to be the policy and statutory requirements that govern the development and assessment of new regulation, the Chamber welcomes the Issues Paper's consideration of measures that could be taken to manage the stock of existing regulation.

Simple arithmetic suggests that the opportunities to reduce red tape from the existing stock of regulation are likely to be many times that which comes from the proper screening of new regulation. While management of the stock and flow of regulation are both important, the

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<sup>6</sup> For example, whether other jurisdictions regulate a particular activity offers a reasonable benchmark for assessing whether a policy objective remains relevant or not.

Chamber encourages the Review Panel to give a greater weighting (than might otherwise be suggested by the terms of reference) to measures that reduce the stock.

As earlier noted, the Chamber supports the NSW Government's Better Regulation Principles. While the principles have been framed in a manner that is intended to apply to new regulatory proposals, the Chamber encourages the Review Panel to consider how they could be applied to reduce red tape generated by the stock of existing regulation.

*Actively working to identify opportunities to reduce the stock*

Identifying priority areas for reform is challenging. While stakeholders may indicate they feel burdened by the weight of regulation, it may not necessarily be clear which regulatory imposts warrant further review.

Regulated entities cannot be relied on in isolation to identify opportunities for reform. This is because they:

- are unlikely to report unnecessary regulatory burdens if they do not think that doing so will result in any changes;
- may regard a regulatory burden as applying equally across an industry and see no benefit in having the regulation removed, particularly in circumstances where they may be relatively efficient at dealing with the regulation compared with their competitors; and
- are not always well positioned to know the best channels to report an unnecessary regulatory burden.

For these reasons institutional architecture is required to actively identify opportunities for reform. In NSW this has been fulfilled by targeted industry reviews conducted by IPART or on an ad-hoc basis. While the Chamber supports these reviews there is scope to build additional capability.

The Chamber's Action Plan recommended that the Government should explore innovative ways to harness the feedback of businesses. The Chamber cannot offer fully-formed policies for additional frameworks, however the following concepts could be considered:

- **'Fix my red tape' review mechanisms** — The ACT Government has in place a feedback mechanism<sup>7</sup> for stakeholders to identify red tape for review. A similar but slightly different model is the Board of Taxation's 'Sounding Board'<sup>8</sup> which invites stakeholders to contribute ideas for tax system improvement. In the NSW context such a mechanism could be publicised with red tape opportunities reviewed to assess whether action is required. Importantly, these mechanisms would need to represent a genuine opportunity for stakeholders to provide feedback which can be meaningfully considered. Models such as the Department of Fair Trading's 'Super Complaints'<sup>9</sup> system could be used to harness feedback from membership organisations such as the Chamber.
- **'Mystery shopping' of regulatory processes** — Government could commission model businesses (made up of a team of experts either within or external to government) to experience various regulatory processes. The purpose of this would be to simulate regulatory interactions with a view to identifying ways to improve the experience. Experienced professionals would be able to use their knowledge to identify

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<sup>7</sup> See [https://www.accesscanberra.act.gov.au/app/answers/detail/a\\_id/1451/~/fix-my-red-tape](https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1451/~/fix-my-red-tape)

<sup>8</sup> See <https://taxboard.ideascale.com/>

<sup>9</sup> See

[http://www.fairtrading.nsw.gov.au/ftw/About\\_us/Our\\_compliance\\_role/Our\\_compliance\\_priorities/Super\\_complaints.page](http://www.fairtrading.nsw.gov.au/ftw/About_us/Our_compliance_role/Our_compliance_priorities/Super_complaints.page)



whether a regulatory process is necessary within the context of broader policy objectives.

- **Establishing a marketplace for regulatory reform proposals** — At the moment those with considerable expertise in a given regulatory field are expected to provide their insight on public policy questions on a pro bono basis. While expertise exists within government or may be procured externally, this only represents a subset of the collective wisdom. Innovative tools such as 'Social benefit bonds' are already being used by the NSW Government to deliver on social policy objectives. The principles behind this approach could be explored as a possible model to facilitate the identification of verifiable savings in unnecessary regulatory burdens.
- **Providing regulatory impact advice and training to local government** – Local councils, when acting as a regulator, have been consistently identified by the Chamber's red tape survey as one of the most complex regulators for business to deal with. Implementing the leading practices of other states, such as Victoria's Guidelines for Local Laws Manual<sup>10</sup> (which provides guidance to councils in applying a more robust and consistent process for local law making) is strongly supported.

Frontline agencies such as Service NSW have unique visibility on the way in which regulatory frameworks affect businesses and how regulatory processes work in practice. This insight should be harnessed when designing policy, noting the promising gains that look to be realised as part of the 'easy to do business' pilot making it easier to start-up or expand cafes, small bars and restaurants in the City of Parramatta Council area.<sup>11</sup> Process improvements addressing "front end" challenges may not necessarily compromise the effectiveness of regulation yet can still be highly effective in reducing the stock of regulatory burdens.

## **Recommendation 2**

The Review Panel should consider mechanisms to actively reduce the stock of unnecessary regulatory burdens given the most fruitful opportunities to improve the business environment are likely to come from existing regulatory requirements.

In recognising that stakeholders do not always have strong incentives to report red tape, the government should explore how the institutional architecture can better support the active identification of reform opportunities. This includes, but is not limited to 'fix my red tape' review mechanisms, 'mystery shopping' of regulatory processes, establishing a marketplace for regulatory reform proposals, and providing regulatory impact advice and training to local government.

Front end simplification should also be explored as a mechanism to reduce the stock of regulatory burdens, drawing on the experiences of Service NSW's easy to business initiative.

## **A red tape reduction goal**

The Chamber considers that a red tape reduction goal is required to direct and incentivise government initiative toward the task of reducing the stock of red tape imposed on the community. Ultimately the purpose of such targets should be to incentivise the proactive identification of areas where regulation can be made more business-friendly (whereas in the absence of targets there is little incentive for policy makers and agencies to do so).

<sup>10</sup> See [http://www.dtpli.vic.gov.au/\\_\\_data/assets/pdf\\_file/0007/225268/Local\\_Laws\\_Manual.pdf](http://www.dtpli.vic.gov.au/__data/assets/pdf_file/0007/225268/Local_Laws_Manual.pdf)

<sup>11</sup> See <https://www.service.nsw.gov.au/news/easy-do-business-pilot-program-launches-parramatta>

### *Are dollar-based red tape targets appropriate?*

The Chamber's Action Plan recommended that the Government commit to system-wide targets and goals for reducing the impact of red tape while recognising the limitations of explicit dollar-based targets (something further highlighted by accounting concerns raised in the Auditor-General's report).

When considering the issues raised in the Auditor-General's report it is ambiguous whether the Government met its commitment to deliver a 20 per cent saving on regulatory burdens based on 2011 levels (quantified as a \$750m dollar-based target). While government reporting suggests the dollar-based target has been exceeded, the Auditor-General's report raises significant concerns relating to issues such as the quality of estimates, double counting and the impact of new regulation.

Despite this, the Chamber is strongly supportive of the objective behind targets as the absence of one implies satisfaction with the status quo. Meanwhile, targets are meaningless unless efforts are taken to assess whether the target is being met. While it will always be possible to criticise the integrity of such an assessment, some form of measurement is nonetheless required to provide accountability.

### *Developing a new target*

Acknowledging criticisms associated with the previous target, the Chamber encourages the Review Panel to develop a new framework to underpin a revised red tape reduction target. The Chamber notes the Auditor-General's concerns that targets did not drive new red tape reforms. There is therefore a need to consider how the target can be structured to generate new reforms rather than allowing agencies to retrofit existing work programs into the target.

In terms of ambition, a new target should aim to maintain the momentum reportedly achieved under the previous target (which the Government claims produced a reduction of \$226 million per year between September 2011 and December 2015). A less ambitious target implies there are fewer opportunities for reform, something the Chamber is not convinced would be the case if a better framework for identifying reform opportunities could be implemented.

A new framework would need to consider how to value the existing stock of regulation and how to measure the impact of new and repealed red tape. The Chamber is open-minded about alternative approaches that could be used. For example, a system of KPIs could be established to improve service standards, the number of forms, or the number activities regulated.

The Productivity Commission's 2011 Research Report: *Identifying and Evaluating Regulation Reforms* identified some good design features of red tape targets (box 4.2 of that report refers) which could also be drawn on in considering the design of red tape targets.

### *Targets for those with agency over red tape*

Apart from an aggregate NSW target, the Chamber considers that intermediate targets are required for those with agency over red tape. Intermediate targets (whether formal or informal) ensure that aggregate targets are met as well as allowing regulatory reform efforts to be prioritised in areas (e.g. industries) that are most in need of red tape reduction efforts.

Targets and KPIs should apply to portfolios, agencies and their leadership.

### **Recommendation 3**

The Review Panel should recommend a replacement red tape reduction target. Such a target does not necessarily need to be in the same form as the Government's previous \$750m target, though should not be less ambitious.

A new red tape reduction target should also contain intermediate targets so that those with agency over red tape (be they Ministers, departments and agencies, or Secretaries) have KPIs to incentivise regulatory reform efforts.

### **Sunsetting and periodic reviews**

The Chamber supports the NSW Government's commitment to regularly reviewing legislation through embedded statutory reviews as well as the sunsetting of regulations required by the *Subordinate Legislation Act NSW 1989*. These, in theory, provide key opportunities to consider whether regulatory obligations remain appropriate and whether they can be improved.

In assessing whether improvements to these arrangements can be made, the Chamber encourages the review panel to consider the Productivity Commission's 2011 Research Report: *Identifying and Evaluating Regulation Reforms*. In particular, Boxes 5 and 8 of that report set out good design features of both sunsetting programs and periodic reviews.

In drawing on these design features within the NSW context, the Chamber suggests two key additions which would improve the regulatory policy framework including the creation of:

1. a central oversight body (as recommended in the Chamber's Action Plan and discussed later in this submission) responsible for identifying strategic linkages between statutory reviews or regulations due to expire; and the extent to which they ought be reviewed; and
2. an online information portal which sets out the timeline of sunsetting regulations and statutory reviews to support stakeholders in preparing and contributing meaningfully to review processes.

The Chamber encourages the Review Panel to also consider the standard at which statutory reviews are performed. For example, the current review of the Parking Space Levy does not appear to genuinely consider changes beyond minor adjustments which might otherwise have been made (Case study 3 refers).

### **Case study 3: Parking Space Levy Act 2009**

The NSW Government has commenced a review of the *Parking Space Levy Act 2009* (the PSL Act) to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The Parking Space Levy (PSL) is a levy imposed on owners of off-street commercial and office parking spaces, in certain business districts within the Sydney metropolitan area. The aim of the PSL is to reduce congestion by discouraging car use, as well as attracting customers to public transport by funding improvements to infrastructure such as commuter car parks and interchanges.

The PSL is being reviewed owing to a statutory obligation set out in section 18 of the PSL Act. As part of a discussion paper released by Transport for NSW, it was noted that "the

*Government's preliminary view is that the objectives of the Act remain valid, and that the terms of the Act remain appropriate for securing those objectives".*

The Chamber makes the following observations about this review process:

- while periodic review of the PSL Act demonstrates good regulatory practice, the review process does not genuinely question the relevance of the policy objective and whether the PSL Act is the best option in meeting that objective;
- the discussion paper does not make any attempt to assess (either qualitatively or quantitatively) the impact that the PSL has on congestion or car use;
- the discussion paper is not framed in terms of options available to government, but instead invites stakeholders to comment on 'around the edges' changes that can be made; and
- the discussion paper does not give proper acknowledgement to the PSL's role as a revenue measure or consider its appropriateness in this capacity.

The Chamber is not suggesting that the discussion paper necessarily fails to meet the requirements set out in section 18 of the PSL Act. Instead, the Chamber suggests that more onerous review requirements could be imposed to improve policy outcomes.

The extent to which the PSL is viewed as being within the scope of the Better Regulation Principles is also important. While it may be regarded as a revenue measure (rather than being regulatory in nature) it comes with regulatory implications.

The review of the PSL Act is a good example of how, in the Chamber's view, the principles behind RIA could be better integrated into government decision-making.

### **Constraints on the growth of new regulation**

The Government has previously committed to (though these commitments have since expired) restrictions on the flow of new regulatory burdens.

The "one on, two off" policy required the number of new principal legislative instruments introduced to be offset by the repeal of at least two instruments (the numeric test) as well as for the regulatory burden of new instruments to be offset on a one-to-one basis (the regulatory burden constraint).

The Chamber recognises that regulatory budgets (such as the one on, two off policy) can be criticised as having superficial appeal. The Chamber supports approaches that focus on regulatory burdens rather than the quantity of legislative instruments. More generally, the need for a regulatory budget constraint diminishes in circumstances where robust red tape reduction targets apply.

In NSW there is no stated objective to constrain the growth of new regulatory burdens given the expiration of both the \$750m red tape reduction target and "one on, two off" policy. This begs the question of what should be put in its place — the Chamber does not accept that "nothing" is an appropriate response.

Even if not applied at the aggregate level, regulatory budget constraints could form part of portfolio-based targets and KPIs when combined with a broader red tape reduction target.

**Recommendation 4**

The question of regulatory budget constraints should be considered within the context of broader red tape reduction objectives. The Review Panel should consider whether regulatory budget constraints could form part of portfolio-based targets and KPIs as part of a broader red tape reduction goal.

## Improving the quality of new regulation

Both the Issues Paper and the Auditor-General's report pose questions around the appropriateness of arrangements to assess the impact of regulatory proposals before they are implemented. This section will consider those issues and make recommendations on how regulatory policy framework could be improved to ensure the quality of new regulation.

### Conceptualising the need for a BRS or RIS

Current requirements in NSW are for regulatory interventions to be accompanied by either a Better Regulation Statement (BRS), Regulatory Impact Statement (RIS) or both depending on the nature of the proposal:

- all significant new and amending regulatory proposals are required to demonstrate that the better regulation principles have been met through a BRS; and
- the *Subordinate Legislation Act NSW 1989* sets out the circumstances in which new or amended regulations (through changes to subordinate legislation) requires a RIS (which may also be drafted to simultaneously satisfy the requirements of the BRS).

Together, the BRS and RIS (hereafter collectively referred to as 'regulatory impact assessment', or RIA) are the key mechanisms through which new proposals are subjected to regulatory impact analysis.

It is not clear to the Chamber why a different approach is required for changes in regulations (triggering RIS obligations under the *Subordinate Legislation Act NSW 1989*) and broader policy changes that otherwise require preparation of a BRS. Realisation of the benefits of RIA is not contingent on a particular regulatory instrument being used. For this reason the Chamber is not opposed to streamlining of RIA processes such that it is simpler and easier for stakeholders to engage.

The Chamber is more concerned about ensuring that RIA is viewed as an integral part of the decision-making process within government. In this regard RIA should be the primary vehicle through which agencies form their advice to Ministers or Cabinet — it should not be a tack-on product after policy advice has already been formulated and decisions already made (whether formally or informally). Indeed, there is little value in performing two sets of analyses on the same policy issue and an integrated approach is required to avoid duplication. This should be achieved through a RIA framework that requires the proper documentation of policy analysis in order to maintain transparency and accountability.

Any streamlining should not come with deterioration in the standard of analysis expected as part of the RIA. Any trigger that allows for less onerous RIA requirements should be based on the principle of proportionality (the magnitude of the likely impacts) rather than whether a particular instrument is being used.

Any new RIA processes will also require consideration as to their role and function within the regulatory policy framework. This submission considers some of these questions separately below.

#### **Recommendation 5**

The Review Panel should consider ways in which RIA processes can be streamlined (to minimise duplication between BRS and RIS requirements), while maintaining the standard of analysis required, with a view to making it simpler and easier for all stakeholders to engage.

## **The need for central oversight over RIA**

The Chamber is pleased that the focus of the review is on the institutions and structures that ensure the quality of regulation and protect against unwarranted regulatory interventions.

As the Issues Paper notes, NSW has lacked a consistent approach to ensuring the quality of analysis performed on the impact of new regulatory proposals — something not helped by the abolition of the Better Regulation Office.

While both the *Subordinate Legislation Act NSW 1989* and *Guide to Better Regulation* set out the requirements of RIA, they do not guarantee that the analysis will be performed in a robust and consistent manner across government. As the Issues Paper notes, the lack of effective oversight over RIA is a key concern for stakeholder groups such as the Chamber. For RIA to be effective it must be ingrained into the policy process rather than being seen as an ex-post, 'tick the box' exercise. In the absence of an accountability mechanism, it is questionable whether this can be achieved.

The Chamber's Action Plan recommended the establishment of a central body with a 'gatekeeper' role over regulatory impact assessments, in line with the recommendations from the 2006 IPART *Investigation into the burden of regulation in NSW and improving regulatory efficiency*.

While the Chamber accepts that an overly bureaucratic approach can stifle cultural acceptance, it considers there to be a number of advantages associated with the gatekeeper model. In particular it would:

- build the technical and analytical capabilities required to perform robust regulatory impact analysis for deployment across government;
- be better placed (than agencies or Ministers) in advising whether an intervention would benefit from a more comprehensive assessment of the costs and benefits;
- support agencies in identifying the most appropriate options (the next best alternatives) to which the preferred option should be benchmarked;
- be able to act as a screening point so that less contentious proposals do not need to be subject to more onerous regulatory impact analysis requirements (according to the principle of proportionality);
- ensure that regulatory impact analysis is performed consistently (in standard and format) across government;
- support public confidence in the robustness of regulation impact analysis by vetting and approving the analysis; and
- provide extra discipline on policy advice and decision-making as agencies would need to satisfy the scrutiny of the central body.

The ultimate purpose of central oversight should be to ensure that the best policy options are considered by government and to prevent poorly prepared RIAs from being relied on by decision-makers. In the absence of central oversight it is questionable whether existing RIAs genuinely form the basis of Government decision-making or simply justify the preconceptions of the decision-maker. Even if current RIA processes are sufficiently robust and ingrained in the policy process, the lack of oversight creates a perception that they are not as robust as they could be.

### *Independence*

A related question is the extent to which central oversight should be provided independently of government and the governance mechanisms that provide for that independence. While it is possible for a central oversight body to be located within policy departments such as DPC or

DFSI; overlapping management structures (such as where the oversight body reports to the same Secretary as a policy agency) can weaken its independence (whether real or perceived).

A preferable approach is therefore to place central oversight responsibility within a body that reports directly to a responsible Minister, the Premier or Cabinet as a whole (such as occurs with the Commissioner for Better Regulation in Victoria which reports directly to the Treasurer). Alternatively the oversight function could be absorbed within an existing agency that is capable of providing independent advice but that does not have overlapping policy responsibilities.

Within the NSW context it would seem logical for such oversight to be provided by an authority such as IPART given that their organisational capabilities are broadly in line with what is required from robust RIA.

### *The gatekeeper role*

The Chamber considers that NSW should have a central oversight body with a gatekeeper role. However, as previously noted, the Chamber accepts that an overly burdensome gatekeeping function could serve to undermine cultural acceptance of robust RIA processes within government. Instead, the Chamber envisages a model where the vast majority of RIAs are passed without any major changes, with issues addressed through early engagement with the policy agency before they emerge. Under this approach, a RIA would only be rejected if the policy agency did not work constructively to resolve concerns or where there is a fundamental disagreement on policy grounds.

It is important to note that a gatekeeper role does not take away the Government's ability to make a decision in the absence of an approved RIA. The gatekeeper role should ultimately be viewed as an accountability mechanism which informs the community whether a decision has been made with or without appropriate policy advice. Best practice would require discipline by government (with an aim for all decisions to be backed by an approved RIA); however the government would not be constrained in exceptional circumstances. Again, there should be transparency in circumstances where this occurs by reporting non-compliance against the RIA framework.

If the central oversight body were to report to a responsible Minister, then that Minister would also be the champion for best practice within government with a view to achieving full compliance against the RIA requirements.

### *Resourcing*

The Review Panel will no doubt wish to consider the resourcing implications of establishing a central oversight body. In this respect there are two critical questions:

1. what are the costs and benefits of ensuring that RIAs are prepared properly and consistently across Government; and
2. what level of resourcing is currently allocated within DPC and agencies toward this objective?

Poorly designed market interventions can have considerable costs to the community. It is therefore appropriate to allocate reasonable resources in ensuring that policies are well-designed and the least-cost approach to achieving a particular policy objective. The appropriate level of resourcing will depend on the nature of the proposal, however making an investment toward the optimality of policy will more than pay for itself over the longer term.

The resources required by a central oversight body in fulfilling an accountability function should be seen within this context. If the quality of RIAs is not properly verified before being



put to Ministers or Cabinet then it is less likely that they will be prepared to a high standard. Further, if there is no dialogue with an agency as an RIA is being prepared then there is less scope to improve the direction, approach and options considered by the analysis — it is more likely to be considered on an 'accept it or not' basis.

The Chamber understands that DPC considers and verifies BRS' through its role within the Cabinet process. Further, agencies that prepare RIAs must also satisfy themselves and their Minister that the RIA has been prepared to a sufficient standard. There are therefore already resources allocated toward the purpose of ensuring the quality of RIA. Creating a central oversight body could therefore be established through a reallocation of these resources.

Given that relatively small errors in policy design can have exponentially significant costs to the community, the benefits of central oversight would more than justify any additional resources required to the extent they are needed for the central body to do the job properly.

In building analytical capability, there may also be scope for the central oversight body to proactively harness private sector intelligence (including through relationships with private sector providers), develop more sophisticated consultation tools, and work closely with the Behavioural Insights Community of Practice located within DPC and the data analytics centre. In doing so, the economies of scale that could be achieved through a central oversight body could be leveraged to reduce resource costs.

### **Recommendation 6**

The Review Panel should recommend the establishment of a well-resourced and independent central oversight body with a gatekeeper role. The central oversight body should be responsible for:

- engaging early with agencies to identify whether a policy issue warrants RIA and, if so, the depth of analysis that ought to be applied;
- guiding agencies along the process of developing options, consulting with stakeholders and drafting RIAs by ensuring that they draw on appropriate capabilities, methodologies and evidence bases; and
- working with agencies to resolve any issues early and approving RIA before being considered by the decision-maker.

The body could be resourced by consolidating existing resources that are allocated toward the purpose of RIA quality control. The benefits of central oversight more than justify the application of additional resources to the extent that they are required.

### **Depth and scope of analysis**

The value in having consistent and robust RIA is in preventing market interventions that are not the least cost solution to a policy problem.

When considering the robustness of RIA that ought to be required, the Chamber encourages the Review Panel to differentiate between depth and scope (where depth refers to the degree of analysis whereas scope refers to the breadth of issues considered).

The Chamber accepts that it is not a good use of public resources for relatively minor and insignificant proposals to be subject to 'over-the-top' analysis that adds little value to the decision making process. Instead, it is better to allocate these resources in improving RIA for proposals that are likely to have a bigger impact.

However, ex-ante determination of the likely impact of a proposal (and therefore the depth of analysis that is needed) requires broad consideration of the possible impacts including the full suite of unintended consequences that may result. Broad consideration of alternative options is also required to provide confidence that the preferred option is indeed the most efficient response. Given the Auditor-General's Report finding that RIAs prepared by agencies do not consistently provide a considered assessment of potential regulatory impacts, the Chamber supports an approach to RIAs which is broad in scope for all RIAs but with analysis that is proportionate in depth.

As a general principle, the test for whether additional resources should be allocated toward more sophisticated analysis will depend on whether doing so improves decision-making. For example, accuracy over orders of magnitude is more important to obtain than precision, yet precision will be an appropriate standard to expect for more significant proposals.<sup>12</sup> In both cases the need for deeper analysis will also depend on the marginality of the decision, that is, the extent to which the recommended option is confidently estimated as being more attractive than the alternatives.<sup>13</sup> Whether the accuracy of an estimate can be improved (within reasonable costs) must also be considered.

The Chamber encourages the Review Panel to flesh out in more detail, with possible metrics to act as a guide for policy agencies, the circumstances in which deeper analysis may or may not be warranted.

*Who should decide the depth of analysis required?*

As noted earlier, the Chamber supports a central oversight body with a gatekeeper role. Integral to this role would be to ensure that an approved RIA has a depth of analysis that is appropriate to the likely impacts of the proposal.

Wherever the Review Panel lands on the question of central oversight, the Chamber considers it inappropriate for the depth of analysis to be self-decided by agencies or Ministers. This is because they do not have the best visibility over the significance of a proposal (relative to other proposals across government) while conflicting interests may lead to the significance of the proposal (and therefore the depth of analysis required) being underestimated.

The Chamber encourages the Review Panel to develop a framework for considering the depth of analysis required from RIAs. The short-form impact assessment approach (as discussed in the Issues Paper) could form part of this framework as a means for the central oversight body to develop advice.

### **Recommendation 7**

The Review Panel should develop a framework, to be administered by the central oversight body, for considering the depth of analysis required from RIAs. That framework should have regard to:

- the likely magnitude of a proposal based on a pre-assessment of the costs and benefits (potentially through a short-form impact assessment);
- the potential for alternative policy options to represent a better policy option if costs and benefits are inaccurately assessed; and
- whether the accuracy of an estimate can be improved within reasonable costs.

<sup>12</sup> For example a 5% overestimation of net benefits on a significant proposal estimated at \$1bn is equivalent to an error of 500% on a proposal that has actual net benefits of \$10m.

<sup>13</sup> Given the examples in the footnote above, additional analysis might not be warranted if the next best option does not generate net benefits within \$50m of the estimation (given a reasonable sense, ex-ante, over the accuracy of the errant estimate).

## **A broader framework to consider the impacts of all market interventions (including non-regulatory options)**

Any decision by government that will change the behaviour of market participants, no matter how it is achieved, is capable of benefiting from a proper assessment of its benefits and costs relative to 'next best' policy alternatives.

RIA is a particular approach to conducting this type analysis in circumstances where interventions are regulatory in nature. However, there are many different ways in which government can intervene in markets which equally come with costs and benefits. For example, a financial incentive for acting in a certain way might equally be thought of as a financial penalty for not acting — the effect is the same and may have implications for competition, consumer choice and welfare.

Further, an examination of the list of non-regulatory and regulatory options contained within Appendix B of the NSW Guide to Better Regulation suggests that there is a degree of ambiguity over which category various policy tools fit. This will have subsequent implications for whether RIA is required. The guide notes that:

*"Non-regulatory approaches are options to deal with a policy problem that do not involve government intervention to direct the actions of people or organisations."*

Under this definition it is open to interpretation whether a regulatory approach is limited to proposals which require or restrict a particular activity or whether other interventions (such as market-based instruments) could also be captured.

Whichever option is regarded as the best approach to a policy problem, the community should be able to expect its government to conduct a proper analysis of the alternatives whether a regulatory or non-regulatory option is initially proposed.

The Chamber does not propose an expansion of the regulatory policy framework to cover all decisions by government, but encourages the Review Panel to consider how the principles behind RIA can be better integrated into government decision-making.

### **Recommendation 8**

The Review Panel should consider how the principles behind RIA can be better integrated into government decision-making, including in circumstances where market interventions are not classified as regulatory in nature (and are therefore not subject to existing or prospective RIA requirements).

### **Improving transparency**

One of the Chamber's principal concerns is that there is no central repository of completed RIAs as well as information on the Government's regulatory reform agenda more generally.

As the Chamber's Action Plan noted, it is hard to find detailed and easily accessible information in relation to:

- the Government's red tape reduction objectives and overarching framework;
- red tape reduction commitments under the previous term, including detailed reporting on the "one on, two off" policy and detailed cost-benefit analysis on policies reported as part of the red tape reduction target;
- individual portfolio targets and KPIs for agency heads;
- reporting on regulatory impact analysis performed to support consideration of new regulatory proposals; and

- the outcomes of review processes such as the 2011 Review of NSW Regulatory Gatekeeping and Impact Assessment Processes.

While some degree of ambiguity appears to be the result of the recent transfer of function between DPC and DFSI, NSW has never maintained a comprehensive central repository of RIAs.

Having a central repository would allow the public to gain a whole-of-government view on how decisions are made; support knowledge management within government; allow external stakeholders to gain a better understanding of the history of particular issues; and facilitate better coordination in circumstances where policy areas overlap.

A central repository would also improve accountability and demonstrate the Government's commitment toward effective RIA processes. As the Auditor-General's Report notes, "*public access improves regulatory outcomes and accountability by allowing the community to scrutinise decisions as they are being made.*"

For example, it is not clear to the Chamber the extent to which Cabinet's decision to introduce venue lockouts under the *Liquor Amendment Act 2014* and related measures was informed by a robust assessment of the costs and benefits as well as the merits of alternative policy responses. While the Chamber and other groups are prepared to support regulation that is in the best interests of the community, it is harder to do so when it is not possible to fully understand the rationale behind government decision-making. Transparency around RIA processes can also help sell the case for reform (Case study 4 refers).

#### **Recommendation 9**

The Review Panel should recommend that the Government keep a central repository of completed RIAs as well as information on the Government's regulatory reform agenda. Such a central repository should:

- be comprehensive and complete;
- public and searchable; and
- compile historical RIAs as comprehensively and as far back as practicable.

Information and resources on the regulatory policy framework should be made available on a single website rather than having to view separate agency websites. A new Premier's Memorandum (or equivalent) should be issued to update stakeholders and the bureaucracy on the Government's regulation reform priorities and requirements.

#### **Case study 4: Hairdressers' Act 2003**

In July 2016 DFSI released a discussion paper to seek the views of industry stakeholders in relation the potential repeal of the *Hairdressers' Act 2003* (the Hairdressers' Act).

The Hairdressers' Act imposes a number of requirements on commercial hairdressers including that they hold an "authorised qualification" such as a Certificate III in Hairdressing. NSW is among only two jurisdictions in Australia which have requirements for hairdresser qualifications (though other regulatory frameworks protect consumers and maintain standards in NSW and other jurisdictions).

The discussion paper noted that the Hairdressers Act contributes to the regulatory burden for hairdressers in NSW without delivering any significant benefits that are not conferred by other laws. In presenting options, the discussion paper presented favourably the option of repealing the Hairdressers' Act given that doing so would remove redundant red tape.

Shortly after the release of the discussion paper, the Minister for Innovation & Better Regulation issued a media statement noting that:

*"The Government has listened to the concerns of stakeholders and taken the decision to retain the Act in its current form."*

<https://www.finance.nsw.gov.au/about-us/media-releases/media-statement-hairdressers-act-2003>

The Chamber makes the following observations about this review process:

- the discussion paper made no attempt to quantify the costs and benefits of reform meaning that stakeholder reaction was largely uninformed — deeper analysis may have put forward a more compelling and robust case for reform or equally it may have informed on some the stakeholder concerns that resulted in the reversal of the decision to review the requirements;
- it is questionable whether the stakeholders invited to comment on the discussion paper represented the full cross-section of stakeholders that the discussion paper suggested would largely benefit from reform;
- there is no remaining source of information about this review available online apart from the Minister's media release and what is available from third party websites; and
- a lack of online information weakens transparency around the nature of the stakeholder feedback (and the arguments that were provided against reform) that informed the Government's decision.

A decision not to act is still a decision taken by government. It is therefore clear that the Government did not base its decision on a properly prepared RIA, particularly given the discussion paper was skewed to promote the benefits of repealing the Hairdressers' Act.

More generally this case study provides a good example of how improved RIA processes can support reform. The Chamber accepts that governments must balance political considerations when identifying reform opportunities; however a strong evidence base provided by appropriately developed RIA can help governments sell the case for reform. In this example, the Chamber does not consider that the Better Regulation Principles were properly applied in the development of this discussion paper or the subsequent decision taken by Government, irrespective of what view might be taken on the reform of the Hairdressers' Act.

## **Attachment A – 2016 red tape survey and action plan**

(Included separately in email – Survey can be downloaded at  
<http://www.nswbusinesschamber.com.au/Issues/Business-Surveys/Annual-Red-Tape-Survey>)