



DISCUSSION PAPER:

Review of small business experiences with regulatory policymaking

June 2024

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Introduction

About this review

Fair and effective regulation is as important to small business as it is to consumers. However, the accumulation of poorly designed or overly burdensome regulation has the potential to limit business productivity and growth, and in some cases can impact ongoing business viability.

There has been an intensified effort to view regulated businesses as customers, aiming to enhance their regulatory experiences while achieving essential policy goals of safety and adherence to minimum standards.

However, the Commission continues to hear from small businesses reporting growing concerns with the impact of red tape, including requirements imposed by Local, State and the Federal Governments. Some regulatory requirements disproportionately affect small businesses as they do not possess the resources of larger businesses to acquire specialist assistance to navigate complex requirements.¹

In NSW, the Better Regulation requirements provide a framework for new regulation to be well-designed and supported by clear and compelling evidence from a variety of sources, particularly sources outside government. The inclusion of industry perspectives is essential to informing the design of policy options as well as understanding the impacts of new regulatory proposals. However, the perspectives of small business can sometimes be overlooked in circumstances where they are not as well represented as larger businesses or when there is no embedded culture of considering their needs during the policy design stage.

This *Review of small business experiences with regulatory policymaking* considers opportunities to improve small business experiences with regulation including current requirements and expectations underpinned by the NSW regulatory policy framework.

The purpose of this discussion paper is to encourage feedback from both small businesses and their representatives about their experiences engaging in regulatory policy making processes to identify opportunities for improvements in the way small business perspectives are engaged as part of policy making processes as well as consideration of the impacts of regulatory proposals to small business.

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 into 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

This review is being undertaken in accordance with the *Small Business Commissioner Act 2013* which 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 business or that is relevant to the Commissioner's objectives or functions.

1 Productivity Commission, [Research Report: Regulator Engagement with Small Business](#) (Oct 2013) 67.

Note on terminology

In some contexts, 'regulation' refers to a specific type of statutory instrument. In this discussion paper, 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.

How to make a submission

Information page: [Review of Regulation Policy Making Processes: Have Your Say](#)

How to make a written submission:

Email written submissions to review@smallbusiness.nsw.gov.au

How to participate in the survey: [Survey link](#)

The survey and submission process close at 5pm on Friday 12 July 2024.

Terms of Reference

Review of small business experiences with regulatory policy-making

Purpose

The purpose of this review is to examine the experiences of small businesses as a key stakeholder group within the regulatory policy development process, and to ensure their needs are taken into consideration when developing new legislation, regulations, rules and other requirements.

This 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 will provide findings and recommendations with a report to be provided to the Minister for Small Business. The review will be informed by engagement with small business stakeholders, government agencies and examination of best-practice approaches to regulatory policymaking.

The review may consider 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 should be sought to inform the review, including through the establishment of the Commissioner's Small Business Advisory Group comprising of small business representatives.

The review is to be completed within six months of the date of issuance of these terms.

Context of the Review

Red tape is broadly defined as excessive regulation and includes delays, duplicative requirements, inefficient processes and out-of-date requirements. Many small businesses experience frustration with red tape and the pace of regulatory change.

Excessive red tape can hinder economic growth and productivity.

A 2013 Productivity Commission report found that small businesses spend around five hours a week complying with government regulatory requirements.² Twice as many regulations were created between 2010 and 2019 than in the previous decade, resulting in more time spent by businesses to understand and comply with requirements and less time and flexibility for businesses to focus on other areas of their business.³

Small businesses have consistently reported the increasing burden of regulatory requirements as a key concern when operating a small business.

The NSW Government has implemented a range of red tape reduction strategies, including the adoption and implementation of the Better Regulation Principles⁴ and requirements to prepare a Better Regulation Statement or Regulatory Impact Statement for new regulatory proposals. There have also been previous efforts to examine and reduce regulatory burden associated with the 'stock' of existing regulation. This includes implementation of red tape reduction targets, 'one-in two-out' requirements, automatic repeals of subordinate legislation and statutory revision programs.

The NSW Government has also invested in new technology and platforms to engage small businesses and other stakeholders, including through initiatives such as the 'Have Your Say' platform where stakeholders can contribute their feedback in a range of ways including surveys and other feedback tools.

A focus of this review will be to consider the efficacy of these initiatives in meeting the needs of small businesses, and opportunities to ensure small business perspectives and needs remain front of mind during regulatory policymaking.

2 Productivity Commission, [Research Report: Regulator Engagement with Small Business](#) (Oct 2013)

3 NSW Productivity Commission, [NSW Productivity Commission White Paper 2021 – Rebooting the economy](#) | Commissioner for Productivity

4 NSW Treasury [TPP 19-01 NSW Government Guide to Better Regulation](#) (Jan 2019).

Stakeholder consultation and engagement practices

Best practice consultation, regulatory impact assessment as well as specific consideration of small business needs can reduce unnecessary impacts and improve outcomes for small business. There is merit in examining current arrangements to ensure that small business needs are properly considered and that agencies are compliant with existing requirements.

The NSW Government's *Guide to Better Regulation* ([TPP 19-01](#)) sets out requirements that if followed, would improve outcomes. However, every policy problem is unique and consultation processes can sometimes vary depending on the nature and scope of what is proposed.

Stakeholder feedback may be sought across different stages of the policy development process. This could include feedback to inform government on the nature of an issue affecting the community, provide information to help design and assess policy options and provide assurance to Parliament when considering new legislation. The different consultation phases where stakeholder feedback may be sought are outlined in **Table 1**.

Despite the *Guide to Better Regulation* promoting a best practice approach, there is significant discretion for policy agencies to vary their approach.

Small business stakeholders frequently raise concerns about the impact of new proposals or changes they believe are poorly designed and have not undergone appropriate consultation. While industry stakeholders are often invited to comment on draft regulation or legislation, stakeholder views are not always sought to inform the policy design stage when options are being developed and the recommended approach is decided.

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. Best practice regulatory policy development typically encourages stakeholder perspectives to inform assessments about:

- the extent of a problem
- the objectives of Government intervention
- the development of alternative options to achieve policy objectives
- the costs and benefits of alternative options.

Fully transparent and open consultation processes do not guarantee small business perspectives will be fully taken into account when designing new regulation. Consultation needs to be undertaken in good faith, with policymakers genuinely open to amending policy objectives or proposals according to the feedback received.

Best practice regulatory policymaking assigns responsibility on policy agencies to ensure new regulation meets the needs of small business, even in circumstances where small business perspectives are not forthcoming. In these circumstances, proactive engagement and investigation of their needs through other means may be required to better understand the perspectives of and impacts on those being regulated.

The Commission is seeking stakeholder feedback on their experiences when engaging in NSW Government consultation processes.

Table 1 - Impact assessment, consultation, and the legislative process

Consultation documents to inform policy development	
Issues Paper	An Issues paper outlines and discusses specific topics or challenges related to a particular area of interest. It serves as a starting point for further exploration, analysis, and public consultation. Issues papers are released early in the policy development process. ⁵
Discussion Paper or Green Paper	A Discussion Paper provides a comprehensive overview of an issue or topic to stimulate public discussion and explore perspectives before moving to the next stage of policy development. ⁶ It explores possible approaches to addressing identified issues but does not contain detailed policy proposals.
Final Reports or White Paper	Final Reports or White Papers are often released as a statement of policy intent or as recommendations to government. ⁷ They may sometimes be released in draft form to solicit further feedback. White Papers are usually developed following a Discussion Paper or Green Paper.
Consultation Paper	A Consultation Paper is typically used to engage discussion and consider a specific issue. A Consultation Paper is sometimes used more generically to describe any type of document which seeks input and perspectives from stakeholders and other interested parties.
Impact assessment to assess policy options	
Better Regulation Statements (BRS)	Stakeholder engagement may sometimes occur through a consultation BRS. All significant new and amending regulatory proposals must prepare a BRS. These statements document the application of the NSW Government better regulation principles. ⁸ BRS assess the economic, social and environmental impacts of a proposed regulation compared to other options.
Regulatory Impact Statements (RIS)	Stakeholder engagement may sometimes occur through a consultation RIS. The <i>Subordinate Legislation Act 1989</i> requires a RIS to be prepared when a principal regulation is made. ⁹ A RIS provides information on the impacts of the proposed regulation and should generally be informed by public feedback. It may be submitted in place of a BRS but should also align with the better regulation principles.
Cost Benefit Analysis (CBA)	It is mandatory to undertake CBA when producing a business case to support a government funding or regulatory proposal. ¹⁰ CBA is used to assess whether the benefits of a proposal are likely to exceed the costs, and which option is expected to result in the highest net benefits.
Legislative review	
Draft Legislation	The Government may publish exposure draft legislation in the form of a draft Bill or regulations prior to introducing to Parliament. The Parliament may sometimes refer a Bill for further review by Parliamentary Committee prior to further consideration by Parliament. Additional community feedback may be sought at this stage.
Explanatory Memorandum and Notes	An Explanatory Memorandum and Notes are separate documents presenting the legislative intent of the Bill in terms which are more readily understood than the Bill itself. In NSW, Bills are accompanied with an Explanatory Note which explains the purpose and provisions of the Bill.
Statutory Instruments	Statutory Instruments are rules, regulations, by-laws, ordinances, rules of the court or proclamations made under certain Acts. Statutory instruments are not debated in the Parliament unless a member of either House lodges a motion to disallow part or all of that rule or instrument within 15 sitting days of the tabling of the notice. ¹¹

5 Treasury, [Achieving Best Practice Consultation with Small Business](#), A Guide for Government, 10

6 Ibid

7 [What is a 'white paper'?](#), Parliamentary Education Office,

8 NSW Productivity Commission, [Regulatory Impact Assessments | Commissioner for Productivity \(nsw.gov.au\)](#)

9 Ibid.

10 NSW Treasury [TPG23-08 NSW Government Guide to Cost-Benefit Analysis](#) (Feb 2023), 8

11 [Legislative process explained](#), Parliament of New South Wales. Available [here](#).

Questions for consideration

1. Have you had experience participating in a public consultation for a NSW Government policy proposal? Please provide details of the proposal and consultation process.
2. Have you ever provided feedback for a public consultation through any of the below feedback channels. If so, describe your experiences and whether you were able to effectively convey your views and perspectives.
 - a. Feedback channels on the NSW Government's 'Have Your Say' [website](#)
 - b. Industry forums or meetings where you were able to discuss as a group
 - c. Providing a written submission
 - d. Surveys
 - e. Meeting with government representatives to discuss your perspectives.
3. At what stage were you asked to provide feedback as part of the consultation? For example, were you invited to contribute evidence or perspectives on the problem and possible solutions or was it limited to providing feedback on draft legislation?
4. Do you feel you have an industry body or representative that can effectively represent your interests to government if you are unable to engage in a consultation affecting your industry?
5. Do you have any examples of where your perspectives were considered and taken on board when designing new regulatory requirements? Do you have any instances where you feel your feedback was ignored?
6. Is there anything else that would assist small business engagement as part of consultation processes?

Managing the flow: Impact assessment and the NSW Regulatory Policy Framework

Table 1 outlines the many stages when small business perspectives can be sought to inform the development of new regulatory proposals. However, there is some inconsistency as to when and how small businesses are invited to contribute their perspectives.

Small businesses face different challenges to larger businesses and it can be easy to overlook their needs without comprehensive impact assessment and attempts to understand their unique challenges.

The NSW Government's Better Regulation Principles guide the development of regulatory proposals. Cabinet and Executive Council proposals must be accompanied by a Better Regulation Statement (BRS) for all significant, new and amending regulatory proposals and must be published on the agency's website.¹² New or amending statutory rules, (i.e., regulations) are subject to Regulatory Impact Statement (RIS) requirements under the *Subordinate Legislation Act 1989*.

The Better Regulation Principles require the need for government action to be established and for it to only occur where it is in the public interest, that is, where the benefits outweigh the costs. CBA is mandatory for regulatory proposals. Mandatory requirements of CBA in business cases are outlined in NSW Treasury guidance [TPG23-08](#).¹³

The NSW regulatory policy framework was last reviewed in 2017. This review recommended changes to existing requirements, however, not all recommendations were implemented in full (see Box 1).

Small Business Impact Statement

Impacts on small business as a subset of the broader business community must be considered, however, there is no prescriptive requirement to specifically consider how their needs differ from larger businesses.

The Commission has previously proposed the concept of a *Small Business Impact Statement*. A Small Business Impact Statement process could oblige agencies to confirm they have sought a small business perspective and have considered the unique needs of small business. It could require agencies to confirm they have considered factors such as:

- Whether policy objectives can be met if small businesses are exempted from any new requirements
- The adequacy of their engagement with small business stakeholders and whether small business needs have informed policy design
- Potential implementation issues and practical challenges experienced by owner operators without specialist legal or regulatory expertise
- 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 Commission has proposed the concept of a Small Business Impact Statement as a mechanism to ensure the needs of small business are front of mind when policy is being developed and is intended to complement rather than replace existing regulatory impact analysis requirements.

¹² See [TC19-02](#): NSW Treasury Circular - Guide to Better Regulation (Jan 2019)
¹³ NSW Treasury, TPG23-08 NSW Government Guide to Cost-Benefit Analysis, 8-9

Questions for consideration

1. Are there any areas where you believe the existing regulatory policy framework could be improved to better meet the needs of small business?
2. Have you participated in a consultation to inform an assessment of the costs, benefits and impacts of a regulatory proposal? What was your experience, and do you feel your feedback informed policy development?
3. Are you aware of any examples where costs, benefits and impacts on small business were not properly assessed (please describe any examples)?
4. Do you have any examples where the specific needs of small businesses were not considered as part of a regulatory proposal? Do you think the concept of a Small Business Impact Statement would secure better outcomes for small businesses?
5. Apart from Small Business Impact Statements, are there any other mechanisms that could be used to assess impacts of regulatory proposals on small business?

Box 1 – Independent Review of the NSW Regulatory Policy Framework

The 2017 Independent Review of the NSW Regulatory Policy Framework (the Greiner Review) considered arrangements for improving regulatory quality in NSW.¹⁴

Recommendations 12-17 specifically proposed a new process, referred to as Policy Proposal Evaluations (PPEs), to ensure options are properly considered and that stakeholders are engaged. PPEs would replace existing RIS and BRS requirements and would:

- Be fully integrated into the policy-making process
- Clearly articulate the problem statement; i.e. what is the issue being addressed and what the Government wants to achieve
- Be focused on outcomes when comparing policy options
- Assess the impact of policy options, including the incremental burden of regulatory options on stakeholders
- Actively consider industry-led solutions
- Actively consider data and digital technologies that can help achieve outcomes
- Provide decision-makers with a clear analysis of the risks of each option, including to the regulated and the end-user
- Consider how the options will connect with and affect the existing regulatory environment
- Embed post-implementation evaluation strategies, tools and measures.¹⁵

The Greiner Review also recommended the establishment of a commissioner role to ensure the public sector meets the objectives of regulatory policy, including:

- Promoting regulatory quality and reducing red tape
- Providing independent advice to the Premier and Ministers on regulatory development process and practice, including an independent assessment of the adequacy of PPEs
- Providing assurance to the Government and the community through publishing annually a report on the efficacy of regulatory stewardship, a summary of the adequacy of PPE assessments, and reduction in red tape.¹⁶

The role of the NSW Productivity Commissioner was established following the Greiner Review.

14 Greiner N, *Independent Review of the NSW Regulatory Policy Framework – Final Report* (Aug 2017). Available at: [Independent Review of the NSW Regulatory Policy Framework final report](#)

15 Ibid, Recommendation 12, 44-45

16 Ibid, Recommendation 1(d), 10

Managing the stock: Efforts to reduce existing regulatory burden

In addition to improving the quality of new regulatory proposals, there are additional mechanisms which attempt to reduce the burden of existing regulation.

In NSW a stewardship approach is taken to managing the stock of existing regulatory burden. Ministers and Departments are assigned responsibilities for legislation and regulatory instruments and may act to review or amend regulatory requirements should circumstances change.

The NSW Parliamentary Counsel (PCO) is responsible for drafting legislation and works closely with the Premier's Office to ensure that Bills (proposed new law or change to an existing law) are ready for introduction into Parliament and support the passage process.¹⁷ The PCO also manages the staged repeal program, also referred to as "sunsetting" legislative instruments, and writes to agencies with regulations due for repeal each year requesting notification of their Minister's intentions with respect to those regulations. The PCO also supports the Statute Law Revision program which facilitates the repeal of Acts and instruments that are redundant or of no practical utility. For example, two Statute Law Bills were introduced during 2022-23 which amended 111 Acts and 97 statutory instruments.¹⁸

Other initiatives to reduce regulatory burden include digital transformation which focusses on improving user experiences. A focus on the customer experience of regulated entities has, in some areas, reduced the time it takes to comply with requirements or engage with government agencies. For example, the NSW Digital Identity allows identity verification while controlling personal information sharing to simplify accessing government services, applying for licenses and changing utility providers.

Previous initiatives have incentivised proactive initiatives to find new ways of reducing the burden of existing regulation. Previous policies implemented in NSW include red tape reduction targets and the 'one on, two off' policy requiring the number of principal legislative instruments (principal Acts and principal Regulations) repealed to be at least twice the number of new principal legislative instruments introduced.

Questions for consideration

1. Do you have any feedback regarding a specific regulatory requirement affecting your business or industry?
2. As a representative of small business, would you feel confident about raising your concerns about a regulatory requirement? Would you know who and how to raise your concerns? Would you be confident your concerns would be addressed?
3. Do you have any feedback regarding current or previous initiatives to reduce regulatory burden?

17 NSW Parliamentary Counsel's Office, Annual Report 2022-23, 14

18 Ibid.