Australian Government
Productivity Commission

Regulator Engagement with Small Business

Productivity Commission Draft Report

June 2013

This draft report has been prepared for further public consultation and input. The Commission will finalise its report after these processes have taken place.

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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au) or by contacting Media and Publications on (03) 9653 2244 or email: maps@pc.gov.au

Opportunity for further comment

You are invited to examine this draft report and provide written comments to the Productivity Commission either by submission or through the Commission's twitter address. The Commission also welcomes further responses by Commonwealth, state and territory agencies to its survey of regulators. Any written comments on the draft report and additional survey responses should reach the Commission, preferably in electronic format, by **Wednesday 14 August 2013**. Further information on how to provide written comments and a link to the regulator survey is included on the study webpage listed below.

The Commission is planning to hold several workshops with small businesses to get feedback on the draft report. This feedback, along with further discussions with interested parties, any written comments received, and additional survey responses will be drawn on by the Commission in preparing its final report. The final report will be presented to the Australian Government by the end of September 2013 and publicly released by the Commission shortly thereafter.

Commissioners

For the purposes of this inquiry and draft report, in accordance with section 40 of the *Productivity Commission Act 1998* the powers of the Productivity Commission have been exercised by Dr Warren Mundy, Presiding Commissioner.

Study contacts

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Terms of reference

BENCHMARKING STUDY ON REGULATOR ENGAGEMENT WITH SMALL BUSINESS TERMS OF REFERENCE

I, David Bradbury, Assistant Treasurer, pursuant to Parts 2 and 4 of the *Productivity Commission Act 1998* hereby request that the Productivity Commission undertake a research study to benchmark the extent to which the different approaches to regulator engagement with small business have the potential to affect the costs (including time and effort) incurred by these businesses. This request follows agreement by COAG's Business Regulation and Competition Working Group that the Productivity Commission undertake a study of this type.

Small business stakeholders consistently raise with Governments their view that compliance approaches and the regulatory posture adopted by regulators with respect to small business, and the degree to which regulators recognise and accommodate the particular circumstances of small business, can have a significant impact on regulatory burden.

Approaches to the regulation of small business can be wide ranging, with some regulators adopting a facilitative role, assisting small businesses to meet their compliance responsibilities, recognising that regulatory compliance activities impose a disproportionate cost on smaller firms. Other regulators adopt a more traditional compliance based regulatory posture.

In undertaking this study, the Productivity Commission is asked to:

- identify the nature of the regulatory posture of Commonwealth and state and territory regulators with respect to small business, including the extent to which facilitative and educative approaches are appropriately combined with compliance based approaches, and the extent to which approaches vary according to the nature and objectives of the regulations;
  - in doing so, the Commission should draw where appropriate on examples of the various approaches that are used in shaping regulatory culture (including by incorporating regulatory objectives into legislative instruments).
- identify the levels of assistance and education that jurisdictions provide to small business and consider whether this could be better targeted;

- identify the extent to which regulators apply a risk based approach to enforcement and compliance, including the mandating of information requirements, in regulating small business;
- clarify the extent to which regulators consider the size and nature of a business when undertaking compliance and enforcement and compliance based information-gathering activities;
- identify whether particular approaches to the exercise of regulatory roles have the capacity to reduce unnecessary compliance costs incurred by small business, while sustaining good regulatory outcomes, and could therefore be described as best practice; and
- have regard to leading practices in overseas jurisdictions.

In order to undertake this study, the Commission will also need to consider and determine a definition of what constitutes a small business, noting that different regulators and jurisdictions use different definitions. As a starting point, the Commission may wish to consider whether there would be benefit in broader adoption of the Australian Bureau of Statistics (ABS) definition of a small business to provide for ease of comparison with ABS data.

A report is to be completed within nine months of the receipt of this Terms of Reference. The Commission is to provide both a draft and final report, and the reports will be published.

David Bradbury
ASSISTANT TREASURER

[Received 7 December 2012]

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OVERVIEW

Key points

- Small businesses feel the burden of regulation more strongly than other businesses. Almost universally, their lack of staff, time and resources present challenges in understanding and fulfilling compliance obligations.
- Small businesses primarily 'experience' regulation and much of its associated compliance burden through engagement with regulators in their delivery of regulation. While regulators are generally committed to effective engagement and to minimising unnecessary burdens, it is apparent that many do not have robust frameworks to ensure high level ideals consistently translate to good practices on the ground.
- Regulator culture is crucial. Those regulators noted by industry and government as having effective engagement practices have adjusted their culture by focusing on senior management priorities, training and skills of enforcement staff, performance monitoring, stakeholders feedback, and rewarding behaviour consistent with the desired practices.
- Regulators can be more responsive to small business needs and capacities in their communications. In particular: greater use of industry associations to disseminate information; tailoring information requirements around data already collected by businesses; and proactive sharing of compliance information between regulators would generally improve small business experiences with regulators.
- There is scope for increased targeting of those businesses and activities which present a higher risk to communities, and for adoption of lesser compliance cost approaches for lower risk businesses, such as less frequent inspections or less onerous reporting requirements.
  - When done well, such targeting is likely to achieve outcomes at a lower cost than an engagement approach derived from strict application of a small business definition.
- Governments can improve engagement outcomes by ensuring the institutional and governance frameworks within which regulators operate do not inhibit adoption of leading engagement practices. This includes ensuring regulators have access to an appropriate range of compliance and enforcement tools, and resourcing to effectively deliver the policy objectives behind their regulatory responsibilities.
  - Where regulators are inadequately resourced, either some risks to communities go unmitigated or the costs of mitigation are pushed onto those regulated (including small businesses). Governments should provide regulators with explicit guidance on regulatory priorities, given limited resources.
- Regulator discretion in compliance monitoring and enforcement must be accompanied by appropriate transparency and accountability measures with regulator guidance provided on use of discretion and, where feasible, a separation of education and enforcement roles.
- More widespread use could be made of formal cooperation arrangements between regulators to minimise the overall interaction burden on business. Lead agency models to facilitate joint compliance checks and inspections and regulator forums to exchange views on good practice and build professional capacity are effective means of improving engagement.
- Ongoing monitoring by regulators of the effectiveness of delivery approaches and costs imposed on business is essential to improving regulator performance. Governments should require regulators to report against engagement principles and ensure low cost mediation services for the resolution of disputes, particularly with local governments.

Overview

Over 95 per cent of Australia's businesses are 'small', with the majority of these functioning with the owner as the sole operator. Small business (those with fewer than 20 employees) is the dominant form of business in all industries but is particularly prevalent in: construction; professional and technical services; rental and real estate services; and agriculture.

Regulation is an inescapable part of doing business. From health and safety to environmental, from construction standards to fair trading, from employment conditions to competition, there is a broad spectrum of regulations — at multiple levels of government — that can impact on a business' activities. However, the impacts of such regulation can be more pervasive for some businesses than for others. For some small businesses, compliance necessitates substantial diversion of productive business time and modifications to their production or service delivery processes in ways that are uncertain to deliver improvements in regulatory outcomes. Australian studies have found that small businesses spend, on average, up to five hours per week on compliance with government regulatory requirements. Overseas studies have found that small businesses sometimes bear many orders of magnitude higher compliance costs (per employee) than larger businesses.

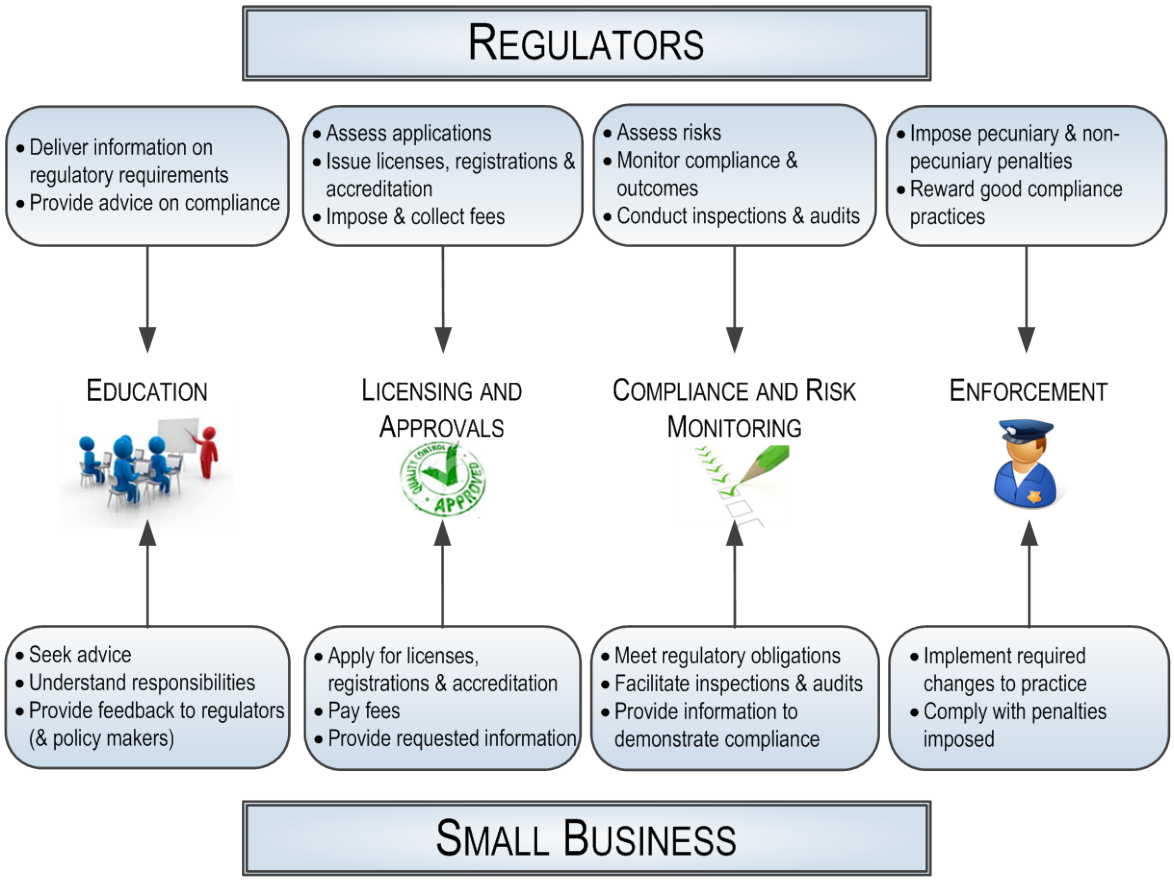
The way regulations are implemented is as important to small business and to compliance outcomes as the content of the regulations themselves. Regulators, by their conduct in interpreting, administering and enforcing regulatory requirements, can take considered, well designed regulation and produce regimes which discourage compliance, squander government resources or add to business costs and delays. Alternatively, a regulator might take an unwieldy accumulation of regulation and, by choosing judiciously what, when and how to enforce, deliver the desired regulatory outcomes in an efficient manner. It is through engagement with regulators in their role of administering and enforcing regulation that small businesses primarily 'experience' regulation and much of the associated compliance burden.

For businesses, good engagement with a regulator is generally associated with an educative and facilitative regulatory posture, rather than a combative approach. Most businesses want to be found compliant with regulatory requirements and, for the benefit of their industry and own competitiveness, want fellow businesses to also be compliant. Small businesses especially value:

- brevity, clarity and accessibility in the communication of compliance obligations

- in the regulator's approach to compliance management and enforcement, a demonstrated capacity and willingness by regulators to:
  - be flexible and proportionate in their enforcement, with a consistent focus on outcomes
  - minimise unnecessary compliance and reporting costs imposed on small business, including the cumulative burden derived from engagement with multiple regulators
  - understand the needs and constraints of small business generally and those specific to their business or industry.

Figure 1 **Nature of engagement between regulators and businesses**



From a community wide perspective, good engagement necessitates that the benefits of improving regulatory outcomes (mitigating risks to communities) more than match the costs of achieving further reductions in risk (both business compliance costs and regulator costs). The priorities for governments and regulators should be directed at achieving outcomes at minimum necessary cost (avoiding the inappropriate transfer of costs to regulated parties) and encouraging innovation in

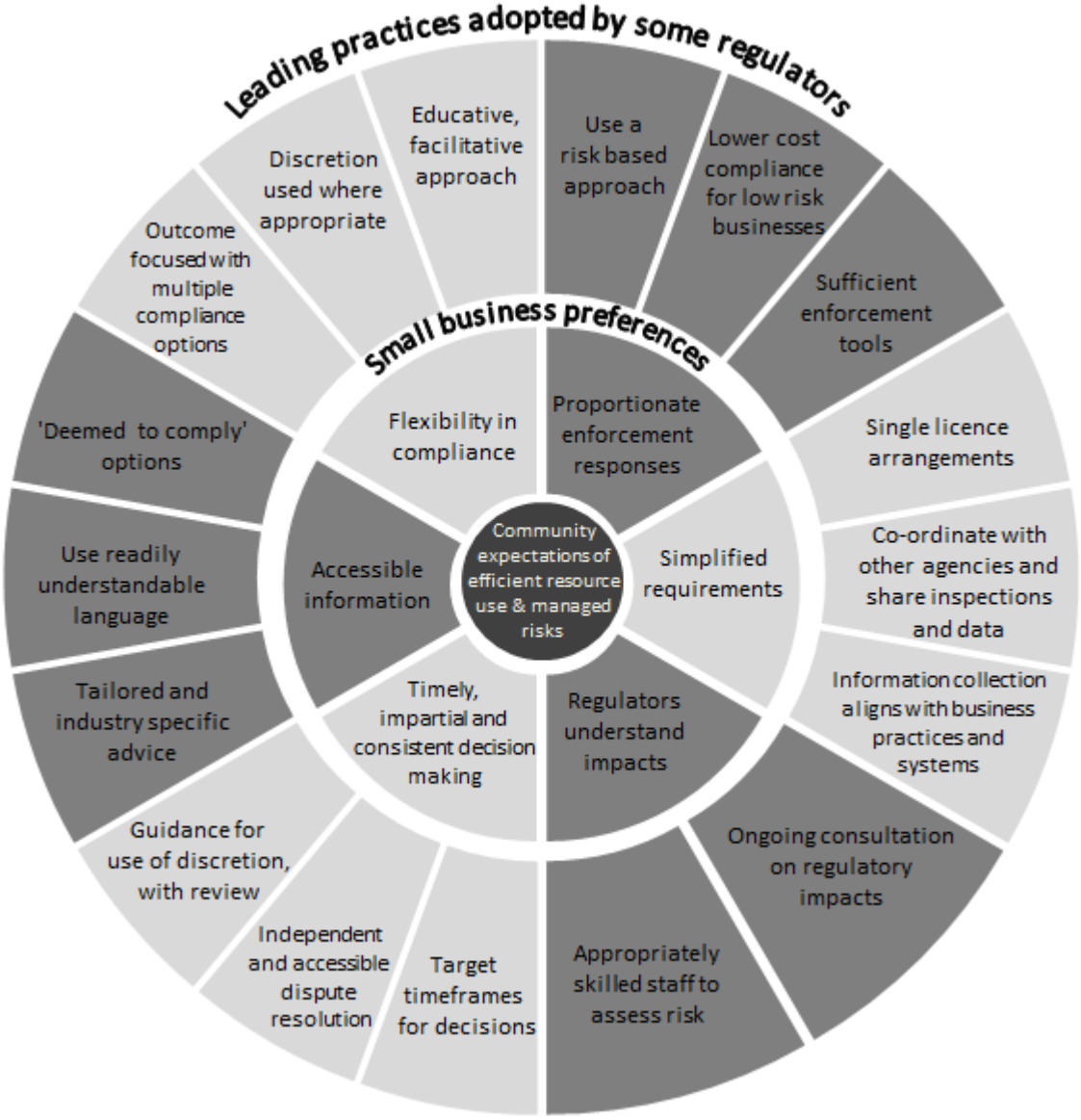
meeting regulatory objectives. The culture of regulators and their approach toward business engagement is crucial to delivering these priorities.

In this study, the Commission has been asked to benchmark regulator approaches to engagement with small business in order to improve the delivery of regulatory objectives for communities and reduce unnecessary compliance costs. The engagement approach needed to achieve desired regulatory outcomes for the community can vary with business size when the understanding or attitude of businesses to compliance requirements, or the likelihood or consequences of an adverse outcome, are considered to differ between small and larger businesses.

Overall, the Commission considers that Commonwealth and state/territory regulators are generally committed at senior levels to adopting leading business engagement practices and minimising unnecessary burdens for businesses. While a number of stakeholders have identified unacceptable regulatory experiences, the Commission has received little evidence of systemic problems with the approach of regulators, as distinct from the content of the regulations themselves. Indeed, positive feedback has been received about many regulators across jurisdictions and functions. Local governments as regulators were comprehensively examined in a separate study in 2012, with the Commission concluding that there were significant and widespread challenges in the execution of their regulatory functions.

Participants in this study plus reviews and audits of some Commonwealth and state/territory regulators in recent years have identified scope for improvement in individual practices and have emphasised the cumulative burden of regulator engagement. Furthermore, it is apparent to the Commission that many regulators do not have robust frameworks in place to ensure high level ideals on engagement are implemented in practice on the ground, nor do they rigorously monitor the impact of their engagement practices on businesses. The Commission considers that the identified shortcomings in regulator approach could be readily addressed through judicious implementation of leading practices in engagement in lower performing areas. The Commission's recommendations for these, and the benefits potentially available to small business, are highlighted at the end of this overview.

Figure 2 **Leading practices in engagement**



Getting the regulatory framework right

Governance, resources and engagement scope

A first step for governments concerned with the impact of regulator engagement on small business is to ensure that the regulatory frameworks — including the institutional and governance arrangements under which regulators operate — do not inhibit regulator adoption of leading engagement practices. With vast differences between the regulatory areas, however, there is a limit to the value of detailed 'one

size fits all' prescriptions for regulatory frameworks or indeed, for regulator approaches to business engagement.

While some regulators are expressly obliged by their overarching legislation to proactively identify potential breaches or to encourage compliance with the regulatory scheme (such as most food safety regulators), others are confined to assessing applications or granting approvals for business activities (such as development assessment regulators), or reacting to notifications of potential compliance breaches (such as anti-discrimination regulators). Local councils, as a creation of their state government, are often constrained by state regulations handed to them without proper consultation about their capacity to enforce, and the appropriate circumstances for enforcement.

For many regulators, the tools available to enforce compliance (such as the issuing of infringement notices or capacity to inspect a premises) are established in legislation or government directives and can shape their approach to engagement with business. Access to a range of tools allows regulators to tailor their responses to breaches (or potential breaches) of regulation in a proportionate way. From examples provided by study participants, better outcomes for small businesses and the community are achieved when regulators have educative tools available to them, rather than having to rely solely on combative approaches such as initiating legal proceedings.

Some 30 per cent of regulators reported to the Commission that they have an insufficient range of enforcement tools. For the most part, these regulators saw the need for more tools in the mid range of sanctions, such as improvement notices and enforceable undertakings. Accordingly, the Commission recommends that governments ensure their regulators have a sufficient range of enforcement tools available for their activities.

Resources matter. Engagement approaches available to well resourced regulators with broad regulatory roles and the capacity to attract and retain skilled staff are generally more extensive than those approaches that are feasible or efficient for smaller, lower resourced regulators. For example, regulators using a risk based approach had average staff numbers that were seven times higher, and a regulatory budget that was six times higher, than regulators not using a risk based approach.

As found in the Commission's recent study *Local Government as Regulator,* local governments are routinely under resourced for their regulatory functions, and the evidence suggests that this problem has not yet been addressed. When regulators are not adequately resourced to effectively enforce all regulations within their ambit, either more risks to communities go unmitigated or the costs of mitigation are

pushed onto those regulated. In a tightening financial environment, the costs of unmitigated risks and the compliance burden on small businesses may increase. While governments should make every effort to ensure their regulators, including local governments, are adequately resourced, where this is not possible in the short term, the Commission recommends that governments provide regulators with explicit guidance as to which regulatory activities should be given priority. In the longer term, governments should desist introducing further unresourced regulatory objectives.

Human resource capability is critical to engagement approach — people matter. For regulator staff to be able to perform their duties competently and professionally, they must have the appropriate knowledge, skills and values. Whether the regulator values and hires staff with law enforcement skills, educative skills or with in-depth industry knowledge critically affects the extent to which high level ideals on engagement are put into practice on the ground. As an example, WA Department of Fisheries now places greater emphasis in its recruitment of regulatory officers with communication skills and a broader understanding of natural resource management in an attempt to shift the cultural focus away from the traditional policing approach and toward sustainability of fishery resources. For many local councils, attracting and retaining the necessary skills to implement regulatory requirements is a major issue — in some remote and regional areas, appropriate staff are simply not available. Better skilled regulatory staff means more effective communication with small businesses, a greater understanding by the regulator of those they are regulating, and ultimately, improved regulatory outcomes for communities.

The Commission considers that all regulators should review the skills of their staff in light of their desired business engagement approach and address any deficiencies — governments should be advised of additional resource needs. Practices which may help address regulator skill shortages include more extensive sharing of compliance and inspection information between government agencies (where allowed under privacy arrangements), and greater mobility in resources, such as the 'Regional and Rural Planning Flying Squad' established in Victoria to moderate the effects of local government skills shortages in regional areas.

A regulator culture consistent with the engagement focus

Regulator culture embodies the implicit rules, beliefs and expectations of behaviour under which regulatory officers operate. It varies with factors specific to the industry, regulation and individual regulator — leadership is clearly important. Culture influences the regulator's perceptions about the skills and information required by staff to adequately do their job and is critical to the way the regulator

exercises discretion in assessment of risks, responds to non-compliance, and uses enforcement tools. For example, does the regulator view its role as one of simply enforcing regulation or alternatively, as one of seeking to facilitate business activity whilst mitigating the risks posed to the community?

At one extreme, business views the culture of the regulator as based around formal, precise rules, adversarial and punitive enforcement and an underlying distrust of the regulated community. At the opposite extreme, a regulator may become 'captured' by industry perspectives and be less wedded to achieving regulatory objectives. Engagement in between these two extremes would be results oriented, stressing responsiveness and leaning toward engagement tools involving targeting, trade-offs and persuasion to achieve compliance with, as opposed to enforcement of, outcomes.

Where a small business' experience of a regulator lies along this continuum is not something determined solely by the regulator — it is contingent on factors specific to the business, industry, the legislative framework and the particular risk or outcome being mitigated by the regulation. There is no single regulatory culture that best delivers regulatory outcomes and avoids unnecessary burdens for those regulated. For example, some regulators (often those which deal with potentially costly or catastrophic outcomes) develop a more risk averse culture that has a low tolerance of non-compliance. This behaviour may also reflect an aversion of the regulator to adverse political and/or community reactions associated with the outcome being mitigated occurring, even if compliance with a robust regulatory framework had been achieved.

Government agencies and business groups have suggested that risk aversion can lead some regulators to require excessive evidence of compliance or to rely on overly harsh enforcement approaches which do not adequately take into account small business efforts required to mitigate risks and a realistic assessment of the risk posed by the individual businesses. Areas where regulators reported using comparatively harsh penalties (such as criminal proceedings) with no risk based assessment, included several transport agencies and an animal welfare body.

To ensure the development of an engagement framework most likely to improve regulatory outcomes, the implementation in practice of high level ideas for engagement, and recruitment (and retention) of appropriately skilled staff, the Commission considers cultural change is required in some regulators. Regulators which have undergone cultural change or been noted by industry and government as having particularly effective engagement practices (such as the Australian Taxation Office, Energy Safe Victoria and Workplace Standards Tasmania) have variously focused on senior management priorities, training and skills of enforcement staff,

the monitoring and seeking of feedback from stakeholders, rewarding activities or outcomes that are consistent with the desired culture, and monitoring and reporting on perceived regulator successes.

Working with business to improve regulatory outcomes

Within the bounds set by regulatory frameworks, there is usually considerable scope for regulators to be responsive in their delivery of regulation to small business needs and capacities. In particular, there are a range of communication, information management and consultation practices used by some regulators that could, if adopted more widely, yield tangible improvements in regulatory outcomes. It is in these areas that the Commission considers there is likely to be more scope for regulators to tailor their engagement, where feasible and cost effective, to characteristics of small businesses. There is also scope for improvement in relation to compliance and enforcement practices and, for the most part, these improvements would be of benefit to regulatory outcomes irrespective of business size.

More effective communication practices

Communicating regulatory requirements

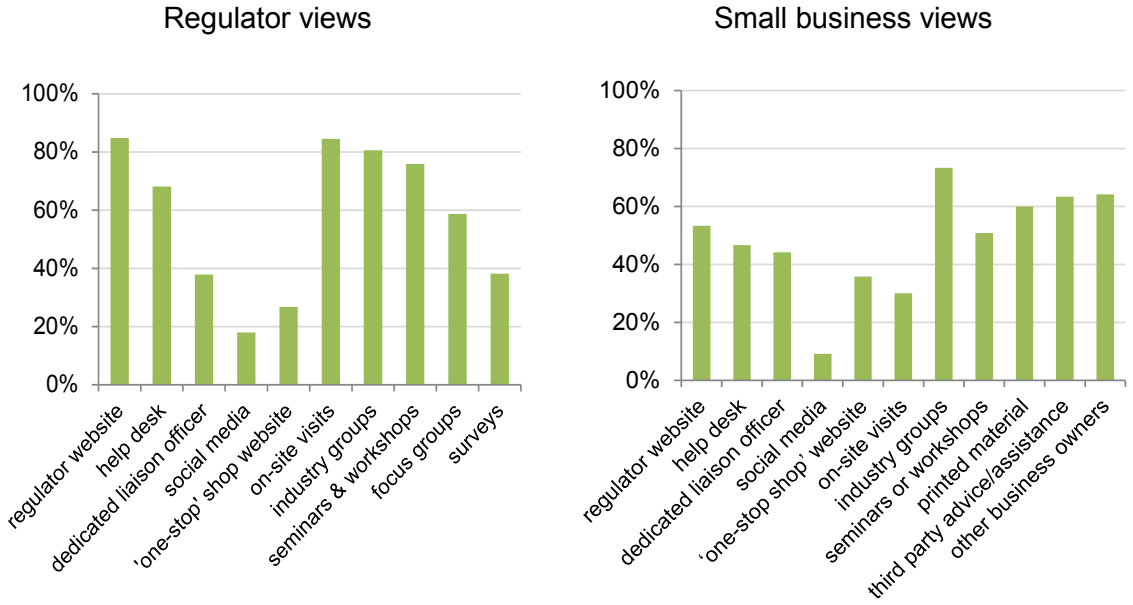
There can be economies of scale for businesses in learning about regulatory requirements and implementing procedures to ensure compliance. The costs of such activities can be burdensome for small businesses — a small business is not just a big business on a smaller scale but one that operates in a fundamentally different way, and may lack the time, knowledge and often motivation to distil the relevant compliance requirements.

Accordingly, in communicating regulatory requirements to small business, regulators should place a premium on simplicity, clarity, brevity and accessibility. This is particularly important given the growing number and range of regulations of which small business need to be aware. Regulators should modify their engagement approach where necessary to ensure communication remains effective, including with small business people who are from non-English speaking backgrounds and/or have cultural perspectives which impact on their understanding of regulatory compliance. The NSW Office of Fair Trading, for example, has worked with ethnic community organisations and media outlets to implement changes flowing from the Australian Consumer Law.

There is some discrepancy between regulator and business perceptions of the usefulness of various communication approaches. In particular, regulators consider

their websites to be one of the most effective means of communicating with small business. Small business, on the other hand, find regulator websites less useful than advice from third parties (such as accountants and solicitors) or from other business owners (although third parties may find websites useful). Industry associations have reported that the quality of regulator websites varies substantially. Both regulators and small business generally consider information provided by industry groups to be one of the most useful forms of communication on regulatory requirements.

Figure 3 **Communication approaches considered effective**



For regulators employing a risk based approach to compliance and enforcement, there may appropriately be a drop off in regulator interaction with some lower risk businesses. In those cases where 'small' equates with 'lower risk', this will mean smaller businesses receive fewer visits from regulator staff or inspectors — sometimes one of the main sources of information on compliance requirements. In the longer term, lower interaction may also reduce regulator knowledge and understanding of businesses and undermine business incentives to comply.

To counteract this, the Commission considers that regulators should be prepared to modify their communication approach to ensure small businesses receive practical, industry specific information on regulatory requirements. Regulators should also, as far as possible, draw on the networks of industry, professional and business associations to communicate regulatory requirements and to ensure that any advice on these requirements is specific and readily implementable in different business environments. In addition to exploiting the preference of many small businesses for sourcing regulatory information from other businesses and industry associations,

this approach circumvents the tendency of some regulators, as noted in audit reports, to avoid the perceived liability associated with providing business specific (rather than general) advice. However, as many small businesses are not members of industry associations, such an approach should complement rather than substitute for a regulator's own interactions with small business.

More generally, there is scope for greater use by regulators of stakeholder advisory groups, such as those used by the Australian Taxation Office and the Australian Competition and Consumer Commission, as a means to identify better ways to achieve compliance and ensure small businesses are (and consider they are) adequately consulted on changes to regulatory requirements. Consultation should enable consideration of the views of a cross section of regulated businesses so as to reduce risk of capture by a dominant business or industry group. Regulators should put in place systems to ensure that information collected through consultations with business is, and is seen to be, used to inform ongoing improvements in regulatory processes.

Collecting information on compliance

Studies overseas indicate that for small business, supplying information to the regulator can be the most burdensome aspect of complying with regulation. Data requests of business by regulators should be the minimum necessary to allow the regulator to perform its function effectively, and, as far as possible, be tailored around data that is already being collected by business. Regulators of a high risk or rapidly changing industry would generally require more information from industry than those of a low risk or static industry. The use of web based and other electronic solutions by regulators for transaction processing and information collection and dissemination is increasing — such approaches are particularly important as an after hours source of information for small business. Regulators indicated that for collection of compliance information from business, they are just as likely to use electronic forms as they are to use paper forms.

However, for some web based solutions, development costs may exceed the benefits derived, especially in those cases where the regulated group may have limited computing skills or where effective internet access is not available. For example, ABS data indicates that around one quarter of businesses in the accommodation and food services sector do not have internet access. While the appropriate use of web based and other electronic solutions will vary depending on the nature of the regulation and the characteristics of the industry, more widespread adoption has the potential to deliver further benefits, providing appropriate strategies are also maintained for less computer literate business owners and those without the necessary internet access.

Small businesses have complained about the unnecessary burden of providing the same or similar information to multiple regulators (for example, for approval to use a particular chemical) or to the same regulator more than once. Indeed, 25 per cent of regulators acknowledged to the Commission that unclear delineation of responsibilities with state and territory regulators in particular, caused them difficulty in carrying out their regulatory functions. Regulators in New South Wales, Victoria and Tasmania reported that most difficulties arose through unclear delineation with local governments; Commonwealth regulators and those in Western Australia and ACT reported most difficulty with national level regulators.

In contrast, arrangements which seem particularly effective in minimising additional compliance burdens on business include where regulators cooperate with third parties — such as industry associations or other government agencies — to elicit information on business compliance.

The Commission recommends that all governments strongly encourage their regulators to be proactive in identifying areas where they can make use of compliance data from third parties, share data with other regulators and ensure regulatory requirements do not conflict. This includes, for example, greater efforts to ensure consistency in the frequency and format of business reporting requirements, presentation of information to business in a common format and location, and greater coordination of inspections.

Better targeting of compliance monitoring and enforcement

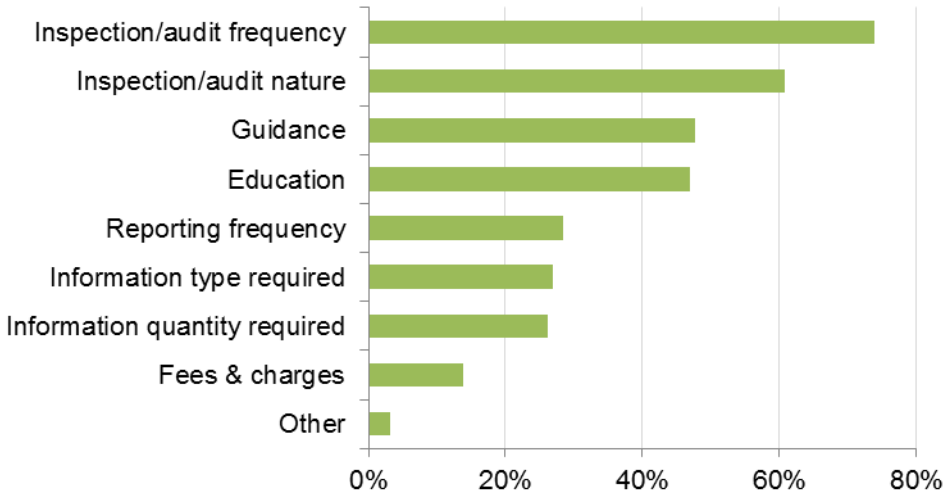
Targeting on the basis of risk

Some regulators are explicitly required by their legislation to adopt a risk based framework. In recognition of their finite resources, many other regulators prioritise their engagement and enforcement activities on the basis of minimising (as far as feasible) the risk to achieving desired regulatory outcomes. Regulation of food safety and environmental outcomes, for example, typically draws heavily on risk frameworks; in contrast, regulation of liquor has comparatively less focus on risk management approaches — one liquor regulator advised the Commission that (regardless of the nature of the business and risks involved) 'it's meant to be hard to get a liquor licence'. A risk based approach to enforcement requires that regulators, governments and the community accept some risks and understand that the costs of further reducing these may outweigh the benefits to the community. The Commission recommends that governments provide explicit acknowledgment to regulators (for example, via ministerial statements of expectations), that it is neither feasible nor socially optimal to attempt to eliminate all risk.

Where targeting is done well, most investigative resources are allocated to, and reporting required of, business activities which pose a higher risk of adverse outcomes — because of the magnitude of harm posed and/or the likelihood of harm materialising. Activities with lower risk, by their nature and/or scale, can be addressed in less resource intensive ways — such as through provision of less onerous or lower cost pathways to manage regulatory risks and demonstrate compliance, and, in the event of non-compliance, through use of warnings and provision of information on how to comply, in the first instance. Regulators reported using risk assessments most often to determine the nature and frequency of business inspections and audits — activities which potentially involve substantial commitment of both regulator and small business resources.

Figure 4 **Aspects of engagement that are affected by risk assessments**

Per cent of regulators who use a risk based approach to determine particular engagement practices



Providing less onerous options for small businesses where they present a lower risk does not innately constitute 'special' treatment but simply reflects the lower benefits of compliance activities with businesses that are low risk. Indeed, of the 70 per cent of regulators who identified adopting a risk based approach, less than half reported providing differential treatment for small business. The primary reason given for lack of differential treatment of small business was that the regulator aims to facilitate compliance by all businesses, regardless of size.

However, in the absence of information on risks to regulatory outcomes, some regulators use business size as a proxy for the likelihood and/or magnitude of an adverse outcome and differentiate their approach to business on that basis. The most common forms of differential treatment for small business are coaching and seminars, tailored forms or fact sheets and simplified requirements. Where there is

differential treatment for small business, the approach adopted should have a reasonable prospect of delivering net benefits to the community. The Commission considers there is scope for greater focus on risk in determining appropriate enforcement strategies. One outcome of such a focus would be adoption of an enforcement approach that varies consistently and proportionately with the risk to regulatory outcomes posed by particular businesses. Such an engagement approach requires that the regulator have a robust system for examining different situations and choosing the appropriate response and procedures in place to collect information on risks to regulatory outcomes.

In implementing an engagement approach which varies (directly or indirectly) with business size, regulators should consider the responsiveness of different size businesses to alternative enforcement approaches. Several Australian studies of enforcement approaches have found that enforcement activity has a cumulative deterrence effect on the consciousness of regulated small and medium size businesses but is less important for larger, reputation sensitive businesses. For larger businesses, regulation and enforcement play only a minor role, serving to provide a 'baseline' which many businesses go beyond to meet a perceived need to protect their reputation and/or market share. Nevertheless, the Commission considers that regulators should continue to undertake spot compliance checks and apply tough sanctions on comparatively low risk businesses (of whatever size) for serious breaches, because a strategy based entirely on persuasion and self regulation can be readily exploited by those intent on non-compliance.

Targeting to reduce unnecessary compliance burdens

Around 40 per cent of small businesses indicated that they primarily want to be told what they need to do in order to comply with regulation. Unlike larger businesses, many small businesses are not looking to be innovative in how they meet regulatory requirements. Some lack the knowledge, and many the time, to effectively manage risks and have less capacity to develop alternative, lower cost, compliance approaches.

To meet the needs of many small businesses that prefer prescriptive guidelines but also to accommodate those other businesses which may want to develop their own lower cost ways of complying, the Commission considers that regulators should offer businesses compliance solutions which, if adopted, would deem business compliant, as well as offer flexibility for businesses to propose alternative (outcome based) compliance solutions.

Regulator commitment to leading practice time frames for key regulatory processes and decisions and tracking of referrals to other agencies would ease the time burden

for businesses associated with compliance checks and regulator processing of applications. Streamlining development assessment processes is one area on which some governments have focused attention in recent years but business groups have indicated broader issues of delays in obtaining licences to operate or undertake particular activities.

The Commission considers that more widespread use could be made of formal arrangements between agencies in related regulatory areas — for one regulator, agency or certifier to undertake inspections or compliance checks on another regulator's behalf, in order to minimise the overall interaction burden on businesses. In these circumstances, the regulator whose area poses the greatest risk to the community would take the 'regulatory lead'. The Victorian Environment Protection Authority, for example, has a formal arrangement for Dairy Food Safety Victoria, whilst undertaking its food safety audit activities, to also undertake preliminary risk assessments of dairy farm effluent management systems. The Commission encourages jurisdictions to consider whether there are certain industries for which a 'one business, one licence' approach may lead to lower regulatory burdens without significant deterioration in regulatory outcomes.

Similarly, recognition by regulators, where appropriate, of industry and other third party certification, accreditation and audit processes would substantially reduce duplication in compliance efforts for some businesses. For example, some regulators in Victoria, Western Australia and South Australia recognise accreditation under the Australian Tourism Accreditation Program, when granting access licences to National Parks.

Regulator discretion in compliance and enforcement

Regulators make choices about how they achieve regulatory outcomes. Discretion allows the regulator flexibility in dealing with regulations that are out of date or conflicting with other regulations, or to tailor their responses to particular circumstances such as dealing differently with businesses that present a low risk or have little understanding of their compliance obligations. The discretion to waive certain requirements or to not enforce penalties for minor or initial breaches of regulation, not only reduces costs to regulators and business but can also be a way of gaining cooperation from businesses and attaining a higher level of overall compliance. How much discretion regulators have available to them and whether they use it in an open, systematic and defendable manner, are the critical questions. Too much discretion without transparency and accountability creates opportunities for corruption and discrimination and opens a regulatory agency to capture by the

regulated community — thus heightening the exposure of the wider community to the risk being mitigated.

Regulator use of discretion is influenced not only by culture specific factors such as aversion to risk and industry specific factors, but also by regulator resourcing and the skills and capacities of staff. For example, regulators may prefer to undertake inspections or other compliance checks if the costs of these can be recovered from businesses. Alternatively, given the relative costs of different regulatory approaches, a poorly resourced regulator may adopt a punitive approach over a more educative approach.

Nearly all regulators reported having some discretion in responding to compliance breaches. Most regulators provide some sort of guidelines and/or training on the use of discretion, and some (such as Brisbane City Council) formally review their use of discretion. Business complaints and audit reports suggest guidelines and training alone are not entirely effective. In particular, small businesses have noted that some regulators get caught up with administrative errors rather than focussing on the bigger picture. The Commission recommends that where at all possible, there be a greater focus on improving regulatory outcomes rather than on simply identifying non-compliance with regulatory requirements.

In order to manage the use of discretion, ongoing attention of senior regulator staff to the practical implementation of high level engagement principles is essential to address variability and inconsistency between different officers. This would be aided by transparent documentation of all key processes and decision making criteria, training and guidance for enforcement officers on the appropriate use of discretion, and provision of a service charter on what business can expect when engaging with the regulator.

Regulators should also implement checks and measures to avoid regulatory capture of their staff by industry groups, particularly in regional areas. Such measures include: separation of education and enforcement roles (where practicable), expanding community group rights to participate; requiring decisions to be made in a public and transparent manner; opening records to the public; and centralising inspection programs (to reduce decentralised discretion).

Furthermore, given its importance in determining engagement approaches, governments should provide guidance to regulators on use of discretion — for example, what constitutes non-compliance, how different degrees of non-compliance should be addressed, and the transparency and accountability mechanisms necessary to avoid abuse of discretion. This can be done via government wide actions, such as the United Kingdom's statutory Regulators'

Compliance Code, or in a more targeted fashion, such as through the ministerial statements of expectations given to Australian statutory authorities. More generally, the Commission recommends that all governments develop, endorse and monitor the application of, in liaison with regulators and business, a set of engagement principles for the use of discretion.

Continuing leading engagement practices into the future

Engagement practices must adapt to changes in regulation, overarching institutional and governance structures, industry advances and changes in market structures and business capacity to comply with regulatory requirements.

There is a lack of clear and robust evidence on which engagement approaches work well in particular circumstances, and which do not. Currently, less than 15 per cent of regulators monitor the costs on business imposed by their engagement practices. To bridge this gap, and enable an overall improvement in engagement, the Commission considers that regulators should regularly monitor, evaluate and report on their business engagement activities. Activities which could be monitored include compliance levels, business compliance costs and other costs and benefits of implementing particular enforcement or educative approaches, and business satisfaction with regulator activities.

Effective complaints handling and grievance processes, which have a degree of independence from the enforcement activities of the regulator, and provide businesses with clear reasons for decisions, would help build business confidence in overall regulatory processes. Such processes could include external dispute resolution mechanisms for aggrieved small businesses, use of small business commissioners (where these are available and other processes do not exist) and ready access by business to documentation related to decisions made about them.

For the longer term improvement of regulator performance, there are a number of key steps that governments can take to improve the frameworks within which regulators operate. The Commission recommends that governments in all jurisdictions develop a common set of performance measures across different regulators to provide an opportunity to measure and compare regulator performance over time. Such measures would facilitate transparent assessments of regulator performance and the implementation of agreed business engagement principles. In addition to rates of compliance, emphasis should be on measuring effectiveness in achieving outcomes, while minimising compliance costs. For businesses, such measures will ultimately increase the frequency of good engagement experiences and generate greater certainty on what to expect from regulators.

Performance monitoring and reporting would also provide more scope for regulators to learn from each other and highlight areas where greater cooperation and coordination between regulators might be possible in order to reduce the cumulative burden of engagement.

Concerns have been expressed about apparent inconsistency in definitions of 'small business'. The Commission (and indeed, many stakeholders) found little merit in the idea of adopting a single harmonised definition for small business, which could lead to inflexibility and higher costs. Policy makers and regulators are best placed to define small business for their regulatory area, but generally they should give careful consideration to existing definitions before introducing further variations and should also consider the extent to which a definition of small business is even necessary when implementing a risk based approach to engagement.

There is also a role for governments in facilitating between regulator interactions to remove areas of overlap, duplication and inconsistency. This may be achieved through greater use of formalised coordination arrangements such as MOUs, but also in aiding the development or expansion of regulator forums within their jurisdiction to encourage an exchange of views on good practice and build professional capability.

Increased attention needs to be given to regulator conduct and practices by central agencies or those with special responsibilities for small business. In Victoria and NSW where this has occurred (through the Victorian Competition and Efficiency Commission and the NSW Better Regulation Office, respectively), it has facilitated learning across regulatory functions and more widespread understanding of good engagement approaches. In some jurisdictions regulators have drawn on the advice of small business commissioners for the design of proposed regulatory strategies.

Finally, governments should be mindful that good regulatory engagement experiences for business are most likely when regulation is designed with consideration given to its implementation and transition arrangements from the existing regulatory environment. Accordingly, governments should adhere to their agreed regulatory impact analysis criteria and fully consider, when designing regulation, how it will actually be implemented and enforced in practice. Victoria goes part way toward this by considering in the design of regulation, the possibility that compliance with the proposed regulation may be less than complete. Generally, however, small business associations have reported that regulator enforcement officers in many jurisdictions complain to businesses that the rules are not sensible, they would not design them the way they are, but they still have to enforce them.

With ongoing evaluation and reporting of their practices in delivering regulation to business, regulators will be able to determine, in dealing with small business, which engagement practices are most effective at achieving regulatory objectives and impose minimum unnecessary compliance burdens. Even regulators currently engaging effectively with the business community must adapt their approaches in the face of changes in regulatory frameworks and in the businesses being regulated.

Draft recommendations

Better engagement outcomes for small business

DRAFT RECOMMENDATION 3.1

Given the challenges small businesses face in fulfilling compliance requirements, including their generally lesser capacity to manage compliance and their higher compliance cost structures, regulators should:

- ***where possible, remove any unnecessary complexity in regulatory requirements and associated guidance material, particularly so that low risk small businesses can more effectively manage their own compliance***
- ***set outcome based regulatory requirements, but also offer detailed guidance about acceptable solutions including, where feasible, offering a compliance pathway, which if fully implemented, would deem businesses compliant with requirements.***

DRAFT RECOMMENDATION 3.2

Governments and regulators should provide different treatment for small business wherever this would maximise net benefits to the community. When designing such regulation, governments and regulators should undertake formal regulatory impact analysis, including consultation with small businesses and the community, and specifically consider:

- ***the potential to reduce unnecessary compliance costs for small business, including transitional costs that might affect the appropriate pace of implementation of regulatory requirements***
- ***the administrative cost, complexity and potential for distorted business behaviour from altering the content of regulation for small businesses***
- ***the likely change in compliance outcomes and any risk to regulatory objectives.***

DRAFT RECOMMENDATION 4.1

To increase voluntary compliance and reduce compliance costs for small business, regulators should ensure — subject to the overarching goal of maximising community net benefits from regulation — that:

- ***they are adopting an educative and facilitative approach to achieving compliance***
- ***licensing, registration, and other processes and requirements are as simple and streamlined as possible***
- ***unnecessary requirements are removed, for example, by rationalising licences or requiring less frequent or comprehensive inspections for low risk businesses***
- ***they cooperate and coordinate to reduce the cumulative burden of regulation, for example through mutual recognition of approvals and permits or joint or delegated inspections***
- ***existing industry and other third party certification and inspection processes are recognised when determining compliance requirements for business.***

Governments must ensure that there are no unnecessary legislative or other constraints on the capacity of regulators to adopt such strategies where appropriate.

DRAFT RECOMMENDATION 2.3

Governments must recognise the fundamental importance of regulator culture in influencing engagement practices. Working closely with regulators, they need to ensure that appropriate transparency, accountability and capacity building mechanisms are in place to foster the adoption of a culture — reflected in the actual engagement practices of all staff — that:

- ***promotes a facilitative and educative posture towards business which seeks to achieve regulatory objectives without unnecessarily constraining business activity and growth***
- ***embraces continuous improvement, including critical evaluation of existing practices and opportunities to learn from the experience of other regulators.***

Better processes for delivering regulation

DRAFT RECOMMENDATION 4.3

Regulators must undertake their regulatory activities in a timely manner, so as to minimise the compliance cost for businesses associated with delays. In addition to the use of statutory time limits wherever possible, regulators should be required to:

- ***commit publicly (for example in service charters or annual reports) to target timeframes for key processes***
- ***to report on their performance in meeting targets***
- ***routinely communicate expected timeframes to businesses in relation to individual applications***
- ***consider other measures to improve timeliness, such as tracking of referrals to other agencies and the use of pre-lodgement meetings.***

DRAFT RECOMMENDATION 5.1

Regulators should ensure information and advice on regulatory requirements is readily available, up-to-date, reliable and provided in brief, clear and user friendly formats, using language that is easy to comprehend. Where the benefits are likely to outweigh the costs, information and advice should also be tailored to consider factors that affect the compliance capacities of small businesses, such as the prevalence of business owners from non-English speaking backgrounds.

DRAFT RECOMMENDATION 5.2

The widespread application of standard business reporting principles — beyond the collection of financial data to information requests by regulators more generally — would substantially assist in streamlining business reporting. Accordingly, regulators should ensure data and information requests of business are:

- ***no more than they need to regulate effectively***
- ***tailored around data businesses are already collecting***
- ***not already available or collected by another regulator.***

Further, regulators should make it as easy as possible for small business to complete and lodge forms, including through the use of IT to streamline reporting.

DRAFT RECOMMENDATION 5.3

Regulators should ensure that effective processes for consulting with small business are in place that allow businesses to provide feedback, at low cost, on the source and magnitude of compliance burdens; how well the regulation is achieving objectives; and any unintentional adverse impacts, including interactions between different regulations and cumulative effects.

To facilitate this, governments should ensure that already agreed principles for effective consultation, including those for small business recently endorsed by COAG's Business Regulation and Competition Working Group, are adhered to by regulators.

DRAFT RECOMMENDATION 5.4

Regulators should ensure that processes for lodging complaints and seeking review of decisions are readily accessible by small business. Appropriate mechanisms should have a degree of independence from the day-to-day operation of the regulator, provision for businesses to seek reasons for decisions taken, and processes that allow regulators to learn from complaints.

Further, governments should ensure that there are independent, low cost mediation services in place to facilitate the resolution of disputes and misunderstandings between small businesses and regulators.

- ***As a minimum, regulators must be required by legislation or ministerial direction to cooperate with the mediation agency and provide whatever information the agency reasonably seeks.***
- ***This function should be undertaken by Small Business Commissioners (including the Australian Small Business Commissioner with respect to Commonwealth regulators) where currently in place. Such processes would complement (not replace) existing statutory and administrative rights to have decisions formally reviewed and the functions performed by offices of the ombudsman.***

Better governance for regulators

DRAFT RECOMMENDATION 6.3

Regulators must ensure there is transparency and accountability in decision making and in the use of discretion, in order to minimise uncertainty and the risk of corruption or the inappropriate treatment of one business relative to another. Generally, this should include:

- ***formal documenting and publishing of compliance and enforcement strategies and key decision making processes***
- ***documenting enforcement decisions and reasons and (subject to meeting any confidentiality and privacy requirements) publication of significant decisions with broader implications or with particular educational or deterrent value***
- ***provision of a client service charter detailing what business can expect in their interaction with the regulator***
- ***ensuring all decisions are potentially subject to review and businesses have access to appropriate dispute resolution mechanisms.***

DRAFT RECOMMENDATION 2.1

When designing regulation, all governments should apply government agreed regulatory impact analysis principles, including evaluation of: intended approaches to regulation implementation, monitoring and enforcement; and the likely impacts of proposed regulations on business.

DRAFT RECOMMENDATION 2.2

Public statements of governments' expectations of their regulators should make the regulator's risk management approach and the government's acceptance of, and commitment to, that approach, explicit and transparent. There should be explicit acknowledgment that some risk cannot be eliminated and that the regulator should operate independently, without undue interference from government.

DRAFT RECOMMENDATION 1.1

Policy makers and regulators are best placed to define small business for their regulatory area. Currently regulators use a variety of practical and appropriate ways to identify small business. Governments should not impose a single definition as it may lead to inflexibility and higher costs for some businesses and for the community more generally.

DRAFT RECOMMENDATION 4.2

Governments must ensure that regulators have access to a sufficient range of enforcement tools to enable them to respond to compliance breaches flexibly and in a graduated and proportionate way.

Better regulator performance

DRAFT RECOMMENDATION 6.1

Governments must ensure that regulators have sufficient resourcing to enable them to administer and enforce regulation effectively and efficiently. This includes ensuring regulators have the capacity to make appropriate use of educative and facilitative engagement practices. Clear guidance needs to be provided by government on enforcement priorities, given resourcing levels.

DRAFT RECOMMENDATION 6.2

To address gaps in staff skills and capacities regulators should:

- ***implement policies that focus on the recruitment and retention of staff with the appropriate industry knowledge and mix of enforcement, investigative and education/communication skills***
- ***ensure the provision of appropriate training and written guidance for staff, including on the underlying rationale for risk based enforcement and on the appropriate use of discretion***
- ***facilitate opportunities for staff to enhance their understanding of business practices and their awareness of the constraints on the capacity of small businesses to comply with regulations***
- ***implement cooperative arrangements with other regulators that facilitate the sharing of knowledge and resources (such as Victoria's use of 'flying squads' to support local governments).***

DRAFT RECOMMENDATION 6.4

Governments and regulators must ensure mechanisms are in place to strengthen the incentives for continuous improvement and the wider adoption of leading practice engagement approaches. This includes:

- ***ongoing internal, and periodic independent, evaluation of the effectiveness and costs of regulator engagement strategies***
- ***facilitating the efficient sharing of information, experiences and lessons learnt, for example, through the use of forums of regulators or 'communities of practice'***
- ***requiring regulators, including regulatory functions embedded within departments, to monitor and regularly report on their performance — including measures of effectiveness in achieving outcomes and reducing the compliance burden imposed on business (and small business in particular)***

- ***a commitment to common, whole of government, performance measures that can be used to facilitate comparisons of regulator performance, both within and across jurisdictions***
- ***development of better practice regulator-business engagement principles that can be used as a guide for regulators, including to inform the development of performance indicators.***

An appropriate body in each jurisdiction should monitor and periodically report on regulators' progress in implementing engagement practices that are consistent with the agreed principles. Such reporting would also provide an opportunity to highlight innovative practices that could be adopted more widely.

Table 1 **Potential impacts of recommendations**

Draft recommendation	*Benefits for small business*	*Benefits & costs for the regulator & community*
1.1 Small business definition – multiple possible	• Definitions practical & appropriate for industry • Differential treatment is not limited to those that meet a generic definition	• Flexibility to improve regulatory outcomes
2.1 Evaluate impacts when designing regulation; consider implementation & enforceability	• Business impacts taken into account & activity only regulated when justified • Compliance burdens reduced	• Regulation able to be implemented & deliver intended outcomes • Compliance can be efficiently monitored & enforced in practice
2.2 Clarity of government's expectations & acknowledgment of risk	• Lower risk businesses may have less regulatory burden • Stronger incentive to manage risks	• More consistent approach to risk & capacity to target resources • A less 'risk averse' culture that is less likely to overreact to adverse events
2.3 Appropriate regulator culture needs to be facilitated	• Builds trust with regulators • Regulator has better appreciation of small business needs & compliance capacity	• Continual improvement in regulator culture helps facilitate business understanding, potentially lowering costs of non-compliance
3.1 Remove unnecessary complexity; offer small business standard compliance solution or option to innovate	• Lower costs in meeting regulatory requirements • Detailed guidance that provides greater certainty • increased scope to innovate in compliance	• Improved compliance & regulatory outcomes • Increased administration costs to develop standard compliance solutions & evaluate alternatives
3.2 Differential treatment for small business in regulation delivery or design	• Lower compliance burden from a more consistent & consultative approach to small business treatment	• More efficient allocation of enforcement resources to higher risk businesses • Costs of developing & administering different delivery approaches
4.1 Achieving compliance • educative & facilitative approach • streamlined processes • inspections & audits commensurate with risks • cooperation & recognition of other related processes	• Better understanding of compliance obligations • Simpler processes with fewer approvals & licences needed • Less frequent renewal & information requirements • Regulatory posture towards lower risk businesses is more permissive, lowering compliance costs • Less frequent and/or comprehensive inspections for lower risk businesses • Better scheduling/reduced overlap will reduce burden of inspections • Capacity to use third party & private sector compliance information to satisfy regulatory requirements	• Increased voluntary compliance & improved relationships with business • Reduced costs through elimination of some processes or less frequent engagement • Some agencies may incur higher costs (where licence scope is broadened) • Handling of risk is evidence based, & guides targeting of resources & setting of compliance obligations • Additional administration costs to implement structured risk-based framework • Sharing of intelligence & inspections with other regulators can reduce duplication & costs • Drawing on industry expertise can address gaps in skills or capacities

(continued next page)

Table 1 **(continued)**

Draft recommendation	*Benefits for small business*	*Net benefits for the regulator & community*
4.2 Sufficient range of enforcement tools	• Businesses can expect a proportionate response to any compliance breaches	• More efficient enforcement & deterrence by making response proportionate to risk • Better balance between facilitative & combative engagement approaches
4.3 Timely processes & decisions	• Reduce undue delays due to regulatory processes • Greater transparency of expected timeframes improves certainty	• Greater clarity on expected timelines • Improved timeliness performance • Encourages a decision making culture & empowerment of staff
5.1 Information & advice is clear & accessible & delivery tailored where appropriate	• Requirements targeted & easier to access & understand — including by small businesses that face particular challenges, such as those with owners with poor English skills	• More effective communication with business • Improved compliance outcomes
5.2 Streamline information requests/reporting processes	• Easier to complete/lodge forms • Less overlap/duplication in reporting • Greater consistency of requests with data business already collects	• Sharing of information between regulators can reduce duplication & costs • May require investment in IT & systems redesign
5.3 5.4 Consultation & processes for complaints handling, review of decisions & mediation	• Avenues to formally raise concerns about decisions or approaches are readily accessible & timely • Greater confidence complaints will be handled impartially & processes will provide suitable redress	• Opportunities to learn from business feedback & improve engagement practices • Enhances accountability, builds trust & credibility with stakeholders
6.1 6.2 6.3 Sufficient resourcing; staff skills & capacities; transparency & accountability in decision making	• Regulator more accessible & facilitative in engagement with business • Greater certainty & consistency in engagement with regulators & how discretion is exercised both within & across regulators • Regulator staff better understand business & can more effectively communicate & adjust compliance requirements • Reasons for decisions are transparent	• More efficient achievement of objectives with improved compliance outcomes & better decisions • Improving guidance & training may increase administration costs • Regulator staff better skilled to appropriately use discretion & to effectively administer & enforce regulation • Reduced risk of corruption or regulatory capture • Improved skills & knowledge builds trust & credibility with businesses
6.4 Evaluation/review; sharing information; monitoring/reporting performance; develop & report engagement principles.	• Stronger incentives for regulators to adopt engagement practices that minimise compliance burdens • Problematic engagement practices are less likely to persist • Greater certainty on what to expect from engagement with regulators	• Facilitates continuous improvement in regulator engagement practices • Increases the net benefits of regulation

1 Scope of the study

Key points

- Small businesses account for more than 95 per cent of Australian businesses. Many are operated solely by the owner with no employees and generally do not have specialised skills or extensive time to devote to regulatory requirements. Some operate as an alternative to working as an employee while others produce only a small income to fund a hobby or supplement other income.
- It is neither feasible nor appropriate to develop a single definition of small business that will be suitable for all regulatory purposes. Policy makers and/or regulators should determine which businesses are considered 'small' in their regulatory field based of an assessment of the policy purpose. Regulators should also consider the extent to which a definition of small business is necessary when targeting their engagement.
- Regulators are entities that are empowered by legislation to grant approvals, monitor compliance and enforce laws. Regulators will often have complementary roles such as developing and reviewing regulations or standards and providing information or education about regulatory requirements.
- The Commission estimates that within Australia there are roughly 120 national regulators, 350 operating within state and territory governments and 560 local councils. These regulators operate in a vast array of areas — from health and safety to environment, from construction standards to fair trading, from employment conditions to competition.
- Businesses incur a range of costs associated with complying with their regulatory requirements. Unnecessary burdens can be created by a regulator's engagement approach through, for example, inconsistent advice, excessive reporting requirements or unnecessary delays in processing licences and permits.
- A cross-section of businesses reported that regulator behaviour can be just as important as the design of regulation in contributing to compliance costs.

1.1 Background of the study

The Productivity Commission has been asked to benchmark regulator engagement with small business. This includes considering how different regulatory approaches affect business and highlighting any approaches which have the potential to reduce unnecessary compliance costs. The study was commissioned with agreement from COAG's Business Regulation and Competition Working Group and followed

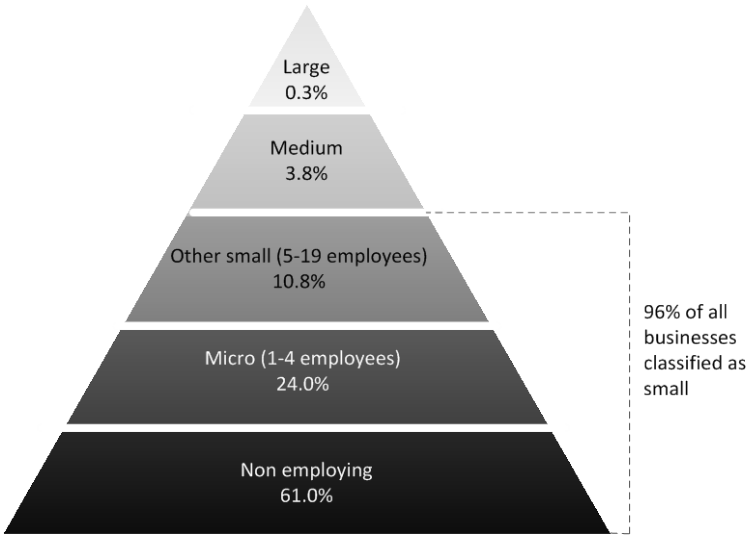
concerns raised at the inaugural COAG Business Advisory Forum meeting in April 2012 that 'small and medium enterprises are particularly vulnerable to inappropriate or unnecessary regulations' (COAG 2012a). It also reflects growing recognition that regulator behaviour in the delivery of regulation needs to be considered, in addition to the design and review of regulation, to ensure business activities are not unduly constrained by regulation and its implementation.

The design and review phases of regulation have been the topic of other recent Commission studies (PC 2011a, 2012c). The current study concentrates on the delivery and implementation of regulation. While much of the analysis in this report focuses on Commonwealth, state and territory regulators, evidence of the regulatory engagement approach of local governments — collected during the Commission's study on *Local Government as Regulator* (PC 2012b) — is also drawn on where relevant.

1.2 Small business in Australia

The vast majority of Australia's 2 million businesses are small (96 per cent) with around 60 per cent of these businesses functioning with the owner as the sole operator (figure 1.1).

Figure 1.1 **Proportion of businesses by employment size**[a]
At June 2012



[a] Small: employing fewer than 20 employees, Medium: employing between 20 and 199 employees and Large: 200 or more employees.

Source: ABS (2013b).

Small business are the dominant business type in all industries but operate predominately in: construction; professional, scientific and technical services; rental, hiring and real estate services; and agriculture (table 1.1). In 2011-12, small business produced around 35 per cent of GDP and accounted for 43 per cent of employment (ABS 2013a).

Table 1.1 **Small business by industry, June 2011**

	Share of total small business[a]	*Share of small business within industry*
Industry	per cent	per cent
Construction	17	98
Professional, scientific and technical services	12	97
Rental, hiring and real estate services	11	99
Agriculture, forestry and fishing	10	99
Financial and insurance services	8	99
Retail trade	7	93
Transport, postal land warehousing	6	98
Health care and social assistance	5	95
Other services	4	97
Manufacturing	4	89
Administrative and support services	4	93
Wholesale trade	4	93
Accommodation and food services	3	84
Arts and recreation	1	95
Education and training	1	92
Other[b]	2	ne

[a] Does not sum to 100 as 2.3 per cent of small businesses are not classified by industry and there are rounding errors. [b] Other includes: Information media and telecommunications (0.9 per cent), mining (0.4 per cent), public administration and safety (0.3 per cent), Electricity, gas, water and waste services (0.3 per cent). ne not estimated.

Sources: DIISRTE (2012) and Commission estimates.

What is a small business?

A small business is usually not just a larger business on a smaller scale but one that operates in a fundamentally different way to larger businesses. The issue of what constitutes a small business has been well examined.[1] In qualitative terms, a small business typically has the following three fundamental characteristics:

- it is independently owned and operated, that is, it is not part of a larger corporation or controlled by another firm

[1] For example, ABS (2000), Beddall (1990), Forsaith and Hall (2001), Lattimore et al. (1998), Schaper et al. (2010).

- the owner manager is the principle decision maker
- the owner manager contributes most, if not all, of the operating capital.

Other characteristics common to the way a small business operates include:

- a small number of individuals work in the business — often from the same family
- a simple management structure, usually with no specialised finance, personnel or regulatory/legal managers or systems
- limited resources, including finance, staff and skills — this often requires the owner manager to fulfil all regulatory obligations, leaving them time poor.
- a small market share with a greater propensity to only supply the local market, or operate within a single state and territory.

According to a recent Council of Small Business of Australia (COSBOA) survey, small businesses viewed these characteristics as central to the nature of a small business (COSBOA sub. 31). Many participants also provided similar views in submissions (box 1.1).

Despite these core characteristics, small businesses differ in a variety of ways. They vary in purpose and function across industries, some exist for many years, others for only months (ABS 2013b; DIISRTE 2012). While the launch of a small business venture frequently starts with identifying a market opportunity, it is sometimes precipitated by events such as redundancy, job frustration, graduation or inheritance. Small businesses take on a number of different organisational and legal operating forms, some are run on a part-time basis, often from home, while others have a more conventional business structure (ABS 2013b; Schaper et al. 2010).

The motivation for owning a small business also varies with some owners looking to earn an income sufficient to support a household and others preferring increased flexibility associated with being their 'own boss' or greater capacity to balance personal or family interests. Consequently, some small businesses have a comparatively low income, turnover or profit margin (perhaps to supplement another income or hobby), while others produce a higher income for the owner than would be earned if they were employed by someone else (Schaper et al. 2010).

Looking at the people behind small businesses, the profile of small business owners in Australia is changing over time but current statistical information indicates that the 'typical' owner is: male, born in Australia and working either as a tradesperson or using financial skills (ABS 2008). They are likely to have completed secondary school or trade qualification but often have not undertaken formal management training and tend not to use a business plan (ABS 2013a; Schaper et al. 2010).

Migrant small business owners are a significant group (27 per cent) and are most likely to have been born in Europe. Those small business owners who have migrated to Australia from Asia are more likely to be female than are owners from other regions of birth (ABS 2008).

Box 1.1 **Participants' views on characteristics of a small business**

Lack of specialised management functions

… in small businesses the owner is often responsible for doing the work, managing staff and meeting all the regulatory obligations. (NSW Business Chamber, sub. 25, p. 2)

As small businesses generally do not have dedicated human resource or payroll staff, all changes to the regulatory environment are typically dealt directly by the business owner/operator. (WA Small Business Development Corporation, sub. 22, p. 7)

… it is unlikely that they will have a dedicated compliance manager. (Business SA, sub. 3, p. 2)

… we have significant evidence to suggest that it is not until employment reaches approximately 50 employees that the business case and costs of dedicated in-house WHS, HR, environmental and/or financial compliance staff are appointed. (Chamber of Commerce and Industry Queensland, sub. 16, p. 3)

These people in small business do not have experts to assist them. They do not have paymasters, OH&S experts, tax experts, health experts etc. (COSBOA, sub. 15, p. 3)

Limited resources: time and staff

Many small businesses are family owned and run and often operate with a small number of staff which means that they are both resource and time poor … The nature of small business means that many do not have access to the same level of resources as larger companies. (Business SA, sub. 3, p. 1)

In general, small business operators are, more often than not, extremely time poor. (WA Small Business Development Corporation, sub. 22 p. 4)

Small businesses differ from large enterprises in a fundamental way in that they are operated by one or two individuals … (Tasmanian Small business Council Inc., sub. 13, p. 1)

Small geographic market

… small businesses tend to sell their goods and services within a local area and within a single state or territory, while only a small percentage of small business sell their products overseas. (ACCI, sub. 5, p. 6)

Defining small business in the regulatory environment

The terms of reference direct the Commission to consider what constitutes a small business and to consider the merits of broader adoption of the ABS (number of employees) based definition to provide for ease of comparison with ABS data (see appendix C).

The Commission believes the best way to define small business is through its inherent characteristics described above, such as in the following general definition of:

> … an independent firm that is usually managed, funded and operated by its owners, and whose staff size, financial resources and assets are comparatively small in scale. (Schaper et al. 2010)

However, the Commission believes it is neither feasible nor appropriate to develop a single definition of small business that would be suitable for all regulatory purposes. While there may be benefits in broader adoption of the ABS definition, the Commission considers these are unlikely to outweigh the costs of moving to a single definition for regulators in all parts of the economy (see box 1.2).

As outlined by the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE), policy makers and regulators need flexibility in defining small business to allow each definition to 'turn on the particular traits of the small business which a policy outcome is related to or intending to target' (sub. 18, p. 2). In short, definitions need to be fit for purpose. Master Electricians Australia also supported regulators developing a definition that is fit for the intended purpose, noting:

> … it is necessary for each regulator to apply a definition of small business that is geared towards their specific regulatory purpose … (sub. 8, p. 1).

Policy makers and regulators are well placed to determine whether a definition of small business is needed and which businesses are considered 'small' for the given regulatory area. In making such determinations, they need to be clear about the problem or barrier they are attempting to overcome (such as a difficulty of some businesses in understanding regulatory obligations), which businesses should be targeted and whether business size is relevant. Regulators seeking to better target their education and compliance activities may find they do not need a strict definition of small business. (The nature and need for differential treatment for small business is discussed in depth in chapter 3.)

Nevertheless, government and regulators should be mindful that varying definitions do add to small business compliance costs and have a cumulative burden. Given the information gaps associated with developing a precise definition to delineate small from larger businesses — as a first step — regulators could consider the relevance and applicability of the existing definitions of small businesses. Another definition of small business should only be introduced (after consultation with business) if there are clear reasons that such a definition would better address the particular regulatory problem and if there are greater net benefits from using such a definition.

Box 1.2 The pros and cons of a single definition of small business

A myriad of small business definitions exist in Australia and internationally (appendix C). In this study, business associations generally reported that varying definitions can pose problems for some small business.[2] These participants claimed that:

- varying definitions caused confusion as some businesses are defined as 'small' by some (but not all) regulators
- the different definitions of small business can increase the compliance costs for small business as they need to take more time researching and understanding whether particular regulatory requirements apply to them
- small businesses may not understand that they are exempt from regulatory requirements and mistakenly comply, incurring unnecessary compliance costs
- small businesses may believe they are exempt from regulatory requirements and mistakenly not comply, which may result in fines and penalties.

Rather than streamlining the number of definitions of small business to better target regulator engagement, a number of the requests for a single definition principally related to:

- exempting small business from complying with particular regulations in the design of the regulation (see chapter 3) or
- the eligibility of small business to receive grants (outside the scope of this study).

Some industry and government bodies have highlighted that a consistent definition of small business would allow for greater analysis of data across different collections (assuming privacy issues are addressed) with subsequent analysis better informing policy making.[3]

Nevertheless, the costs incurred by business to research and understand whether particular regulatory requirements apply are likely to be a relatively small component of overall compliance costs and imposing a single definition would not remove or reduce these costs greatly. Moreover, having a single definition of a small business, such as the ABS definition, may:

- lead to higher overall costs to the economy as differential treatment is not appropriately targeted (chapter 3)
- require regulators to collect additional information to be able to use an externally decided definition, imposing an additional burden on business to supply such information.

Furthermore, for regulators that adopt a risk based approach to administering and enforcing regulation, having a definition of small business is not necessary. Regulators with a risk based approach ensure lower risk businesses operate with less intervention from regulators, while higher risk businesses generally have closer

[2] For example, Australian Chamber of Commerce (ACCI) sub. 5, Housing Industry Association (HIA) sub. 24, Institute of Public Accountants (IPA) sub. 29, Chamber of Commerce Western Australia (CCI WA) sub. 7, Australian Hotels Association (AHA) sub. 17, The Tax Institute sub. 11.

[3] For example, AHA sub. 17, ACCI sub. 5 and DIISRTE sub. 18.

examination and education to ensure compliance. Depending on the regulatory field and individual business circumstances, smaller businesses may be either high or low risk (chapter 3). Around 70 per cent of regulator respondents that had a risk based approach, did not have a working definition of small business (PC regulator survey 2013).

Some participants' concerns on the issue of defining small business relate to eligibility for government programs and grants rather than the nature of regulator posture with small business. Governments may wish to review how information for programs and grants is disseminated to ensure small business easily understand their eligibility. Communication strategies to assist businesses to understand regulatory obligations are discussed in chapter 5.

DRAFT RECOMMENDATION 1.1

Policy makers and regulators are best placed to define small business for their regulatory area. Currently regulators use a variety of practical and appropriate ways to identify small business. Governments should not impose a single definition as it may lead to inflexibility and higher costs for some businesses and for the community more generally.

1.3 Regulators and their engagement with business

The term 'regulator' is used throughout this report to denote government officials, departmental units and independent statutory authorities that are empowered by legislation to administer and enforce regulation, or more specifically to: grant approvals (including registration and licensing); monitor compliance; and enforce laws. Regulators will often have complementary roles such as: developing and reviewing regulations or standards; providing information or education about regulatory requirements; resolving disputes and giving regulatory advice to third parties. Given the scope of this study, the Commission focuses on regulators that have a direct impact on business, particularly small business, or its employees (for example, through required professional accreditation).

The Commission estimates that within Australia there are roughly 120 national regulators, 350 operating within state and territory governments and 560 local councils (see appendix B for a full list of regulators in Australia). Since the vast majority of businesses in Australia are small, most regulators are primarily engaging with small rather than large businesses.

Regulators operate in a vast array of areas — health and safety to environment, from construction standards to fair trading, from employment conditions to

competition. Over 40 regulators across Australia indicated in the PC regulator survey that they managed regulation in the area of environmental protection and some 30 regulators had a role in overseeing public health or safety.

The institutional and governance arrangements for regulators can vary substantially between regulatory areas and jurisdictions. This was reflected in responses to the Commission's regulator survey.

- *Governance:* the vast majority of regulators reside either within a department or operate as statutory authorities.
- *Roles and responsibilities:* the breadth of roles performed by regulators varies from only one regulatory task such as registration/licensing or collecting fees to a combination of many regulatory roles including providing education, and conducting inspections and investigations. Further, roughly 90 per cent of survey respondents have some involvement in policy development and/or review in addition to their administration and enforcement roles.
- *Resourcing:* reflecting the varied roles and responsibilities above, the number of full time equivalent staff employed by survey respondents in 2011-12 ranged from one employee to several thousand.

These and other differences affect the way regulators are able to perform their role and their posture towards business (chapter 2).

Compliance costs associated with regulator engagement

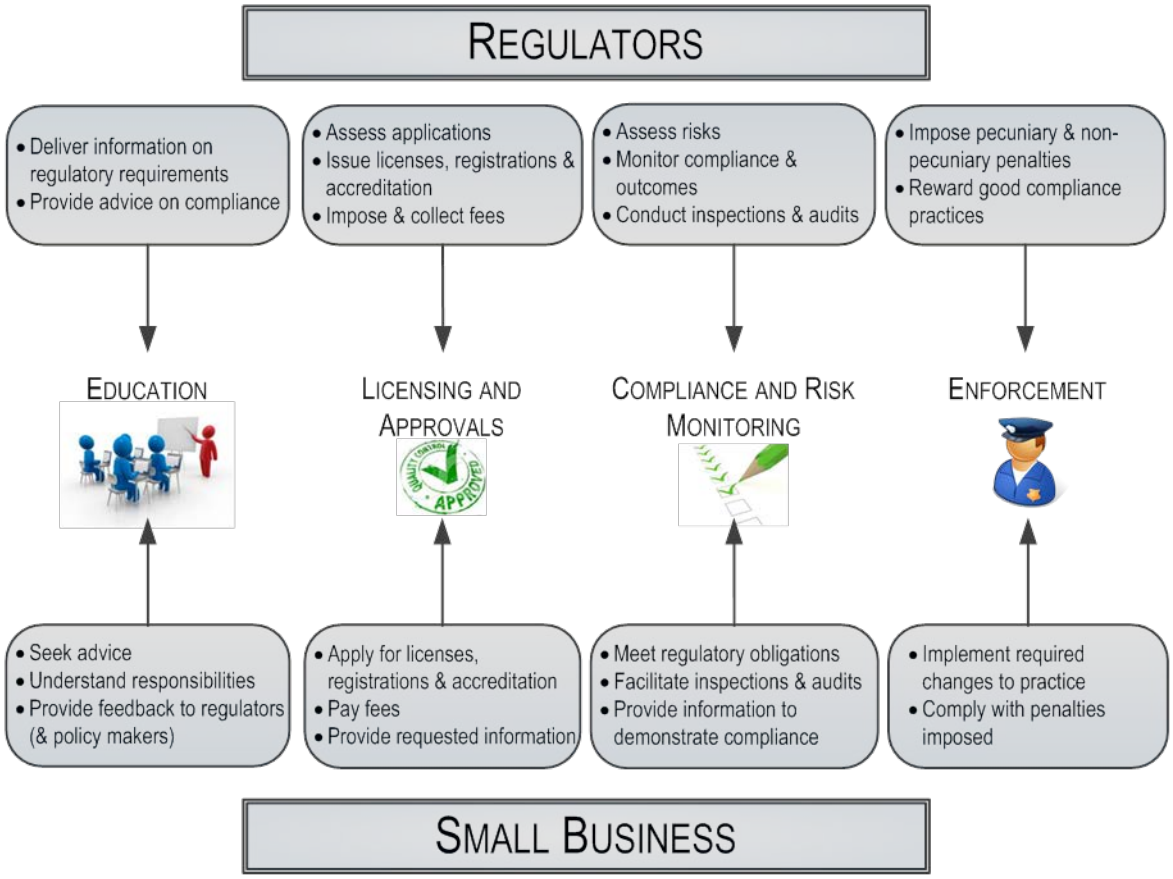
Regulators engage with businesses for a variety of purposes (figure 1.2) and it is through this engagement that businesses primarily 'experience' regulation and much of the associated compliance costs. These costs include the time taken to research and learn about requirements, filling in and lodging forms, establishing and maintaining reporting systems (such as details of accidents in the workplace) and preparing for enforcement activities such as inspections.

With each area of engagement, there is potential for business compliance costs to be compounded by a regulator's approach to engagement. Possible sources of additional or unnecessary compliance costs include:

- *Ineffective communication*: lack of effective communication with business about proposed regulatory changes; lack of guidance or inconsistent advice about what constitutes adequate compliance.
- *Excessive licensing and approvals processes:* unnecessarily extensive reporting requirements; the supply of similar/same information to a number of government organisations; excessive delays in processing licensing applications.

- *Onerous compliance requirements:* an adversarial attitude to business owners; excessive number of inspections or audits, given the business's compliance record.
- *Heavy handed enforcement:* excessive prescriptiveness in interpreting regulations; rigid enforcement actions; poor communication on why a breach was considered to have occurred and what must be done to be compliant.

Figure 1.2 **Role of regulators and business in engagement**



In some cases, the costs to business of regulator behaviour will be influenced by the regulation administered, which makes it difficult to untangle whether the source of the compliance burden on business is the regulation itself, or the way it is delivered. The majority of small business respondents to a COSBOA survey reported that regulator behaviour is just as important as the design of regulation in contributing to compliance costs (COSBOA, sub. 31). A number of business associations have commented on how significant the engagement approach taken by regulators is in determining the impact of regulations on business (for example: Chamber of Commerce and Industry Queensland (CCIQ), sub. 16; Business SA, sub. 4; COSBOA, sub. 15). In particular, the CCIQ claim that:

> [it] has significant evidence that in many cases it is the approach of regulators — their communication, advice and support, enforcement and reporting requirements — that has the most significant impact on business owners. (sub. 16, p. 1)

Nevertheless, Sparrow (2000) notes that even when the fault lies with the regulation itself, the blame is usually borne by regulators:

> To the public, and especially to industry, regulators seem all too often nitpicky, unreasonable, unnecessarily adversarial, rigidly bureaucratic, incapable of applying discretion sensibly, and (worst of all, since regulation costs so much) ineffective in achieving their missions. (p. 18)

In addition to business compliance costs, there may also be broader costs of engagement arising from regulatory 'distortions' — for example, where regulation reduces competition and affects incentives for investment and innovation. Such distortions (often unintended), can be due to overly prescriptive regulators (PC 2011a). In a recent ACCI survey, just over half of small business respondents indicated that complying with regulatory requirements had to some extent prevented them from making necessary changes to grow and expand their business (ACCI, sub. 5).

Given these costs — and the fact that it can be difficult to change the underlying regulations and institutional and governance arrangements to reduce burdens arising from these — it is particularly important that regulators attempt to reduce regulatory burdens associated with their delivery of regulation to business.

From the Commission's consultations, it is clear that small businesses see good engagement with regulators as being associated with an educative and facilitative regulatory posture, rather than a combative approach. Most businesses want to be found compliant with regulatory requirements and, for the benefit of their industry and own competitiveness, want fellow businesses to also be compliant. Small businesses especially value:

- brevity, clarity and accessibility in the communication of compliance obligations
- in the regulator's approach to compliance management and enforcement, a demonstrated capacity and willingness by regulators to:
  - be flexible and proportionate in their enforcement, with a consistent focus on outcomes
  - minimise unnecessary compliance and reporting costs imposed on small business, including the cumulative burden derived from engagement with multiple regulators
  - understand the needs and constraints of small business generally and those specific to their business or industry.

1.4 Conduct of the study

The Commission received terms of reference for this study in December 2012 (reproduced on page v). An Issues Paper was released in January 2013 which outlined the key areas under investigation to assist interested parties to make a submission. Prior to the release of this Draft Report, the Commission received 31 submissions, 20 of these were from business or their associations and 7 were from regulators.

The Commission consulted extensively in all Australian jurisdictions, meeting with business groups, regulators, government departments and agencies, and intermediary groups (see appendix A for the full list of study participants). The Commission is planning several workshops to consult with small businesses on the content and recommendations of this draft report.

In preparing this report, the Commission has also drawn on responses to its survey of Commonwealth, state and territory government regulators (appendix B) and surveys of local government undertaken for the Commission's *Local Government as Regulator* study (PC 2012b). In addition, the Commission has drawn on a small business survey administered by the Council of Small Business of Australia (COSBOA sub. 31). Finally, the Commission has considered business surveys undertaken for other studies, and analysis and findings in previous reviews, audits and studies from Australia and overseas.

It has not been possible, however, to comprehensively review and compare the detailed compliance and enforcement policies and practices of all regulators across Australian jurisdictions. Therefore, where examples are provided or particular models highlighted they should be considered indicative of good practice — the Commission does not suggest that they are necessarily the best examples. The Commission will be using the process of consultation on the draft report to further assess the merits of the highlighted practices and to identify other and/or better examples of leading practice.

2 Influences on regulator posture

Key points

- A myriad of factors outside regulators' control can affect their posture towards business, including regulation design, the overarching governance and institutional framework and stakeholder pressures.
- All jurisdictions have well established regulation design principles, which, when followed, can create an environment that enables regulators to minimise unnecessary regulatory burdens for business. Where issues such as implementation, monitoring and enforcement are not adequately considered during regulation design, regulators may be forced to adopt unnecessarily process (rather than outcome) focused or overly prescriptive engagement approaches.
- Regulator culture is closely aligned with the posture adopted towards small business, and is critical in fostering optimal engagement approaches. To deliver the best outcomes for small business, leading practice engagement principles espoused by the leadership of regulators must permeate to officers 'on the ground'.
  - Governments and regulators need to ensure that appropriate transparency, accountability and capacity building mechanisms are in place so that all regulatory staff adopt a facilitative and educative posture towards business, while meeting regulatory objectives and without imposing unnecessary regulatory burdens on business.
- It is important that regulators are adequately resourced so that they can carry out their regulatory responsibilities effectively. Small regulators (including many local councils) often struggle to adopt a proactive engagement approach due to the resource constraints they face.
- Regulators face constant pressure from the public, the media and governments to reduce, or even to eliminate risks, regardless of their magnitude or mitigation costs.
  - To avoid any criticisms stemming from perceived regulatory failures, some regulators adopt an overly risk averse posture, imposing unnecessary compliance and regulatory costs on business.
  - Where governments directly intervene in regulator decisions, confidence in the regulator's risk management approach is undermined.
- The tools at a regulator's disposal (such as the power to conduct inspections and audits and impose fines) must reflect the range of risks that they mitigate and enable regulators to facilitate compliance and to respond proportionately to compliance breaches.

2.1 Introduction

Regulator posture can be broadly defined as the approach that regulators adopt towards the businesses they regulate. The extent to which they educate and assist businesses in meeting their compliance obligations, or act as strict enforcers of regulations when breaches are detected can be either a deliberate or strategic decision, or simply the consequence of a range of internal and external influences. Regulator posture cannot be observed directly, but can be inferred from observed engagement practices (box 2.1).

Box 2.1 **Regulator posture and engagement approaches**

Regulator posture can be inferred by the extent to which the regulator adopts a:

- *Proactive versus reactive approach* — proactive approaches encourage, persuade and highlight ways to achieve or require compliance before a breach occurs. They are preventative. In contrast, reactive approaches involve following up complaints or adverse inspection results. Of course, in some respects, reactive approaches can have proactive effects where action to rectify a breach has a broader educative or deterrent effect.
- *Combative versus cooperative approach* — combative approaches often involve the threat of severe penalties as the incentive for compliance. The central idea behind a combative approach is deterrence. In contrast, cooperative approaches focus on education, advice, working together, appealing to self-interest and mutual interdependence.
- *Prescriptive versus discretionary approach* — while heavily influenced by the type of regulation being enforced, prescriptive approaches entail strict enforcement and interpretation, whereas a discretionary approach is more tempered and able to assess alternative means of compliance.

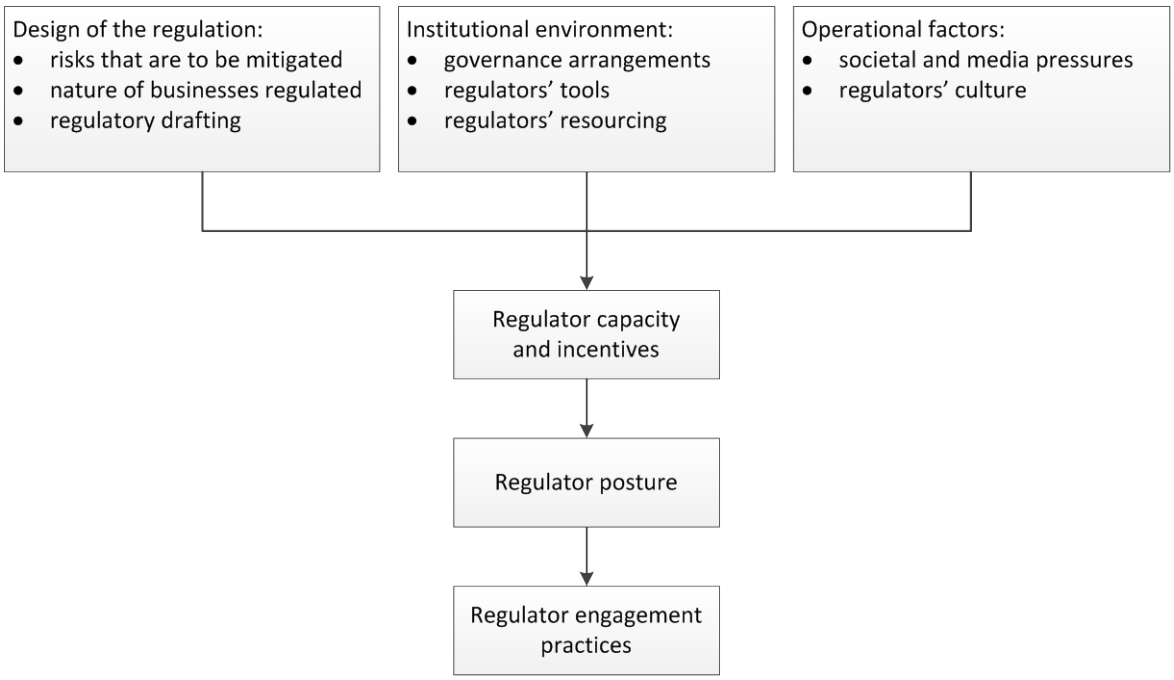
Sources: Based on Office of Regulation Review (1995); PC (2009b).

This chapter discusses key influences on regulator posture. These influences are largely from factors outside regulators' control, such as:

- the design of the regulation, including the nature of the risks to the community to be mitigated;
- the regulator's institutional environment and available resources;
- operational factors such as community and media pressures and the implicit rules, values and expectations of behaviour that are inherent in a regulator's culture (figure 2.1).

These influences create capacity and incentives for regulators to behave in certain ways, which in turn affects their posture, and ultimately the way they engage with business.

Figure 2.1 **Influences on regulator posture**



Another important influence on regulator posture is the extent to which regulators have access to, and develop, a suitable body of skilled and competent staff. This is discussed in chapter 6 as a key influence on regulator performance.

In practice, regulators adopt multiple approaches, with the choice of approach in any given situation depending on particular circumstances specific to the regulation being enforced and the businesses being regulated. Where regulators are able to strike the right balance, unnecessary burdens on business will be reduced and regulatory effectiveness increased, enabling community wide benefits from the regulation.

2.2 Regulation design sets bounds on posture

Features of regulation and its design set bounds on how regulators are able to engage with business. Aspects of regulation and its design which can most affect posture include:

- the risks that are to be mitigated through regulation

- the nature of the businesses regulated
- the regulation itself and the process by which it is made.

Risks being mitigated

There are a range of risks to the community that regulators (both individually and collectively) attempt to mitigate — from threats to public health, to damage to environmental assets and the financial system. Risks are categorised either in regulation or by the regulator according to both the severity of the consequences of the events mitigated, and their likelihood of occurring (appendix D). Regulatory efforts should be targeted towards mitigating risks such that the resulting outcomes maximise net benefits to the community (chapter 3).

If risks are incorrectly assessed, then regulator approaches to business can become unduly compliance focused:

> Business have observed behaviours where compliance officers become "nit-picky" and identify irrelevant or extremely low risk issues just to justify their audit or inspection process "each time the council officer comes out they must find something to report – they couldn't possibly give us a 100% compliance sign-off" (Business owner, Central QLD, 2012). (Chamber of Commerce and Industry Queensland, sub. 16, p. 6.)

For businesses, this means they bear unnecessary costs where the severity of harm is minor or likelihood of occurrence is low. As stated by the NSW Small Business Commissioner:

> Many regulatory regimes are too risk adverse and set regulatory standards that are too high, when a lower standard is likely to be acceptable. The result is a significant volume of unnecessary compliance responsibilities is imposed on the vast majority of operators who will do the right thing anyway. (sub. 12, p. 3)

The severity of the consequences the regulation seeks to mitigate is an important determinant of regulator posture. For example, it is to be expected that regulators tasked with attempting to mitigate catastrophic risks (such as the risks to life posed by aviation or road transport accidents) will be more risk averse (that is, they are less tolerant of mitigated risks materialising), than regulators which attempt to alleviate relatively smaller risks (such as those posed by newsagencies). Regulators tasked with mitigating catastrophic risks are more likely to adopt a very proactive posture — keeping in closer contact with the regulated industry — due to the attendant costs to the community if a regulatory breach were to occur (Organisation for Economic Cooperation and Development (OECD) 2010).

Nature of businesses regulated

The nature of the businesses regulated — in particular, the skills, experience and capacities of business owners and staff — critically affects the businesses' ability to comply with regulations. If not adequately considered in the design of the regulation, then the regulator may be limited to adopting a 'one size fits all approach' and regulate all businesses identically (NSW Small Business Commissioner, sub. 12; Tasmanian Small Business Council, sub. 13; Department of Industry, Innovation, Science and Tertiary Education (DIISRTE), sub. 18). Such an approach would only be efficient if compliance costs are low and/or the consequences of non-compliance are minimal for all regulated businesses (see chapter 3).

A business's ability to understand and comply with regulatory requirements is likely to be affected by a range of factors specific to the business (chapters 1 and 3). These may include: the length of time the business has been in operation; whether the business owner has adequate technical and language skills to understand the regulatory framework; whether the geographic location of the business allows it to have frequent or ready contact with the regulator; the business's capacity and resources available for compliance activities (chapter 3); and the business owner's ability to access information on their regulatory obligations (chapter 5). It is important that regulators seek to adopt a highly educative approach to help foster compliance where businesses struggle to understand their compliance obligations.

As several participants submitted, regulations need to be sufficiently flexible to allow regulators to adopt appropriately tailored engagement approaches (Hills Orchard Improvement Group, sub. 9; Tasmanian Small Business Council, sub. 13). Appropriate tailoring of regulators' engagement strategies is discussed in chapters 3 and 5.

The posture of regulators is also, in part, determined by businesses' willingness to comply. In instances where business are aware of their obligations and how to comply with them, but choose not to, regulators are unlikely to have success employing an educative or cooperative approach with business, and may have to resort to a more combative posture. As noted by the New South Wales Food Authority, additional 'leverage' is provided by the publication of penalties imposed in relation to food safety breaches for poor performing businesses (sub. 28, p. 12).

Regulation and the regulation making process

Good regulatory design processes are critical for creating the environment that enables regulators to deliver regulation effectively. Making regulations in

accordance with well accepted principles — such as those of the Council of Australian Government (2007) — ensures that the affected industry will have been adequately consulted throughout the policy development process. In turn, as the regulation is generally better understood (and possibly accepted) by business, the regulator is able to adopt a more educative and facilitative approach towards the businesses it regulates; focusing attention on assisting businesses to meet their compliance obligations, rather than adopting a reactive approach once regulatory breaches have occurred.

Where sound regulation making processes are not followed there are real risks that the resulting benefits of regulation will be either marginal or impose a net cost to the community, regardless of how the regulator goes about implementing the regulation (PC 2012c). As noted in chapter 1, the majority of small business respondents to a Council of Small Business of Australia (COSBOA) survey indicated that regulation design and regulator delivery approach are equally important in contributing to compliance costs.

The steps in the regulation making process that have the largest impact on regulator posture are: planning for the implementation, monitoring and enforcement of new regulations; and consultation with affected businesses. The content of the regulation which results from this process is also critical for posture.

Planning for implementation, monitoring and enforcement

The Commission recently found that regulation impact statements for regulatory proposals often neglect discussing how proposed regulations will be implemented, including:

- which authority will enforce the proposal, and the resourcing requirements and costs involved
- the actions regulated parties are required to take, such as maintaining extra information, completing forms, or proving experience, expertise or educational achievements
- transitional arrangements to minimise the impact on stakeholders, for example through delayed or gradual introduction of new requirements, and provision of information and other assistance to businesses affected (PC 2012c).

Where the delivery of regulation has been overlooked in the regulation design process, there is an increased likelihood that regulators will be ill-equipped to adopt some engagement approaches and/or there will be unnecessary overlap and duplication with other regulators. As submitted by COSBOA:

> A poorly designed policy will be difficult to police for a regulator. When new policy is developed there should always be involvement from the regulating agencies and small business … Our members still hear field staff of agencies complain that the rules are not sensible but 'they didn't design the rules they just enforce them'. (COSBOA, sub. 15, p. 6)

An inquiry into food regulation by the Victorian Competition and Efficiency Commission (VCEC) identified that implementation issues concerning how the regulation was to be administered and enforced could have been rectified earlier. Had the issues been considered at the regulatory design stage, the imposition of unnecessary overlapping and duplicative registration requirements on business could have been avoided (VCEC 2007).

Consultation with affected businesses

Effective early consultation with business in development of regulation is critical to ensuring it is appropriately targeted and is understood by those affected. As stated by DIISRTE, inadequate consultation with small business during the regulation design phase can result 'in unnecessary, excessive regulation that does not consider the constraints of small business or achieve the intended goals of the new regulations' (sub. 18, p. 2).

Regulators may struggle to effectively engage with businesses where consultation has been cursory. Regulated entities may lack awareness of their compliance obligations or question the merits of the regulation or the value of further engagement with regulators; particularly if they perceive their views were not taken into account when the regulation was being designed. In such instances, there is a risk that regulators are forced to become unduly reactive and focused on responding to instances of non-compliance, rather than facilitating compliance or attempting to prevent breaches occurring in the first place.

Concerns have been raised by many participants in this study about poor consultation practices (for example: Master Electricians Australia, sub. 8; Australian Motor Industry Federation, sub. 23; NSW Business Chamber, sub. 25). Similar concerns were identified in other studies (Borthwick and Milliner 2012; PC 2012c). Where consultation has been inadequate, it is even more important that the regulator attempt to adopt a more educative posture. Inadequate consultation increases the likelihood of non-compliance as the regulation is less likely to be well designed and businesses may find it more difficult to understand the purpose of the regulation and their compliance obligations (for example VCEC 2005, 2007).

Content of the regulation

As regulators are required to undertake their responsibilities in accordance with their overarching legislation, problems can arise if legislative requirements are unclear or ambiguous in their wording. In such instances, regulators may either be reluctant to provide information to regulated entities that could be regarded as conflicting or incorrect (Victoria Auditor General's Office (VAGO) 2011a, 2011b), or alternatively, may interpret legislative requirements in ways that are not consistent with the original intent of the legislation or that impose unnecessary burdens on business (VCEC 2007).

Elements of the regulation that are particularly important for the way regulators can operate include:

- *The regulation's coverage* — ambiguity about which firms are to be subject to the regulation may result in regulators inadvertently regulating businesses that were not meant to be regulated (regulatory creep), or not regulating businesses that should have been (potentially defeating the purpose of the regulation).
- *The regulatory objectives* — in instances where regulatory objectives do not exist or are unclear, the approach the regulator adopts may be inconsistent with the underlying intent of the regulation. For example, recent audit reports found that where unclear regulatory objectives existed, there was no assurance that the regulatory outcomes sought were actually being achieved (ACT Auditor-General 2011; VAGO 2013).
- *The degree of prescription* — while the appropriate level of prescription will vary on a case by case basis, where the regulation is unduly prescriptive and the regulator is afforded insufficient discretion in determining compliance, their approach towards business may be (or may be seen to be) overly legalistic. Legislation can prescribe many factors including the desired regulatory outcomes, required or acceptable compliance processes and the engagement outcomes sought. For example, the legislation governing the New South Wales Food Authority requires it to undertake or facilitate the education and training of persons 'to enable them to meet the requirements of the Food Standards Code and food safety schemes.'[1] Although the means by which persons are educated is not mandated, it is clear that the Food Authority has more than an obligation to merely 'inform' businesses, it must *enable* businesses to meet their compliance obligations.
- *The relationship with other regulations* — where regulatory responsibilities are 'shared' between regulators at the same or different levels of government,

[1] Section 108(2)(e) of the *Food Act 2003* (NSW).

delivery of regulation can result in unnecessary overlap and duplication in reporting requirements for business (VCEC 2009). The VCEC inquiry into Victorian food regulation also found that inconsistent objectives between related Acts makes delivery particularly difficult for regulators (VCEC 2007).

- *The regulation's appropriateness over time* — it is important that the regulation enables the regulator to keep pace with changes in the regulated industry over time (section 2.3).

Where insufficient consideration is given to these elements when formulating the regulation, the posture which regulators can adopt toward businesses may be limited to approaches which are unduly burdensome, process focused or overly prescriptive in their requirements — all of which can lead to less effective engagement with small business.

DRAFT RECOMMENDATION 2.1

When designing regulation, all governments should apply government-agreed regulatory impact analysis principles, including evaluation of: intended approaches to regulation implementation, monitoring and enforcement; and the likely impacts of proposed regulations on business.

2.3 Regulators' institutional environment

Institutional and governance arrangements, the range of legislated tools at regulators' disposal and the resources provided to them to effectively deliver regulation to business establish bounds within which regulators operate.

Governance arrangements

Aspects of regulators' governance arrangements which particularly impact on their posture towards business include:

- where the regulator is located within the structure of government
- the scope of the regulator's roles and functions
- the arrangements in place to ensure the transparency and accountability of the regulator.

While governance arrangements can impact on the quality of regulator engagement with business, most businesses see such arrangements as internal to government and a part of the regulatory landscape that they cannot influence. It can be difficult for those outside of government to offer (or justify devoting resources towards

considering) plausible alternatives to the status quo. As the NSW Business Chamber notes:

> It is difficult for outsiders to give regulators specific guidance on how they should set up their operations to ensure they have the capacity to deliver best practice regulation. (sub. 25, p. 9)

Moreover, it is rarely possible to directly attribute differences in the way regulators approach business to their governance arrangements.

Regulator location

Across Australia, regulators are most commonly separate units within portfolio departments, or statutory authorities. The Commission's survey of regulators found that out of the 187 regulators which responded, 52 per cent were located in departments and 42 per cent were located as statutory authorities (PC regulator survey 2013). In some jurisdictions, the default position is for regulators to be established as either additional regulatory units or statutory office holders within existing departments, rather than as separate entities (Department of Finance and Administration 2012; Victorian State Services Authority (SSA) 2009). A recent review by the Australian Government Department of Finance and Deregulation reiterated the preference for any new bodies to be department based rather than independent agencies (Australian Government 2012). Responses to the PC regulator survey indicate that regulators in smaller jurisdictions are more likely (than those in larger jurisdictions) to be located within departments. The typically smaller size of regulators in these jurisdictions may mean it is administratively more efficient for regulatory roles to be undertaken within a department.

The location of the regulator will have a bearing on the way it operates and its stance in delivering regulation to business. A regulator within a department, for example, may (because of its responsibilities to a minister) be more responsive to industry concerns (table 2.1). On the other hand, there may be more potential for conflicts of interest in the design or delivery of regulation.

Statutory independence puts the regulator at arm's length from government, potentially increasing the likelihood that it would be impartial and objective in its decision making and reduce the risk of perceived or actual conflicts of interest (Australian Government 2012). The Northern Territory Environment Protection Authority recently moved from a department to a statutory authority, in part due to perceptions 'of inefficiencies and unresponsiveness to industry' (Mills 2012, p. 1) and its independence is now explicitly legislated:

> The NT EPA is not subject to the direction or control of the Minister in the exercise of its powers or the performance of its functions.[2]

Nevertheless, in providing statutory independence to a regulator it is also important that strong transparency and accountability frameworks are in place to ensure the activities of the regulator deliver the greatest benefits to the community (OECD 2013b).

Table 2.1 **Implications of regulator location for posture**

Departmental regulator	*Statutorily independent regulator*
• may be more responsive to industry concerns	• more likely to be objective and impartial in decision making processes
• likely to adopt the transparency and accountability arrangements of the overarching department	• may be more transparent and accountable due to separate accountability and reporting arrangements
• likely to adopt the prevailing culture of the department and be less able to adapt this to regulatory circumstances	• may have more scope, with good leadership, to foster an engaging culture amongst regulatory officers
• regulator may have less power of coercion and information collection at its disposal	• may be highly intrusive into businesses operations, where the regulator is granted extraordinary powers
• regulator is in a better position to instigate legislative change to remedy 'gaps' in legislation	• more likely to result in a stable and predictable regulatory environment, robust to changes in government
• staff with general administrative skills are likely to be used where the regulatory role is comparatively minor	• regulator staff may be more likely to have specialised skills enabling better interaction with regulated entities

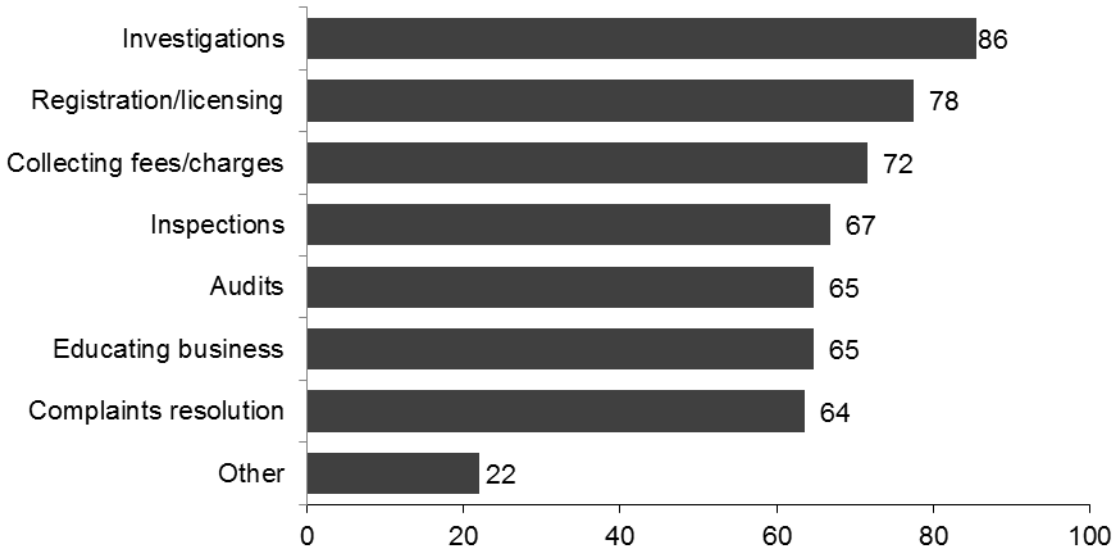
Sources: Based on SSA (2009), PC (2009b); Australian Government (2012); OECD (2013b).

Regulator roles and functions

Regulators perform a wide range of functions including: registering, accrediting and licensing of businesses; collecting fees; conducting investigations, inspections and audits; educating business; and resolving complaints (figure 2.2). Most regulators typically undertake multiple functions — for example, the Victorian Environment Protection Authority (EPA) is responsible for registering and licensing businesses to operate, collecting fees as well as conducting inspections, audits and investigations (EPA 2011). However, some regulators have more specialised roles, such as the Queensland Department of State Development Infrastructure, and Planning (DSDIP), which collects fees and exempts businesses from paying fees, in specified development areas (DSDIP 2013).

[2] Section 9(1) of the *Northern Territory Environment Protection Authority Act 2012* (NT).

Figure 2.2 **Functions performed by regulators**
Per cent of regulators (n=187)



Source: PC regulator survey 2013.

Some regulators perform only an enforcement role, for example the Victorian Business Licensing Authority is responsible for licensing and registering businesses such as debt collectors, estate agents and motor car traders (Consumer Affairs Victoria 2013). In contrast, some regulators are also responsible for setting the policy that they will then enforce, such as the Department of Primary Industries and Regions South Australia (PIRSA) Aquaculture. Responses to the Commission's survey indicate that nearly three quarters of regulators have a role in developing policy (PC regulator survey 2013).

Whether a regulator's approach to engagement is improved by having a policy making role that supplements its enforcement functions will vary on a case-by-case basis (box 2.2). Where regulators solely perform an enforcement function, it can be a challenge to ensure that there is effective communication with the policy making agency when issues arise. The separation of enforcement and policy making roles has, on occasion, resulted in increased uncertainty and delays for business due to poor consultation and coordination between the two bodies (Inspector-General of Taxation 2010). Furthermore, such separation can also create incentives for the regulator to adopt a more compliance-based approach:

> … this delineation of roles tends to reinforce a more rigid compliance regime within the administrator due to the narrow focus of activity. That is, an administrator can justify their operations in terms of simple [key performance indicators] such as the number of infringements issued, whereas the responsibility for evaluation and modifying a regulation to better achieve the intended outcome does not fall within its remit. (Local Government Association of Queensland (LGAQ) sub. 27, p. 5)

Box 2.2 **Relevant considerations of enforcement only versus policy making regulators**

Ensuring role clarity — it is important to ensure that policy making regulators have adequate delineation and separation between their enforcement and policy development roles.

Dealing with changes to the regulatory environment — the policy making regulator may be able to identify problems and assess the feasibility of policy options to remedy any problems.

Avoiding regulator capture — both regulator models need to have appropriate transparency and accountability mechanisms to avoid becoming 'agents' for the regulated industry.

Guarding against regulator creep — policy making regulators must be sufficiently transparent in their activities so as to avoid regulating in areas that are not net beneficial to the community.

Ensuring effective decision-making processes — policy making regulators must be granted the authority to make impartial and objective decisions.

Sources: Based on Uhrig (2003); VCEC (2005).

Where the regulator is responsible for both policy development and enforcement, it may more readily ensure the regulatory framework appropriately reflects developments in the industry and technology changes by being able to instigate legislative amendments. The aquaculture area in the Department of Primary Industries and Resources of South Australia, for example, was able to update its legislative framework to respond to 'the rapid development of industry practice, aquaculture management standards and administrative world's best practice' (Gago 2012, p. 1). The added flexibility and ability to quickly respond to developments that this regulatory model provides does pose potential risks, particularly that the regulator may impose additional costs on business (Hills Orchard Improvement Group, sub. 9) — highlighting the importance of governments ensuring all regulatory changes with a non-minor impact on business are subject to rigorous regulation impact assessment processes. Additionally, it is important to ensure that regulators from both models have adequate transparency and accountability mechanisms in place.

Transparency and accountability

Transparency refers to the availability and ease of access to information held by government, and to the ability of citizens to understand the basis of decision making. In a regulatory context, this means that regulators' decisions are fully

explained and the evidentiary basis upon which those decisions are made is publicly available. Transparency is also a precondition for accountability since a regulatory agency cannot be held accountable unless information is available on how they are engaging with business and meeting their responsibilities. Accountability is 'the obligation to inform, explain and justify conduct and to face consequences associated with that conduct' (PC 2012c, p. 238). The OECD Council on Regulatory Policy and Governance recommends that:

> Mechanisms of public accountability are required that clearly define how a regulatory agency is to discharge its responsibility with the necessary expertise as well as integrity, honesty and objectivity. (OECD 2012b, p. 14)

If businesses or other groups in the community do not have adequate information on regulator policies, practices and how and why decisions are made, there is a greater risk that regulators' incentives and interests will become misaligned with those of the community. Transparency is also a mechanism for generating community support and enhancing the credibility of regulators. It also can greatly reduce the costs to business of understanding and complying with their regulatory obligations. As a consequence, transparency can promote increased voluntary compliance. At a broad level, some transparency and accountability is observed through requirements for annual reporting.

Where transparency and accountability mechanisms have been found to be weak:

- perceived or actual conflicts of interest have not been disclosed (ANAO 2006b; VCEC 2005)
- roles and responsibilities between regulators have been unclear (VAGO 2010a; VCEC 2009)
- record keeping and reporting standards have been poor or inconsistent (ANAO 2006a; New South Wales Auditor General 2011; VAGO 2010b)
- reasons for decisions have not been transparently articulated (VAGO 2010a)
- regulators have been unable to demonstrate that they are meeting the regulation's objectives (ACT Auditor-General 2011; VAGO 2011b, 2012).

If regulators are less open to scrutiny, it is more difficult for businesses and the public to hold regulators to account for their actions, heightening risks that regulators may become less concerned with potential conflicts of interest and lose sight of their ultimate client, the community. Effective transparency and accountability mechanisms are vital then in ensuring regulators discharge their duties objectively and impartially.

Tools at the regulator's disposal

The 'tools' that regulators have to carry out their regulatory responsibilities influence the ways in which regulators can interact with business. In principle, a regulator that has a sufficient suite of tools to deal with the range of risks it is regulating is likely to adopt a more proportionate response than a regulator with a very limited set of tools (chapter 4). Further, where regulators are provided with only low level infringement tools or tools with extremely strong sanctions, they may be unable to respond in a manner commensurate with compliance breaches.

The tools available to regulators have four (often interlinked) purposes:

- to permit/prevent entry into the market (for example, licensing and accreditation schemes)
- to assist businesses to comply (for example, provision of compliance information through various interfaces)
- to monitor business compliance (for example, audits and inspections)
- to respond to instances of non-compliance (for example, correction notices, improvement orders, pecuniary penalties).

As noted, some regulators have the power to create their own legislative tools, whereas others have the power to supplement legislated tools with administrative remedies (ANAO 2013a). Certain regulations may set a maximum penalty that a regulator may impose, and the regulator can then set a series of cascading penalties (relating to different offences) from that maximum amount. The NSW Food Authority, for example, imposes penalties for offences relating to the handling and sale of unsafe food of $770 for individuals and $1540 for corporations, which are orders of magnitude smaller than the maximum penalties allowed under legislation.[3]

In principle, the tools that a regulator has access to should reflect the range of risks and the businesses they regulate. However, in practice, 30 per cent of survey respondents — in particular, liquor and gaming and planning and building regulators — stated that they had an insufficient range of tools, given the risks they regulate (PC regulator survey 2013). Those regulators which identified that they had insufficient tools were mainly in the public health and food safety and environment areas (figure 2.3).

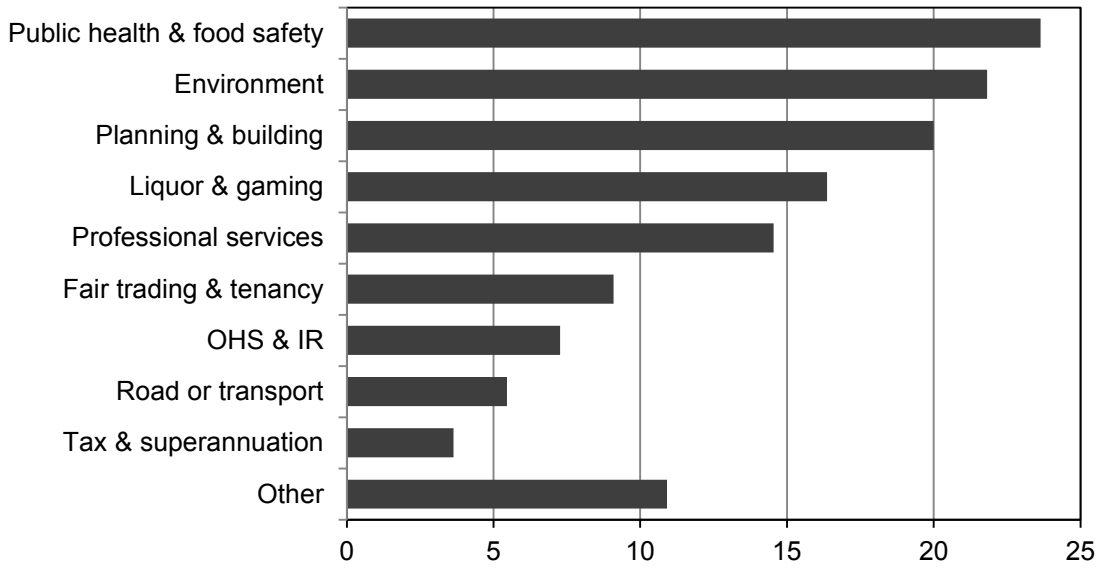
[3] See *Food Act 2003* (NSW); Food Regulation 2010 (NSW); *Crimes (Sentencing Procedure) Act 1999* (NSW).

If regulators are provided with a limited set of enforcement tools, the approach that they are able to take with business when faced with non-compliance will also be limited (chapter 4). In the Victorian food regulation inquiry, for example, VCEC found that the effectiveness of efforts to inform and advise businesses about food safety could be strengthened by:

> … providing councils with enforcement options that are proportionate to the problems encountered. … there is scope to expand the range of remedies available to councils, to create a more comprehensive spectrum of enforcement options. (VCEC 2007, p. xi)

An additional factor that determines regulators' engagement approaches is the cost (to the regulator) of using particular tools. For example, regulators may overly focus on use of fines in cases of compliance breaches by business because alternate compliance tools are not available or because of delays or uncertainties associated with pursuing other remedies (such as taking court action for instance) — see chapter 4.

Figure 2.3 **Regulators with insufficient tools by regulatory area**
Per cent of regulators (n=187)[a]



[a] Results do not sum to 100 as multiple regulatory areas could be selected by respondents.

Source: PC regulator survey 2013.

Regulatory environments are dynamic and just as it is important that regulators have adequate tools when they are established, it is also important that the available sets of tools are refined as circumstances change. In instances where their roles are changed, it is important that regulators are not left with inappropriate (or unnecessary) tools. If a regulator no longer regulates an area or activity that it once

did, then it may be appropriate to revise sanctions so as to ensure that regulatory responses remain appropriate to the risks they now regulate (ANAO 2011b).

The Commission was informed during consultations that where some regulators' responsibilities have increased, there has been little or no consideration as to whether the existing set of tools remain appropriate. Similar complaints were made to the Commission in its *Local Government as Regulator* study (PC 2012b).

Resourcing of a regulator

Resourcing issues appear to be the largest and most significant constraint affecting engagement with business. In this study, around 60 per cent of regulators surveyed nominated budget/resource constraints as one of the most significant constraints on their capacity to effectively engage with business (PC regulator survey 2013).

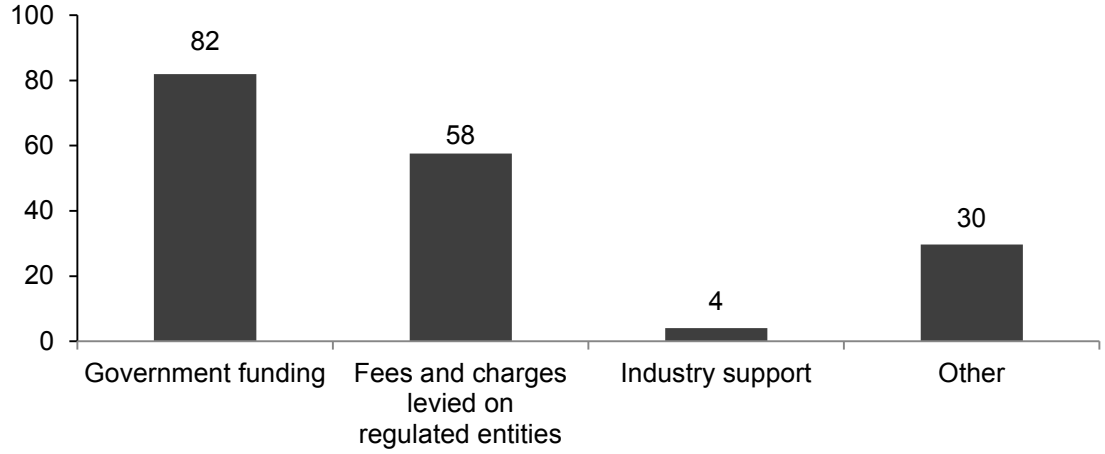
Regulators must be adequately resourced to enable them to efficiently and effectively carry out their regulatory responsibilities. Inadequate resourcing — including insufficient access to adequately skilled staff (chapter 6) — can cause regulators to focus on controlling administration costs when making decisions about compliance and enforcement strategies, which may increase compliance costs for business (and possibly increase overall economic costs to the community). Regulators that are severely resource constrained may adopt a more reactive engagement approach or fail to provide the same level and quality of information and guidance to regulated parties (chapter 5). However, a 'tight budget' should also create incentives to implement a sound risk based approach that ensures scarce enforcement resources are targeted in an efficient way.

Some regulators are partially or completely funded by industry. Responses to the PC regulator survey indicate that around 60 per cent of regulators recover from regulated businesses at least some proportion of the cost of providing regulatory services (figure 2.4). Where some or all of regulatory delivery costs are recovered from business, both industry and the community more generally would benefit from the regulator continually seeking out least cost methods of engagement, subject to meeting regulatory objectives.

It is important that appropriate transparency and accountability mechanisms are put in place to guard against regulatory creep, gold plating and cost padding where regulatory services are cost recovered by regulators (PC 2001). Regulators that are wholly funded by governments may face less industry scrutiny to reduce costs and should therefore be particularly transparent and accountable in their engagement.

Figure 2.4 **Contributions to regulator funding**

Per cent of regulators indicating each as a partial source (n=172)



Source: PC regulator survey 2013.

Resourcing of small regulators

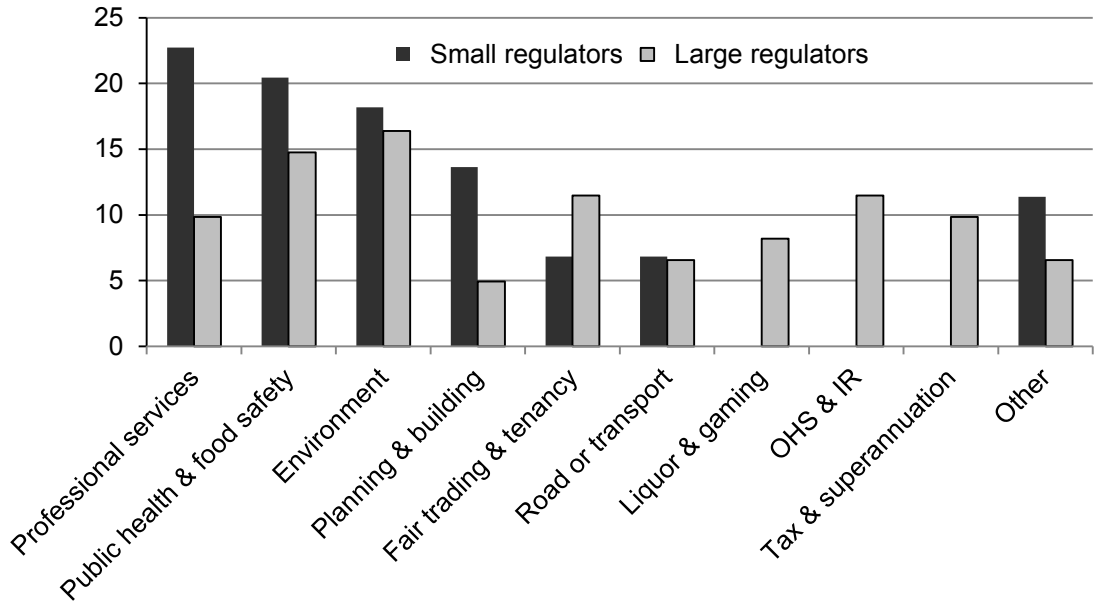
Regulators in the areas of professional services and public health and food safety, tend to have fewer regulatory staff than those which operate in regulatory areas such as fair trading or occupational health and safety (figure 2.5). The proactive approaches to engagement that are possible for large, well resourced regulators will often not be practical or efficient for many smaller regulators.

In its recent benchmarking study of local government as a regulator, the Commission found that many local governments do not have sufficient resources to effectively undertake their regulatory functions. In some states, roughly half of the local government respondents to a Commission survey indicated that they did not have sufficient resources (PC 2012b). The Commission has received no evidence to suggest that resourcing of local government regulators has significantly improved.

Where resourcing is insufficient to ensure the effective delivery of a regulatory function, there may be pressure for regulators to shift the cost of some of their activities onto regulated businesses. This can also happen between levels of government. As submitted by the LGAQ:

> Cost-shifting by other levels of government onto local government has produced situations where the delegated regulatory activity has been unfunded, only partially funded or not funded on a continuing basis. In these cases the regulating local government entity becomes reliant on the revenues from licensing/registration and enforcement. This can also be true of entities set up as autonomous regulators. (LGAQ sub. 27, p. 5)

Figure 2.5 **Regulators by size and regulatory area[a]**
Per cent of regulators (n=144)



a Small regulators are defined as those in the lowest 25th percentile and large regulators are those in the highest 25th percentile, based on full-time equivalent staff directly involved in business regulation.

Source: PC regulator survey 2013.

Similarly, small regulators may face difficulties in attracting and retaining suitably skilled staff, which in turn, may limit the regulator's range of potential engagement strategies. Lack of suitably skilled staff can particularly be an issue for very small local governments and those regulators in regional and remote areas (chapter 6).

The Commission was informed that regulators in regional or remote areas have, on occasion, had to adopt a more reactive engagement approach. Specifically, this was attributed to the high costs of monitoring these areas, given the often vast distances between businesses. As small regulators tend to have smaller budgets, they are understandably less likely to be at the forefront of innovating or trialling new regulatory approaches, particularly where such approaches can involve substantial upfront financial commitments (chapters 4 and 5).

2.4 Ongoing influences on regulator posture

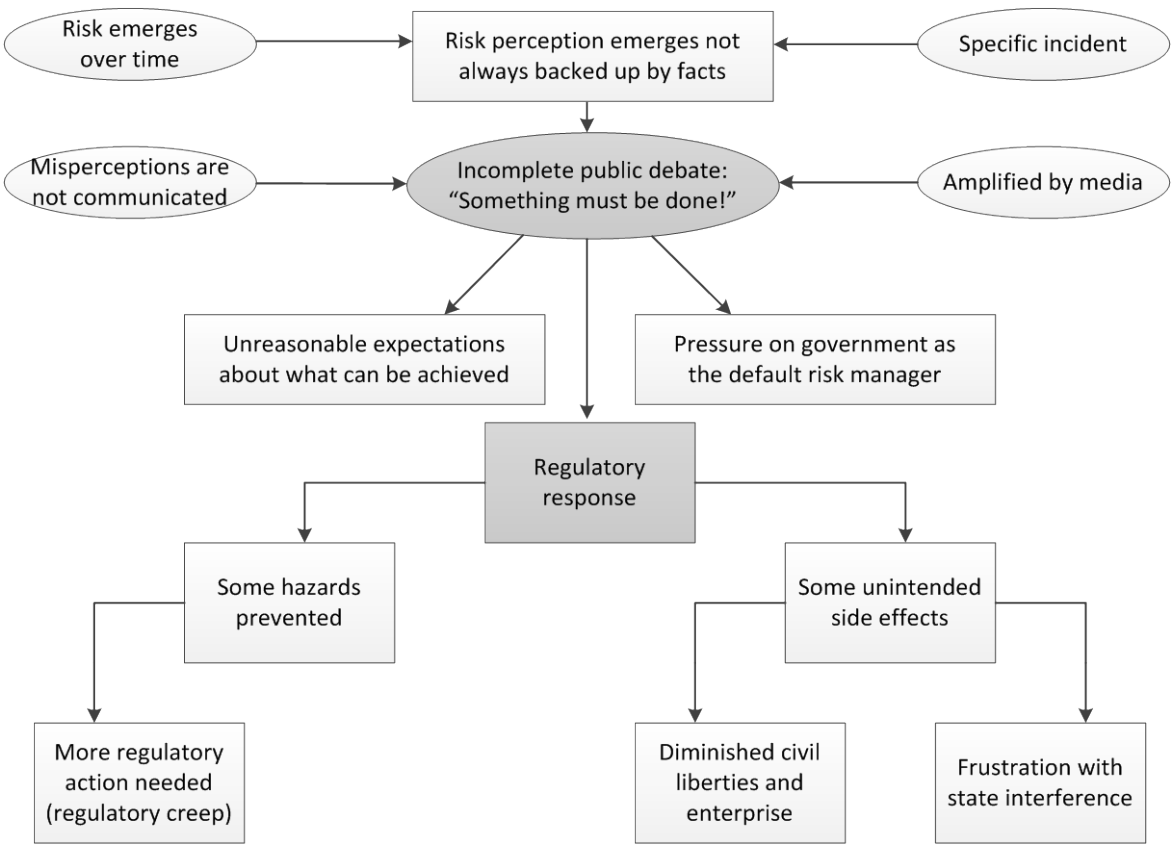
This section focuses on the way regulators' posture can be affected through their ongoing interaction with stakeholders. The day to day influences that regulators face include community's expectations of regulators' ability to mitigate risks, as well as media reporting of perceived regulatory failures, which often results in an

adverse reaction to the regulator from the community and government. This section also discusses regulator 'culture' — that is, the overall values, beliefs and attitudes of regulators — and how this can impact on its posture.

External pressures on regulators

Regulators face pressures from four interrelated sources: the regulated businesses (discussed earlier), governments, the media and the broader community (figure 2.6). Community views guide the priorities of governments — as they should in a representative democracy. However, there are some risks that communities tend to view as having an unrealistically high probability of occurring (such as air crash disasters), and there are other risks (such as car accidents) that communities tend to underestimate (OECD 2010). It is important that governments focus on actual risks rather than perceived risks when making policy decisions. The nature of risk is discussed further in appendix D.

Figure 2.6 **The regulatory response to risk**



Source: Based on Better Regulation Commission (UK) (2006).

Growth of regulation is testament to the importance communities now place on mitigating risks (PC 2012c). As communities become less tolerant of exposure to risks, regulators are under increasing pressure to justify their activities, and demonstrate how they are efficiently managing risks. As Energy Safe Victoria (ESV) stated:

> Regulators have never been so scrutinised. We can be criticised for acting too late or too soon or not at all. We can be seen as heavy handed or captured by those we are supposedly regulating. We must be sticklers for process and procedure but not so inflexible that we are perceived as pursuing process as an end itself. (ESV, sub. 2, p. 2)

Regulators are frequently faced with calls to 'do something' in response to what is publicly perceived as unacceptable. For instance, in a recent speech, the Chairman of the Australian Competition and Consumer Commission (ACCC) stated:

> Indeed, the most common complaint we face is that we are not doing enough on some front … The complained about action is not actually against the law, and in our view nor should it be — this is by far the most common situation …
>
> For example, when faced with calls for us to block the entry of supermarkets into a market where they have no current presence, because their entry would see an oversupply of groceries, I have explained that while such entry may involve important planning issues, it is not against competition law, and nor should it be. (Sims 2013)

In some instances, however, despite the regulator acting in accordance with their regulatory guidelines and objectives, ministers have become directly involved, answering public calls to act in a manner that is inconsistent with the regulator's risk based approach (box 2.3).

These pressures on regulators lead them to adopt an overly risk averse approach:

> … the risk aversion exhibited by regulators, which business groups rightly see as a root cause of many of the problems they experience, is to be expected in an environment where any adverse event within the regulator's field of influence is held up publicly as a 'failure', while any beneficial impacts on market performance that a regulator may have are not directly observable and go unremarked. Hence the incentives facing most regulators are to err on the side of being strict in their enforcement activities. (Regulation Taskforce 2006, p. 159)

Indeed, the pressures placed on regulators to eliminate (not mitigate) risks were explicitly acknowledged by a former British Prime Minister:

> A civil servant or regulator who fails to regulate a risk that materialises will be castigated. How many are rewarded when they refuse to regulate and take the risk?
>
> Bodies set up to guard the public interest have one-way pressures. It is in their interest never to be accused of having missed a problem. So, it is a one-sided bet. They will always err on the side of caution. (Blair 2005, p. 2)

Box 2.3 **Parliament overrides a regulatory approach**

The Australian Fisheries Management Authority (AFMA) is the regulator tasked with ensuring that the Australian Commonwealth's fishery resources are efficiently managed and sustainably used. One such resource is the Small Pelagic Fishery (SPF).

AFMA manages the SPF in part by setting total allowable catch limits and quotas, and, as a result 'the size of the boat does not matter from a sustainability perspective. … There is no evidence that larger boats pose a higher risk to either the target species or broader marine environment.' (AFMA 2012b, p. 1) AFMA has explicitly acknowledged that 'there are considerable economies of scale in the [SPF] and the most efficient way to fish may include large scale factory freezer vessels' (AFMA 2008, p. 2).

In 2012, a fishing vessel named the *Abel Tasman* sought access to the SPF. The *Abel Tasman* is a 142 metre trawler, capable of catching large quantities of fish and processing the fish onboard, holding them in cold storage until unloaded. This would have enabled the product to be used for higher value human consumption, adding significant value to the resource. On 5 September 2012, the fishing vessel *Abel Tasman* was registered as an Australian-flagged vessel.

Concerns about the size of the vessel were nevertheless raised by a range of community groups (eg Australian Recreational Fishing Foundation 2013), and were highlighted by the media. Notwithstanding AFMA's approach to managing the fishery, on 19 September 2012 the Commonwealth Parliament enabled the Minister for the Environment to 'prohibit fishing by large mid-water trawl freezer vessels' for an interim 60 day period, which was subsequently extended to 2 years (Interim (Small Pelagic Fishery) Declaration 2012, Final (Small Pelagic Fishery) Declaration 2012)). The legislation enabling the declaration required a regulation impact statement, but received a Prime Minister's exemption (Office of Best Practice Regulation 2012).

An independent review of the fisheries management legislation was announced in September 2012 and attracted over 2000 email submissions regarding the *Abel Tasman* (Borthwick 2012). Additionally, formal submissions received by the review expressed concern at the 'Commonwealth Government's ad hoc tampering with the existing structures and systems':

> Given current Ministerial actions, [t]here is now no certainty in the legislation and management that in the past has been regarded as one of the best management systems in the world, and in fact suggests that the political processes' deployed to date may in fact have imploded the good work. This has reduced confidence in the independent body (AFMA)… (Southern Shark Industry Alliance 2012, p. 2).

This recent example demonstrates some of the external pressures that regulators are faced with when adopting a risk management approach.

Sources: AFMA (2008, 2012a, 2012b); Australian Recreational Fishing Foundation (2013); Borthwick (2012); OBPR (2012); Seafish Tasmania (nd); Southern Shark Industry Alliance (2012); *Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Act 2012* (Cwlth); Interim (Small Pelagic Fishery) Declaration 2012; Final (Small Pelagic Fishery) Declaration 2012.

Ultimately, the regulator's job is to mitigate risks, not to eliminate them: 'clearly our tool kits can't always save [communities] from every technical risk imaginable (even if they expect us to do so)' (ESV sub. 2, pp. 2-3). And as acknowledged by DIISRTE:

> A regulator's management of risk cannot be completely eliminated however, regardless of the industry or business activity being regulated. In the majority of regulatory contexts, there are diminishing marginal returns on increasing the compliance burdens on business to reduce risk through the traditional methods of regulation. (sub. 18, p. 3)

If community pressures were such that no failure was tolerated, the government would have to ban the activity, rather than regulate it. Therefore, as long as the industry exists, community, governments and regulators must accept that, on occasion, there will be regulatory breaches. This view is evident, for example, in the risk based approach that the Department of Agriculture, Fisheries and Forestry adopts in managing Australia's biosecurity system, implicit in which is the understanding that, 'detecting an exotic pest, weed or disease within Australia is not a failure of the system if it is detected early and dealt with quickly' (ANAO 2012, p. 11).

As previously acknowledged and discussed further in chapter 4, in some circumstances it is entirely appropriate that a regulator adopt a risk averse posture, for example where they regulate catastrophic risks. Problems arise when regulators are *overly* risk averse. The regulator may focus on mitigating any and all risks so that no regulatory failures occur, and adverse media and political attention is avoided. However, businesses are subject to unnecessary compliance and regulatory costs as a result of the regulator's increased intervention. In addition to the direct economic costs, there are significant costs incurred over time, such as reputational damage to the regulator and foregone industry investment and development.

In an attempt to help ensure regulators devote their resources towards the largest risks, ministerial statements of expectations (and regulators' responses in statements of intent) have been developed (chapter 6). In a review of Victoria's regulatory framework, the VCEC suggested that:

> The ministers' Statements of Expectations could provide an appropriate avenue to give regulators high level guidance on the expected treatment of risk and use of risk-based approaches — including accepting that some risk is unavoidable. (VCEC 2011b, p. 114)

As VCEC has identified, an open acknowledgment by ministers that there exists some level of unavoidable risk may help to ensure that regulators do not become overly risk averse. Further, ensuring that systems are in place to avoid inappropriate

or ad hoc regulatory decisions is important to ensure the integrity of, and business confidence in, broader regulatory systems.

DRAFT RECOMMENDATION 2.2

Public statements of governments' expectations of their regulators should make the regulator's risk management approach and the government's acceptance of, and commitment to, that approach, explicit and transparent. There should be explicit acknowledgment that some risk cannot be eliminated and that the regulator should operate independently, without undue interference from government.

Regulator culture

The culture of regulators is closely aligned with their posture. There is no accepted definition of 'culture', but by way of illustration Reason (1997), referring to Uttal (1983) stated that culture can be thought of as:

> Shared values (what is important) and beliefs (how things work) that interact with an organisation's structures and control systems to produce behavioural norms (the way we do things around here). (Reason 1997, p. 192)

In a regulatory context, culture is an inner organisational attitude, which then manifests as outward actions and communication (Reason 1997). The importance of regulator culture cannot be overstated — it is just as important as the specific actions of the regulator in attaining regulatory objectives (Health and Safety Commission (UK) 1993).

A regulator's values, beliefs and attitudes are typically shaped by the leadership of an organisation and ideally flow through to the regulatory officers 'on the ground'. However, this is not a straightforward process and improved culture at the top has not always translated to changes in attitudes from compliance officers. In a speech to staff on regulator culture, the director of the ESV stated:

> There is an old rule called the 10/80/10 rule. And it applies as much to integrity as anything else. 10% will demonstrate integrity all the time, 10% will sadly be seriously challenged and the remaining 80% will operate on the basis of the prevailing culture – what are others getting away with and what is the boss doing … My job is to inspire as many of you as possible to move into the top 10% or recruit from that top 10% in the population so that it makes up 90% of ESV. (ESV, sub. 2, pp. 4-5)

A similar view was put by the Independent Transport Safety Regulator of New South Wales:

> When an organisation starts to use transactional and logical processes, supported by experience in safety risk management and leadership that is spread throughout an organisation's structure, culture and values are understood and promoted by the whole organisation. This starts to unlock up to 80 per cent of its strategic capacity or potential. (Neist 2012, p. 13)

If a regulator adopts an 'us and them' mentality to regulating businesses, it is highly likely that this will manifest itself as poor regulatory engagement strategies, including an inappropriately compliance focused regulatory culture, potentially compromising good regulatory outcomes. As found by McIntyre and Moore (2002, p. 2) 'a culture founded on confrontation between the regulator and the regulated is not conducive to promoting voluntary compliance'. Similarly, COSBOA stated:

> Some regulators will catch a business person and punish them and consider their job done; the good regulators will catch and fine a business person and consider their job has just begun. The first type of regulator will create a culture of fear and a lack of trust with no real change in behaviours. The second type of regulator will achieve better compliance through education and improved processes and communication. … A regulator who walks into a shop or workshop and orders the owner and the staff around is not useful yet, at times, that is exactly what happens. Sometimes this occurs as a 'one off' until that field officer is trained in professional communications but in other situations it is obvious that there is an aggressive policing culture in the organisation (which probably stems from the head and the executive). (COSBOA sub. 15, pp. 4-5)

As highlighted by McIntyre and Moore (2002), a regulator which is combative towards regulated businesses is more likely to interact with businesses once regulatory breaches have occurred, rather than devoting resources towards alleviating them in the first place.

DRAFT RECOMMENDATION 2.3

Governments must recognise the fundamental importance of regulator culture in influencing engagement practices. Working closely with regulators, they need to ensure that appropriate transparency, accountability and capacity building mechanisms are in place to foster the adoption of a culture — reflected in the actual engagement practices of all staff — that:

- ***promotes a facilitative and educative posture towards business which seeks to achieve regulatory objectives without unnecessarily constraining business activity and growth***
- ***embraces continuous improvement, including critical evaluation of existing practices and opportunities to learn from the experience of other regulators.***

2.5 Conclusion

There is a myriad of factors that can potentially impact upon regulator posture, many of which are outside of regulators' control.

- Ensuring policy makers adhere to good regulation design principles — including adequate consideration of implementation and enforcement issues prior to the creation of the regulation — is critical in fostering the optimal environment for regulators to operate in. Additionally, clear drafting is needed to avoid confusing or conflicting regulatory objectives, or inappropriate regulatory coverage, which can result in unnecessary regulatory overlap or duplication, adding to costs for small businesses.
- When developing new regulatory functions, policy makers need to consider whether the creation of new regulators is necessary, or whether the regulatory functions could be performed by an existing regulator.
- Regulators need to be adequately resourced so they can undertake their regulatory functions effectively. Where regulators are resource constrained, they can be more likely to adopt approaches that minimise their costs, but may not be beneficial to the community. Typically, this manifests itself as a reactive (as opposed to proactive) approach to compliance.
- Regulators need to be given fit for purpose tools so that they can carry out their regulatory responsibilities effectively. Where regulators' tools are insufficient for the range of risks they regulate, they are likely to appear 'too hard' or 'too soft' in their enforcement approach.
- Regulators face pressure from communities, the media and the government in their daily activities. Communities and media can have unrealistic expectations of the government's ability to cure all community problems. Regulators cannot be expected to eliminate all risks and it should be acknowledged that, on occasion, a mitigated risk may materialise. Businesses confidence in the regulator to mitigate risks can be undermined when governments directly intervene in regulatory decisions.
- Finally, a regulator's culture is critical in shaping its posture. However, changes in culture conducive to improved engagement will not be reflected in regulator posture towards business where the values espoused at the top of regulators fails to permeate down to officers on the ground.

3 Is a different approach needed for regulating small business?

Key Points

- Small business people often lack the time and knowledge to innovate in managing regulatory obligations and very few have specialised staff to carry out compliance tasks. As a result, compliance with regulation can be a challenge for many small business people, who mostly want to be instructed, clearly and concisely, as to what they need to do to be compliant.
- Many regulatory requirements give rise to economies of scale in compliance. This means small businesses tend to be affected by compliance costs disproportionately compared to larger businesses because they have less capacity to spread such costs across their revenue or employ specialist staff. This can be a particular problem for small business when there is a downturn in sales revenue.
- That said, regulators should consider the overall costs and benefits to the community when designing their approaches to regulating small businesses. In addition to any potential to lower compliance costs for small businesses, regulators should evaluate:
  - the risk profile of different businesses, and whether there is a relationship between business size and the risk (likelihood and consequence) of an adverse event
  - any reduced benefits from altering the standard of compliance obligations
  - the administrative cost, complexity and potential for errors (or perverse behaviour) from delivering regulations differently to small businesses.
- Where implemented well, the tailored or flexible delivery of regulation to small businesses can reduce compliance costs and sometimes improve rates of compliance. Compared to flexible delivery of regulation, targeting small businesses within the design of regulation (tiering) would tend to be net beneficial in a narrower range of circumstances, and should be informed by rigorous assessment on a case-by-case basis.
- A risk based approach to the delivery of regulation helps to ensure compliance burdens are the minimum necessary to achieve regulatory objectives. It means that small businesses presenting a low risk may be provided with lower cost pathways to manage their compliance obligations. However, to ensure compliance cost savings are achieved and to avoid any drop off in rates of compliance, regulators should:
  - endeavour to meet the needs of small businesses that want clear guidance or other (relatively low cost) forms of assistance to facilitate their compliance
  - ensure their enforcement strategy preserves a sufficient deterrence effect.

3.1 Introduction

Regulation is an inescapable part of doing business but its impacts are more pervasive for some businesses than for others. This may relate to the size of a business and the particular activities they undertake. However, for a given industry or activity, small businesses generally incur higher compliance costs relative to their size when compared to larger businesses. And almost universally, small businesses face greater challenges in understanding and fulfilling their compliance obligations. Recognising these factors, regulators sometimes handle small businesses differently when administering regulation.

Different regulatory treatment can be established as a requirement when policymakers design regulation, or it can be achieved in practice through a regulator exercising discretion in their administration of a regulatory regime. This chapter is primarily concerned with the latter type — differential practices used by regulators during the *delivery* of regulation to businesses and particularly strategies that assist small businesses to navigate their regulatory obligations. Further, to the extent that many regulators can also influence aspects of regulatory design and, in turn, set a standard of compliance, this chapter also assesses different treatment involving regulating small businesses less strictly or perhaps not even at all.

The chapter develops broad criteria to guide regulators' decisions around how tailoring their engagement approach can ease compliance burdens for small businesses *and* deliver net benefits for the community. Where possible, it provides some examples of what different treatment may entail in practice and evaluates the influence of risk (as a key determinant of the benefits from regulation to communities). It discusses whether a risk based approach to delivering regulation (appendix D) is likely to result in the appropriate treatment of small businesses, and why regulators should generally provide guidance and assistance to small businesses even if they are assessed as a lower risk.

3.2 Why compliance is a challenge for small businesses

The road to compliance is generally less familiar and more arduous for small businesses, and therefore there may be some justification for their different treatment by regulators. In particular, small businesses:

- are likely to be more heavily affected by compliance costs compared to their larger counterparts — of respondents to a COSBOA survey who supported different treatment, 80 per cent indicated that regulators should treat small business differently because of the disproportionate impact of compliance costs

- may need extra help in understanding compliance obligations because they have less capacity to comply with regulatory requirements, especially to interpret complex legislation, identify effective ways to manage risks and document their compliance to a regulator — as was acknowledged by 42 per cent of COSBOA survey respondents who support different treatment for small business
- may be less likely to comply and therefore require extra attention from regulators — as was reported by 30 per cent of respondents who supported differential treatment for small business in the PC survey of regulators. (figure 3.1)

Figure 3.1 **How are small businesses different?**
Small businesses supporting different treatment, per cent by reason (n=81)

Source: COSBOA sub. 31, attachment A, p. 5.

How the nature of small business affects compliance

The depth and breadth of compliance responsibilities varies considerably across different types of small businesses, largely depending on risks to communities (and the associated extent of regulation) presented by particular industries. For small businesses operating in high risk areas, such as passenger transport and especially aviation, regulatory compliance forms a central part of a business's operation and cost structure. Conversely, regulatory compliance may be more peripheral to the core activities of low risk small businesses, such as for a sole trading hairdresser or florist.

Many small businesses have a lower capacity to carryout compliance tasks when compared to larger businesses.

- Small businesses tend to have relatively simple systems and processes to support the management of their business, are less likely to employ staff with specific knowledge in compliance and are less likely to be informed about requirements.
  - As was summarised by the NSW Small Business Commissioner: the limited resources, capability and sophistication of most small businesses means that a significant proportion will have insufficient understanding of what needs to be done to comply with certain regulations (sub. 12, p. 2).
  - To the extent that small businesses make smaller scale investment in simpler information management systems and processes, they tend to have higher compliance costs than suppliers that have more advanced systems (Europe Economics 2003, p. 3).
  - Thirty seven per cent of regulators responding to the PC regulator survey 2013 (appendix B) reported that small businesses lack an awareness of their compliance obligations.
  - In many instances, compliance tasks are outsourced to an external party with the required technical knowledge, such as to a financial or legal practitioner.
- A small business owner is frequently also the manager and required to be skilled across a range of different areas of business activity, including compliance activity.
  - The volume of tasks that fall on a small business owner means they are notoriously time poor — 30 per cent of regulators responding to the PC regulator survey cited this as problem for their engagement with small businesses.
  - Compliance responsibilities take away from the time a small business owner can devote to the more pressing task of running their business. As stated by the Australian Chamber of Commerce and Industry, in small businesses:

    > … the owner, senior manager or director has to deal with the paperwork while they instead should focus their attention on business management. (sub. 5, p. 6)
- Many small businesses are new businesses and may face additional difficulties in locating and understanding their compliance obligations. But new businesses are often ill prepared for this complex phase of regulatory involvement and may afford it consideration only during the latter stages of business planning.

Typically, these factors mean that regulatory compliance is less likely to be a source of competitive advantage for most smaller firms — that is, they typically have little incentive or ability to innovate to improve the cost efficiency of their regulatory compliance and instead seek to improve their competitiveness in other ways.

Representatives of small business echoed this view, indicating:

- many small businesses want to be told, simply and concisely, what to do in order to meet their compliance obligations
- small businesses especially value guidance about regulatory requirements that is specific to their business's context and conveyed in 'business language'.

The preference of small businesses for clear advice and guidance is likely to be strongest when regulatory requirements are complex. Indeed, some regulatory requirements are almost indecipherable for small businesses, with a common view that they have been 'written … by lawyers for lawyers' (Bradford 2004, p. 8). As stated by The Tax Institute:

> … some benefits within the tax law are almost off-limits to small business due to the complexity of the rules and the prohibitive cost of obtaining sophisticated tax advice to ensure the correct tax outcomes are achieved (for example; tax consolidation, share buy-backs, and certain fringe benefits tax concessions). (sub 11, p. 2)

Unravelling the relationship between regulatory compliance and costs

Regulations impose direct and indirect costs on small businesses

Regulation requires certain processes and outcomes from small businesses (and regulators). For example, it may require businesses to institute procedures to reduce risks, invest in capital equipment, to submit information and keep records, and to train staff or have additional IT systems. Businesses may also be required to pay fees and charges for permits and licences — usually to recover some of the costs of a regulator's administration. And if found non-compliant, businesses may face penalties, including in some regulatory areas fines or suspension of a licence.

Regulations can also impose indirect costs on small businesses — for example, the compliance costs of the owner completing paperwork outside of normal business hours. But because indirect costs are often hidden or difficult to quantify, they are usually not included in formal analysis of compliance costs (Chittenden et al. 2002, p. 21). In the example above, this means that a small business owner's time may not be costed at its full 'opportunity cost', such as the value of forgone leisure time. These sorts of costs are relatively higher for small businesses than larger ones.

Indirect costs can significantly affect the motivation and decisions of small business owners, including a decision to shut down or grow their business. In particular, given the encroachment on their personal time (or reduction in their implicit hourly wage) to become familiar with new regulatory requirements, a small business may be

discouraged from expanding their business, such as into a value adding activity. The Australian Chamber of Commerce and Industry (ACCI) 2012 survey found that complying with regulatory requirements hampered the growth of over 50 per cent of small business members (sub. 5).

Likewise, indirect costs can be especially important in influencing the rate of new business formation, which typically requires a period of 'unpaid' preparatory effort to identify, understand and implement regulatory requirements. For example, the Western Australian Small Business Development Corporation receives a significant number of enquiries from potential small businesses requesting advice about the complicated regulatory arrangements for entering into a retail premises lease (PC 2008, p. 162).

When can compliance be integrated into the operation of the business?

Disentangling the specific cost of a small business's compliance from the costs they would have invariably incurred in a non-regulated context can be difficult. When compliance tasks are integrated into the business's routine operation and administrative procedures, any increment in total costs from compliance can be small and have less noticeable effects on a business's profitability, entry into markets or on other aspects of their operation. Likewise, regulation may sometimes align with an industry's or business's desired branding and goals. For example, many eco-tourism businesses willingly accept, or even ask for, regulations that support their environmental credentials and provide their business with an advantage over competitors that may be more inclined to tolerate lower environmental performance.

However, it may not be straightforward, or even possible, for a business to embed regulatory requirements within their routine procedures and operating cost structure. Indeed, the objectives of regulation may be in direct conflict with the productivity and competitiveness of their business. In such cases, the costs (including opportunity cost) of regulatory compliance would tend to be more significant. For example, a small hotel may be disinclined to report suspected money laundering activity or take action to stop suspected problem gamblers, since doing so directly erodes their profits from gaming machines (Carson 2010).

While profits would be reduced regardless of business size, for a small business a comparatively higher proportion of their overall revenue may be affected by a particular regulated activity. Therefore, any incentive not to comply may be strongest among smaller businesses given the compliance cost disadvantages they face, but also because they may receive less attention from the community or from regulatory staff, such as through inspections. Further, small business may benefit less from industrywide regulatory measures, such as traceability systems and licensing regimes

to support consumer confidence and access to export markets. For example, Dairy Food Safety Victoria imposes significant obligations and collects licence fees from all participants along the value chain. A large scale dairy food manufacturer may view the requirements as 'not at all onerous' (Victorian Parliament 2012, p. 29) and derive substantial benefits from the entire sector's compliance. However, a small dairy farmer may be less accepting if they perceive any industrywide benefits as less relevant to their business's goals and immediate profitability.

Poor regulator engagement practices can impose unnecessary compliance costs

Of course, businesses must incur some costs to carry out their regulatory compliance tasks. The problem is when such costs are inflated because of poor engagement practices by regulators (or because of poorly designed regulations, which have not been alleviated through a regulator's engagement and delivery approach).

Unnecessary compliance costs impose inefficiencies on businesses of any size, and therefore are an issue relevant to both small and large businesses. However, it is generally accepted that small businesses are affected more acutely than larger businesses. As put by the Australian Hotels Association:

> ... the impact of red tape and compliance costs are proportionally greater when applied to small businesses, often impacting directly on the capacity of the small business to expand or to operate profitably. (sub. 17, p. 5)

Further, unnecessary compliance costs may also undermine a business's competiveness to the extent that they knowingly breach regulations to avoid such costs. Such an incentive is arguably strongest for small business given the lesser likelihood of detection and if there are scale economies related to compliance. For example, while the Chamber of Commerce and Industry Queensland (CCIQ) indicated that the majority of small businesses make a genuine attempt to comply with regulatory requirements, it was also observed that:

> … they simply do not have the time or resources to stay up to date, understand and action everything. Most businesses only do that which is absolutely necessary — that which implies the greatest penalty or is most strictly enforced. (CCIQ, sub. 16, p. 1)

Better modes of engagement by regulators can ease both direct and indirect business compliance costs. For example, good communication strategies can reduce the need for small business people to have to search to find and understand their compliance obligations, especially to translate complicated or legalistic language into actionable tasks (chapter 5).

To what extent does compliance impose disproportionate costs on small business?

Many compliance costs are indivisible, such that they do not vary across a range of output or they do so at a decreasing rate (box 3.1). This can result in scale economies from compliance (box 3.2), which means compliance costs tend to be relatively higher for small businesses (measured as a proportion of input costs or per unit of output).[1]

Box 3.1 **The nature of compliance costs**

- *One-off compliance costs:* are generally 'fixed' — they do not vary across a range of the firm's output — hence giving rise to economies of scale in compliance. Many implementation costs, such as when regulatory requirements are newly introduced or updated, fall within this category and can include new or updated plant or other physical infrastructure, IT systems and software (such as for data storage and management), business restructuring costs, staff training costs and, in some cases, payment for external services to facilitate compliance.
- *Ongoing costs:* are typically variable across a range of output, but may also be fixed, and include, the costs of employed staff and their time (such as a quality assurance manager), consumable materials and inspection costs, and having to compile and send out periodic correspondence to customers and regulators.

Although there is a paucity of recent estimates (sub. 5), earlier empirical studies consistently support the premise that the cost base of small businesses is relatively more affected by compliance than that of larger businesses. Australian studies include Pope (1991); ATO (1997), Walpole et al. (1999), and the Working Overtime Survey for the Small Business Deregulation Taskforce (1996). This relationship appears to hold across various studies, countries and regulatory areas.[2] For example, as Chittenden et al. concluded in their review of the literature:

> … for businesses with less than 20 employees, the compliance costs borne are at least 35 per cent higher [per employee] than for firms with more than 500 staff. This figure must be seen as an absolute minimum. (2002, p. 4)

Unsurprisingly, what is less clear is the *extent* of the disproportionate burden on small businesses. It depends on the cost structure of a business and their competitors, in addition to the range and type of regulatory requirements relevant to

1 In some industries, efficient production scale rarely, if ever, results in the formation of large enterprise. A hairdressing business would normally fall within this category. In such cases, compliance costs do not give rise to a disproportionate burden, per se.

2 Beale and Lin (1998); Chittenden et al. (2000); ENSR (1995); Europe Economics (2003); Hopkins (1995, 1996, 1998); Inland Revenue (1998); Lancaster et al. (2003); SBRT (1998).

their industry and scope of business activity. In some industries, the size distribution of businesses heavily reflects the regulatory environment. For example:

- the regulation of health professionals, including general practitioners, is likely to reduce participation by small or solo practices (Campbell Research & Consulting 2003, p. ii)
- for fresh meat manufacturers, fixed or non-recurring compliance costs (as sources of higher unit compliance costs) are particularly high, with one study of UK businesses finding that fixed costs exceed recurring costs by 140 times (Henson and Heasman 1996)
- compliance may sometimes be so onerous that it cannot be undertaken efficiently by businesses of any size, hence resulting in the formation of specialised businesses, such as for asbestos removal or nuclear waste disposal.

As a result, most studies are reluctant to generalise their findings beyond a single industry or a regulatory area, recognising it could be misleading to offer a 'rule of thumb' that extrapolates results across a very mixed population of small businesses. The exception is a meta-analysis by Chittenden et al. (2002), which made the conservative finding that small businesses bear at least one third higher compliance costs (per employee) than much larger firms. The authors reviewed the literature in a range of countries, including the United States, United Kingdom, Europe, Australia and New Zealand, and assessed the relative impacts on small business in a range of regulatory areas.

Other studies find that compliance costs per employee can be many orders of magnitude higher for small business. For example, the 2007 Report from the Expert Group on *Models to Reduce the Disproportionate Regulatory Burden on SMEs* found:

> On average, where a big company spends one Euro per employee to comply with a regulatory duty a medium sized enterprise might have to spend around four Euros and a small business up to ten Euros. (European Commission 2011, p. 2)

Studies usually find that taxation is the largest single contributor to compliance costs for small businesses (Chittenden, Poutziouris and Michaeleas 2000; European Network for SME Research 1995; Indecon 2006), but that simply reflects that all businesses face such regulation, whereas environmental and other regulations apply more selectively across businesses.

However, when compliance cost estimates are adjusted to reflect that not all small businesses face all regulations, the extent to which a typical small businesses will face a higher than average burden is reduced. For example, the majority of small businesses are non-employing (chapter 1) and can therefore escape employment

related regulations and related compliance costs, including unfair dismissal laws, superannuation, payroll tax and workplace health and safety. When accounting for this factor, the US Small Business Administration Office of Advocacy reduced estimates of the disproportionate burden on small businesses from 30 per cent to 20 per cent higher than average per employee (SBA 1995).

In conclusion, the potential to reduce compliance costs from targeting the design, or tailoring the delivery of, regulation for small businesses is likely to vary appreciably across different businesses. This will depend upon key determinants of any disproportionate burden including their industry and the relevant area of regulation, and their capacity to search for and comprehend their compliance obligations.

Box 3.2 **Scale economies from compliance**

Regulatory-induced economies of scale derive from the lumpy (fixed) nature of many compliance costs, but also because many compliance costs that increase with output do so at a decreasing rate. For example, specialisation of compliance functions in large businesses can achieve unit cost reductions through the process of 'learning by doing', as can the purchasing of compliance resources in larger quantities. As a result, small businesses are intrinsically disadvantaged (or face higher unit costs) from fulfilling regulatory obligations compared to larger businesses, with compliance costs absorbed less readily within their smaller revenue base (or cost structure).

Although a small business's fixed compliance costs will usually be less (in absolute terms) than a larger business's, the scale of a small business's activity may be unable to make full use of the fixed capital or labour incurred for compliance because they are frequently lumpy or indivisible investments. For example:

- in some jurisdictions a food safety supervisor is required to be onsite irrespective of the size of the business or meals served on any given night, with the cost of training and lost work time estimated to be around $700 per supervisor (PC 2009b)
- amenities, including a portable toilet, are required to be provided on a construction worksite servicing 2 or 20 employees (WorkCover NSW 1997, p. 9)
- some information reporting requirements impose broadly equivalent fixed (form filling) costs on both small and large firms. Similarly, the cost of software systems, such as MYOB accounting software, is usually at least partially fixed.

Recognising the additional challenges small businesses can face in meeting the costs of capital equipment or consultancy services to fulfil compliance, assistance is sometimes offered. For example, some statutory workplace health and safety insurers provide a rebate (up to the value of $500 in NSW) to help small businesses cover the cost of installing safety equipment, in addition to offering free safety advisory visits.

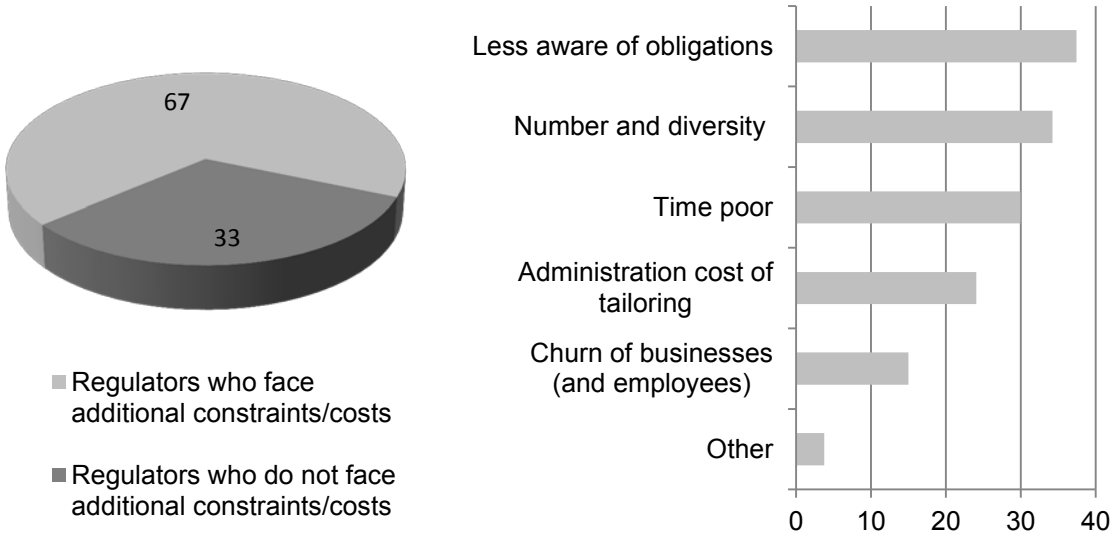
Regulators can also incur disproportionate costs to procure a small firm's compliance

While some regulator costs will often vary with the size and complexity of a business, the fixed nature of many costs (such as for conducting inspections) means that regulators usually face additional challenges and incur higher costs (per unit of business output) to procure a small business's compliance than they would for a larger business. As a result, a regulator can scrutinise a greater share of the total output from an industry by focussing their finite resources on the larger players (Bickerdyke and Lattimore 1997).

Two-thirds of regulators surveyed by the Commission indicated they faced additional constraints or costs to engage with small business (on top of the mostly budgetary challenges in delivering regulation across *all* businesses). The main reasons were that small business are less aware of their obligations and are time poor (figure 3.2).

Figure 3.2 **Additional constraints or costs to engage small business**

Per cent (all regulators, n=175); Per cent by reason (regulators with higher costs, n=118)



Source: PC regulator survey 2013.

However, the extent that a regulator should focus resources on procuring the compliance of larger businesses depends on two inter-related factors:

- how the relative risks (or externalities) posed by businesses vary with firm size. For example, it is sometimes found that small businesses have less incentive or resources to invest in developing the reputation of their business and may therefore pose a higher risk to communities (Gunningham, Kagan and Thorton 2003; Pierce 1998).

- the behaviour of small business and the role of enforcement in effectively deterring non-compliance by small businesses. For example, given their higher unit compliance costs, it is sometimes suggested that small businesses have stronger incentives to not comply with regulation.

It is also important to recognise that small regulators face higher unit costs in delivering regulation to businesses compared to larger regulators (chapter 2). In particular, retention of high quality staff can be an issue for smaller and regional regulators, as was found in the Commission's study into the role of Local Government as Regulator (PC 2012b). This may reduce the capacity of small regulators to effectively monitor risks posed by different businesses and the costs their compliance and enforcement practices impose on businesses. The PC regulator survey found that regulators who adopt a risk based approach or monitor business compliance costs had (on average) 6 to 7 times more staff and budgetary capacity than regulators not adopting such practices.

3.3 Strategies to contain regulatory compliance costs

Cost advantages from larger scale production are a feature of many markets or production technologies, and small businesses employ a range of strategies to reduce the potential disadvantages this can create — for example, to preserve their profitability during low revenue periods, small businesses may attempt to convert some fixed costs into variable costs. This section considers whether small businesses can efficiently control the impact of compliance costs (and other sources of regulatory induced economies of scale) in the same way they do their non-regulatory operating costs. It also investigates how poor regulatory engagement practices can impede the control small businesses would otherwise exercise over their compliance costs to remain profitable.

Difficulties faced by small business in containing compliance burdens

The way regulators engage with small businesses can hamper the strategies a small business might normally employ to reduce the impacts of compliance on their business and maintain their profitability. Inefficiencies can arise, for example, if regulators fail to recognise the challenges many small businesses face in complying with regulations, overlook the fixed (and indivisible) nature of many compliance costs, or are unnecessarily draconian or forceful in implementing new regulation.

In the Commission's assessment, problems tend to gravitate around:

- the length of any transition period to implement new or amended regulatory requirements. According to the ACCI National Red Tape Survey (ACCI 2012), the implementation phase of regulatory compliance is the most costly stage of the overall compliance process for nearly 27 per cent of businesses
- frequent churn in regulatory requirements, an inconsistent regulatory posture and a lack of coordination across regulators for the sharing of information (chapter 5). Based on the VCEC Wallis Survey (2011a, p. 21):
  - over half of all businesses found it difficult to stay up to date with state regulations, with small businesses finding it the most difficult
  - primary industries and construction businesses have found it extremely difficult to keep up to date (with 74 per cent and 63 per cent of small businesses operating in these sectors finding it difficult respectively).
- excessive complexity in regulatory requirements and insufficient or unclear guidance. This may cause small businesses to spend many hours self educating to understand requirements or to pursue high-cost compliance pathways, such as meeting a higher standard of compliance than would strictly be necessary:
  - even in absolute terms, small businesses may spend more time complying with employment regulations than larger firms Chittenden et al. (2002).
- too prescriptive or out-dated compliance requirements, limiting the flexibility of a small business to accommodate their particular circumstances or innovate in how they achieve a standard of compliance. For example:
  - some businesses report that regulators are slow to accept non-standard solutions to improve the safety of manufacturing equipment, which can delay recognition of reduced accident risk by workplace health and safety insurers and discourage businesses from investing in new equipment
  - some participants criticised the Australian Pesticides and Veterinary Medicines Association for being particularly unhurried in accrediting certain new chemicals for safe commercial use (HOIG, sub. 9).
- the strictness of enforcement by a regulator, including whether enforcement is proportionate to the breach and an escalating approach is used (chapter 4). If enforcement is particularly stringent, a small business may interpret their compliance requirements more strictly than necessary — studies find that strict enforcement of regulation constrains business size (Almeida and Carneiro 2008).

It is clearly within the responsibility of regulators to rectify relevant deficiencies in their administration of regulation that gives rise to the problems listed above. To that end, some key strategies are discussed below. First, however, we consider the

performance of a strategy small businesses themselves commonly employ to reduce the impact of a regulator's posture and delivery practices — the practice of outsourcing aspects of regulatory compliance to intermediaries, such as accountants, who can facilitate compliance on their behalf.

Is the use of third parties an optimal strategy for small businesses?

Small businesses may choose to purchase external advice to facilitate their compliance, usually with requirements of a more complex nature, because:

- it *may* reduce direct and indirect compliance costs by relieving a small business owner of what would otherwise be a fixed cost of investing in their own (or another salaried employee's) training and skills development, and may be a particularly effective strategy if compliance requirements are frequently changing
- it can provide greater assurance that the level of compliance is adequate, which is particularly valued by small business if they perceive the consequence of non-compliance as unpalatable, both in terms of any fines, damage to reputation and loss of business income (such as from the suspension of a licence)
- attempts to break down the complexity of regulatory requirements by obtaining advice directly from regulatory agencies may have been futile. As suggested by the Chamber of Commerce and Industry Queensland, businesses are increasingly frustrated that regulators are reluctant to give specific advice:

  > … the result is that businesses either end up being non-compliant or have to seek costly legal/expert advice from consultants. (sub. 16, p. 5)

- as noted in section 3.2, small businesses are 'time-poor' and tend not to have a competitive advantage (or desire to innovate) in compliance, so outsourcing can allow them to focus on their core competencies (Adler 2000; Jennings 2002; Kremic, Tukel and Rom 2006; Quinn 1999; Sislian and Satir 2000). To the extent that regulators offer training and information sessions, these mostly occur within business hours, meaning that attendance results in loss of productive output.

In Australia, third party providers are used widely, particularly to facilitate regulatory compliance in the areas of development and assessment, taxation and superannuation, environmental approvals, occupational health and safety and food safety. Often, the external adviser will deal directly with the regulator on behalf of the small business. For example, some development consultants will handle the submission process for development applications and liaise with the relevant local or state government agency.

Further, as discussed in chapter 5, regulators sometimes leverage off the established relationship between third party advisers and small businesses, by using them to

convey regulatory information to their clients. Similarly, industry associations can provide a useful conduit between regulators and many small businesses, which can sometimes displace the need for a third party's advice. However, rates of membership with industry organisations are usually lower among small businesses compared to larger enterprises, so the use of industry bodies is more likely to offer a complement to, rather than a substitute for, a regulator's own engagement with small businesses.

Outsourcing aspects of regulatory compliance can be a significant cost for many small businesses. For example, a survey of 1200 small businesses found that, on average, over 40 per cent of total compliance costs were incurred engaging external consultants (PC 2006; Small Business Deregulation Taskforce 1996).

Indeed, it is far from proven that outsourcing compliance is an optimal strategy for all small businesses, or for all aspects of compliance. Numerous studies find that the use of third parties for compliance may not achieve compliance goals at lowest cost (Europe Economics 2003, p. 47). A further complication is the need for small businesses outsourcing compliance functions to manage the potential for conflicts of interest; including the possibility that an intermediary may 'create work for themselves', resulting in excessive compliance or risk reduction activity (Kremic, Tukel and Rom 2006, p. 473).

Further, the third party provider may still fail to fulfil compliance obligations, particularly those of a complex nature, which is an outcome that would also be less observable to the business until they are found in breach (and bear the associated consequences). As stated by the UK Better Regulation Executive (BRE):

> Third party support can be more than financially expensive. Poor quality advice and support can also lead some to become unduly complacent, believing — wrongly — that their consultant has enabled them to meet health and safety requirements. Instead, they may have instigated overly bureaucratic processes or actions that are disproportionate, and which do not make their workplaces, their employees, or the public, safer …
>
> Employers are paying for folders of written generic risk assessments and health and safety policies with little or no relevance to their specific workplace as well as for complex paperwork trails which are not appropriate for a straightforward, low risk business. (BRE 2008, p. 38)

While the increasing complexity of regulations may prompt the use of third parties, it can also undermine the business model and profitability of third parties themselves. In particular, accountants and other intermediaries may face higher costs to keep abreast of complex and changing regulations. Depending on whether a third party is able to fully pass on such costs to their clients, they may face reduced profits, a reduction in the use of their services by small business (who may not be able to afford them and choose not to fully comply), and potentially even the demise of their business.

In summary, the cost of using third parties can be significant for small businesses, and it is not clear that outsourcing compliance tasks provides a universally cost effective strategy. On the one hand, this might reflect imperfections in the competitive supply (and consumption) of such services, including principal agent problems. On the other hand, weaknesses in a regulator's administration of regulatory requirements, including excessive complexity and churn in regulatory obligations, may inefficiently raise the cost of procuring third-party services (or increase costs for small business by requiring the purchase of these services).

Strategies for regulators to reduce small business compliance costs

Regardless of the availability of third parties, regulators have an obligation to facilitate business compliance (chapter 5). Particularly if the level of interpretation required extends beyond that which a private adviser can reliably (or cost effectively) offer, regulators should ensure small businesses have access to advice and guidance about their regulatory obligations.

It is important that regulators understand and accommodate the varying knowledge needs and compliance capacities of small businesses, where this is cost effective. Further, regulators must consider the impact that shortcomings in the design or delivery of regulation can have on the ease and costs of small businesses fulfilling their compliance obligations. In particular, excessive complexity, frequent churn in regulatory requirements and a rushed transition can impose unnecessary compliance burdens on small businesses.

Regulators should consider the costs for small businesses to implement new regulatory requirements

More so than larger businesses, smaller businesses may struggle to implement and fulfil new regulatory requirements. Specifically, a rushed transition with an insufficient notification period can prevent small businesses from optimising the timing of investments in compliance tools, limiting their capacity to integrate compliance activities into their 'business as usual' operation.

For example, when a business is approaching a decision to renew its IT system or purchase new software, in many cases, it would ensure any new compliance requirements are also met within those investments. The fixed (and often indivisible) nature of such investments, and their infrequent occurrence, may mean they are more vulnerable to a rushed transition. For example, over 50 per cent of small businesses in a UK survey indicated that the government did not provide sufficient notification for new employment regulations (FPB 2000).

Although a longer transition period will delay the benefits of regulation, a rushed transition may initially procure very low rates of compliance, so the forgone benefits may not be material. Nevertheless, the potential for high compliance costs on the one hand and delayed benefits on the other would require careful assessment of any proposed regulatory change on a case by case basis — for example, the prospect of a catastrophic outcome would generally call for the timelier implementation of a safety improvement.

The Commission appreciates that regulators may have only a limited formal role in determining the way new regulations are implemented, if any at all. However, regulators can usually exercise some degree of discretion in how they go about delivering regulation where there is evidence of substantially higher transition costs. This could involve first concentrating on educating small business (chapter 5) and, at least, initially delaying enforcement activity (chapter 4).

For instance, WorkSafe Victoria provides small businesses with an extended timeframe to complete the declaration of rateable remuneration, which is intended 'to give smaller employers the opportunity to gather the information they require to complete the declaration while continuing to focus on running their business' (WorkSafe Victoria 2012, p. 6).

ASIC allowed an extended transition period over which relevant experience in the credit industry would continue to be recognised before new qualification requirements for credit licensees (including mortgage broking businesses) would be enforced. Such a decision was guided by consultation that revealed small businesses would face fixed transition costs of around $600–$1300 (per key employee) higher than larger businesses (ASIC 2012, p. 15). Not only did this give affected small businesses time to prepare for the upcoming changes, it also provided ASIC with a lead time to develop educational material and raise awareness among the significant number of small businesses affected. (Chapter 5 discusses the importance of pre-testing new requirements and providing intensive education to small businesses with the introduction of new regulations.)

As an alternative to relying on regulator discretion, an extended implementation period may be written into new regulations by governments. For example, under EU legislation small businesses have been afforded an extended period to install health and safety signs in their workplaces, and similarly in the construction industry, to implement changes to the use of workplace equipment. The Commission would be interested to hear of any such examples in Australia.

Regulators should offer standard compliance solutions and outcomes based pathways to fulfil regulatory obligations — a 'hybrid' model

A hybrid model of standardised compliance solutions and outcomes based pathways would meet the varying knowledge needs and compliance capacities of small businesses by allowing small businesses to choose a pathway to fulfil regulatory obligations. Providing such choice allows a small business to self select the level of:

- certainty and instruction they desire in complying with detailed rules and regulations — the adoption of a standard (or prescribed) compliance solution
- risk they are willing to accept and learning they are prepared to undertake in order to develop innovative compliance solutions and potentially lower compliance costs — the adoption of an outcomes based compliance pathway.

Given the generally accepted efficiency gains, including the potential to reduce their own administration costs, some regulators have shifted their administration of regulation towards outcomes based compliance and enforcement.[3] In some instances, legislation has been redrafted to encourage an outcomes based focus — for example, Australian building regulations have been outcomes based since 1996. Such an approach can help to future proof regulation, ensuring its continued relevance and efficiency as risk mitigation technologies and business production processes change over time. It can also encourage a culture of voluntary compliance (chapter 4), since it is necessary for businesses to understand the goals or objectives behind a regulation to avoid the prospect of being found in breach.

The option of outcomes based requirements will particularly benefit those small businesses that are more familiar with the risks their activities present and ways they can incorporate risk reduction activity with the least possible interruption to their business. For example, an innovative small business may alter its production process and technologies to reduce the output of emissions or improve workplace safety, hence avoiding the need to install prescribed control equipment. In fact, regulators can learn from such businesses, and may even modify the prescribed compliance requirements that apply to the balance of small businesses.

In cases where almost all businesses seek full flexibility in how they achieve a compliance standard, it would normally be sufficient for a regulator to provide general advice that outlines the principles according to which a compliance solution will be judged — often termed principle based standards (PC 2004, p. 81). Such advice could outline the objectives of regulation and set a standard of compliance or

[3] One Australian study of large-scale construction projects found that an outcome based approach yielded a cost saving of between 1-5 per cent (PC 2004, p. 82).

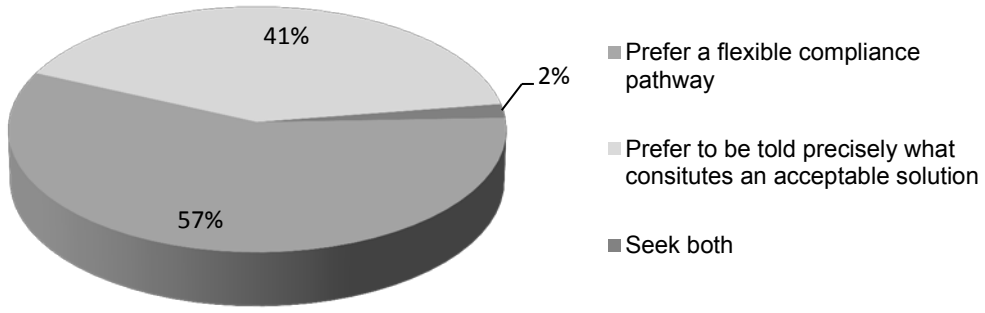
due diligence that small businesses will be evaluated against, but without detailing the process by which compliance could be achieved.

Choice of compliance pathways are offered in a variety of regulatory areas, including building and construction regulation and workplace safety legislation. For example, while a building regulator (or standard setting body) may prescribe exact building methods or materials, they may also approve various alternative solutions to achieve a required outcome.

More widespread use of outcome based compliance necessitates reliable verification methods (at sufficiently low cost) to assess the performance of alternative compliance solutions. Regulators sometimes have to rely on expert advice or thin sources of evidence about the effectiveness of emerging risk reduction techniques (usually demanding a higher tolerance of risk by regulators) (appendix D). Similarly, while a business may seek to comply with the intent of a law or regulation, it is sometimes ambiguous whether they took all reasonable steps that could be expected of them. Retrospective decisions by regulators or courts can provide a precedent for businesses to learn from and adjust their conduct accordingly, but keeping abreast of such information can introduce further compliance costs (although industry organisations and regulators themselves may keep businesses informed of new developments).

Inevitably, however, many small businesses desire the certainty that comes with detailed instruction from a regulator about how to implement a compliance solution that is deemed as acceptable (figure 3.3). Recognising this, even where a shift to outcomes based regulation has occurred, in most cases, regulators continue to produce non-mandatory codes, regulations and guidance material that recommend steps to achieve compliance. Indeed, prescribing what constitutes an acceptable compliance solution can make a regulator's task much easier.

Figure 3.3 **Small businesses are varied — some want scope to innovate others prefer certainty**



Source: COSBOA sub. 31, attachment A, p. 4.

While being optional for small business to access and implement, the availability of prescriptive regulations and guidance can help to educate small businesses and provide them with greater certainty. An extension to this model can involve a regulator accepting that a business is 'deemed to comply' or 'deemed to satisfy' a regulatory standard if they can demonstrate the full implementation of the steps prescribed within a regulatory instrument.

DRAFT RECOMMENDATION 3.1

Given the challenges small businesses face in fulfilling compliance requirements, including their generally lesser capacity to manage compliance and their higher compliance cost structures, regulators should:

- ***where possible, remove any unnecessary complexity in regulatory requirements and associated guidance material, particularly so that low risk small businesses can more effectively manage their own compliance***
- ***set outcome based regulatory requirements, but also offer detailed guidance about acceptable solutions including, where feasible, offering a compliance pathway, which if fully implemented, would deem businesses compliant with requirements.***

3.4 Ways to implement differential regulatory treatment

A set of regulated (or potentially regulated) businesses may be provided differential regulatory treatment when governments or regulators decide to handle their regulatory obligations differently to the broader group. This can occur at every stage of regulation, including in:

- *regulatory design* by policy makers, such as by excluding particular groups from legislative coverage entirely or by simplifying legislative obligations for target groups (often termed tiering or lighter regulation).
- *regulatory delivery* through the use of flexibility by a regulator to make regulatory obligations more implementable for small business (often termed tailoring).

According to the survey of small business by COSBOA, 70 per cent of respondents indicated that regulatory design and regulatory delivery contribute equally to business compliance costs (sub. 31, attachment A).

- Only 20 per cent of small businesses believe the major source of compliance burden stems from the design of regulation.
- Only 10 per cent of small businesses believe the major source of compliance burdens is from the behaviour of regulators when delivering regulation.

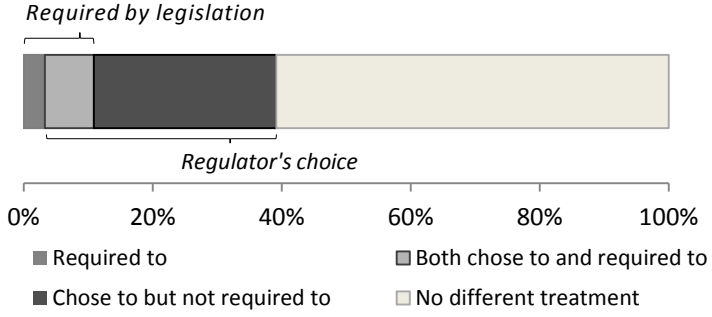
How are small businesses considered in the design of regulation?

Disentangling the effects from the way regulations are *delivered* as opposed to the way regulation is *designed* is difficult. Given this, where aspects of regulatory design lie within a regulator's control, the Commission has assessed how small business issues are formally considered.

Many regulators have considerable flexibility in how they articulate regulatory requirements within legislative instruments (or when developing and approving quasi regulation), such as setting licence conditions, endorsing industry accreditation schemes and formulating enforceable codes of conduct. This is sometimes evidenced through variability in regulatory requirements across jurisdictions. For example, each jurisdiction has a different interpretation (and handling) of the risks at various stages of the meat production process, although the manufacture of small goods is considered high risk in all jurisdictions (PC 2009b). Conversely, regulators in all jurisdictions view it as a priority to reduce volatility in workers compensation premiums for small businesses by applying an industry rate and usually ignoring the claim history (risk) of any individual small business.

Flexibility in setting requirements arises because regulatory objectives are often defined very broadly within the enabling legislation (or any Statement of Intent issued by a Minister). The PC regulator survey found that most regulators have some responsibilities for designing regulation, with 72 per cent responsible for developing policies, and 55 per cent tasked with writing regulation. The survey also found that of the 40 per cent of regulators that provide different treatment to small businesses, one quarter were required to do so under legislation (figure 3.4).

Figure 3.4 **Forty per cent of regulators treat small businesses differently**
Per cent of all regulators responding to the survey question, n=184



Source: PC regulator survey 2013.

Interestingly, although some regulators may be required to treat small businesses differently under legislation, according to the survey, around one third of regulators in such cases did not actually implement (or consider there were sufficient reasons to implement) different treatment. The reasons given for this were mostly that they aim to facilitate compliance by all businesses regardless of size, small businesses do not have different needs, or the majority of businesses are small (suggesting that all regulation is delivered with small businesses in mind).

Some participants have raised concerns about whether small business issues are adequately considered in the design of regulation. In particular, there is a view that small business concerns are neglected when quantifying the costs and benefits of regulations, including when assessing the feasibility of implementing new requirements. Such disregard can result in regulation that unnecessarily diverts small business resources and managerial attention when, in some cases, it may be more efficient to design regulations differently for small businesses. For example, the Department of Industry, Innovation, Science, Research and Tertiary Education suggested that the policy development phase is the main source of excess burdens on small business, which it claims:

> … stem from more endemic shortcomings in government decision making; namely, inadequate consultation with small business in the policy development phase — resulting in unnecessary, excessive regulation that does not consider the constraints of small business or achieve the intended goals of the new regulations … (sub. 18, p. 2)

Similarly, in an examination of jurisdictions' Regulatory Impact Analysis (RIA) processes, the Commission recently found, that:

> Public consultation on policy development is often perfunctory or occurs only after development of draft legislation. (PC 2012c, p. 2)

Where adequate consultation with small business (or their representatives) was identified (for example, during the development of legislative changes affecting taxi driver standards in Western Australia), the report found that significant amendments were made to reduce the cost impacts for small business. It was also found that the impacts of regulation on small business were not widely considered, featuring in only 35 per cent of 182 regulatory impact statements (RISs) analysed by the Commission (PC 2012c, p. 166). Overseas evidence paints a similar picture, with 60 per cent of small businesses indicating they are not adequately consulted in the design of new regulations (Indecon 2006, p. 39).

Even regulators with the best intentions struggle to consult effectively with the large number of small businesses, which is complicated further by the fact that business owners lack the time and resources to participate in consultation processes and are less

inclined to submit information in written form. In the PC regulator survey, regulators identified each of these concerns as a barrier to engagement with small businesses.

The importance of consultation during policy development and implementation is taken up in chapter 5. For the purposes of this chapter, it is relevant to observe that consulting small business is an essential input into quality regulatory design, particularly if:

- small businesses are a significant share of the regulated population
- a regulator is to make informed judgements about whether to target small businesses within the design of regulation
- a regulator is to have an understanding of the size of adjustment costs and ongoing business compliance costs
- the introduction of new requirements is to be appropriately phased and considers any special circumstances for small businesses.

Recognising some of these issues, both Australian and overseas governments have variously put in place institutions and processes to provide small business with more input into the development of regulations:

- some Australian jurisdictions have established a specific agency to champion small business issues, and many jurisdictions have a Small Business Commissioner with a capacity to undertake advocacy work and contribute to the design of regulations affecting small businesses (chapter 5)
- within guidance material for the preparation of a RIS, assessing the impacts of primary legislation on small business is listed by all jurisdictions excluding Queensland and South Australia (PC 2012c, p. 165)
- the Small Business Regulatory Enforcement Fairness Act 1996 (US) requires federal agencies to engage small business in regulatory development through industry publications, direct mail, public meetings and electronic communications.

It is difficult to assess whether these changes produce tangible outcomes, or indeed judge whether they give rise to regulatory changes that are net beneficial. However, they will generally increase the likelihood that small businesses are given additional tolerance and assistance to comply with regulation.

These outcomes are further enhanced where, consistent with agreed RIA requirements, small businesses have been adequately consulted to inform formal analysis of the impacts of options for proposed new or amended regulations. Such consultation should include consideration and analysis of transitional compliance costs that might affect the appropriate pace of implementation.

What does flexible delivery of regulation involve?

Regulatory delivery can involve regulators exercising flexibility when:

- choosing the appropriate tool for enforcement (chapter 4), including by delaying active enforcement for target business groups when implementing new or amended regulatory requirements
- preparing guidance and education material to assist small businesses to understand their compliance obligations and when facilitating consultation from businesses (chapter 5)
- setting the frequency of inspections and reporting requirements, or permitting the use of more streamlined processes to document compliance for different groups of business (chapters 4 and 5).

While the extent of discretion varies, most regulators have some flexibility to tailor their delivery of regulation to assist small business to understand and fulfil their compliance obligations. In many instances, such tailoring simply involves a regulator adopting a more client focused model of service delivery and implementing process improvements to recognise and, where appropriate, accommodate the needs of small business. For some regulators, successful tailoring would require improved data and information, including on business compliance costs and the effectiveness of different strategies in actually assisting small businesses.

By exercising discretion in implementing regulation, a skilled regulator can transform a set of ill defined or cumbersome regulations and achieve sound regulatory outcomes with the lowest possible impost on businesses. Similarly, a regulator can take legislation that is designed to be universally applicable to all businesses and, by choosing judiciously how it should be delivered, actually reduce costs for small businesses while maintaining or even improving compliance outcomes.

Figure 3.5 shows that where (the 36 per cent of) regulators use their discretion to provide different treatment for small businesses, it is most commonly implemented through tailoring forms and factsheets, simplifying requirements and reducing fees.

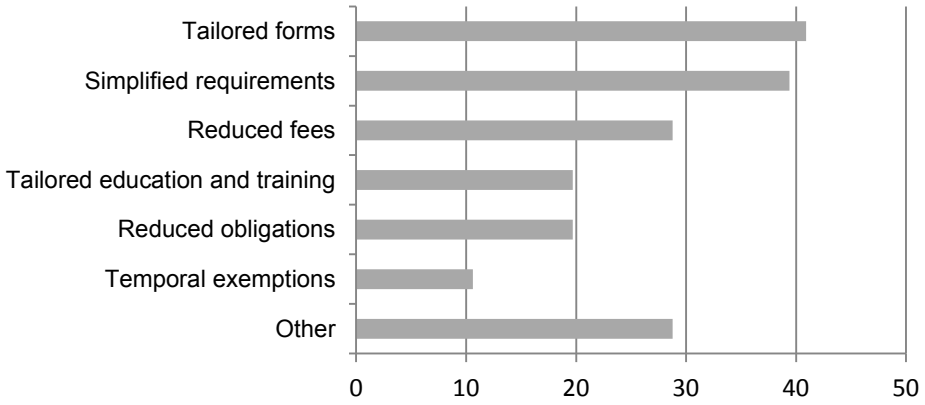
The importance of how regulators deliver regulation and go about achieving regulatory objectives has long been appreciated by the business community, who necessarily experience, but are powerless to influence, the posture (and culture) of regulators. As stated by Business SA, a regulator's behaviour towards small business:

> … can have almost as much of an impact as the regulation itself. (sub. 3, p. 1)

Similarly, the Australian Hotels Association identified that:

> … it is most often the interpretation of planning laws, rather than the laws themselves, that are the source of obstruction to the desirable improvement of licensed premises which serve the local community. (PC 2011b, sub. 56, p. 4)

Figure 3.5 **Types of different treatment provided for small businesses**
Per cent of regulators providing different treatment, by type of assistance (n=66)



Source: PC regulator survey 2013.

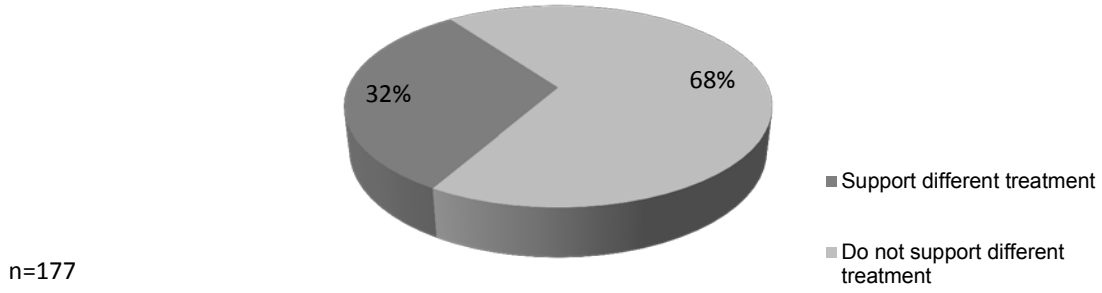
3.5 When is different regulatory treatment appropriate?

Around two thirds of regulators do not practice or do not support different treatment of small businesses. The main reasons for this given by regulators are that the regulator aims to facilitate compliance by all businesses regardless of business size, or because they view small and large businesses as having similar needs (figure 3.6). Further, because the jurisdiction of many regulators may largely (or only) apply to small businesses, the standard delivery of regulation would already accommodate small business needs — this was the reason given by 34 per cent of regulators not supporting different treatment (PC regulator survey 2013).

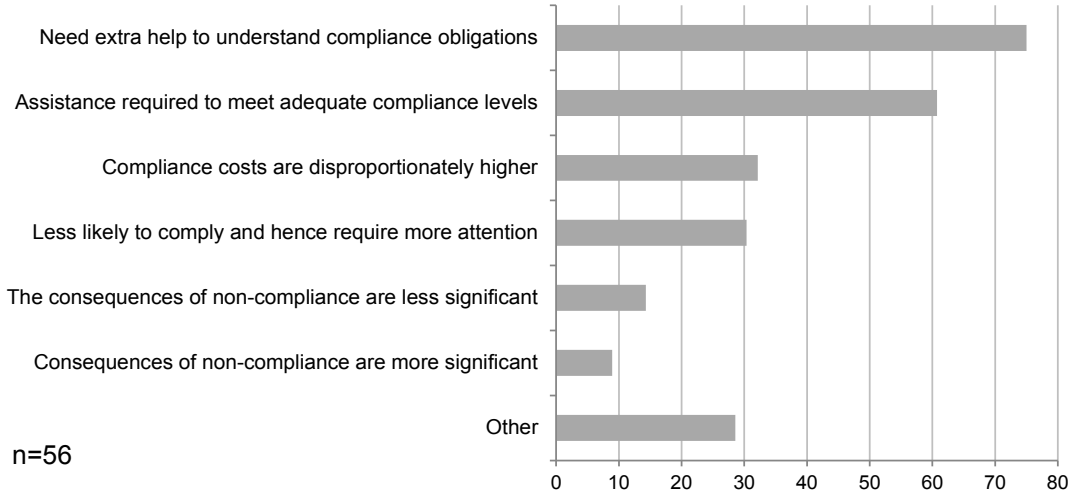
Of the one third of regulators that did support different treatment for small businesses, the main reasons given were that small businesses need help to understand compliance requirements and that compliance costs are disproportionately greater for small businesses (PC regulator survey 2013).

Figure 3.6 **Regulators' views on the merits of different treatment**

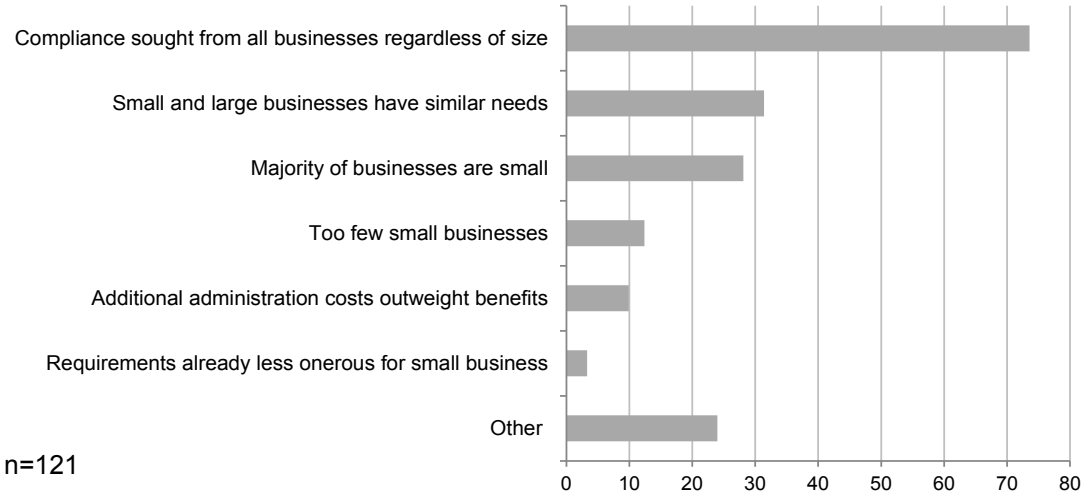
The majority of regulators do not support different treatment for small business



Reasons why some regulators support different treatment (per cent)



Reasons why some regulators do not support different treatment (per cent)



Source: PC regulator survey 2013.

Do higher business compliance costs warrant different treatment?

The relationship between business size and the costs of regulation suggests it may be worthwhile considering ways to contain such costs. As discussed in section 3.4, this could involve either explicitly altering the content of regulation for small business or tailoring the delivery of regulations. However, in deciding whether or not to proceed down either path, a regulator must evaluate whether there is a realistic prospect of achieving net benefits for the community (box 3.3).

Box 3.3 Different treatment of small business must deliver net benefits

The opportunity to achieve net benefits from providing special regulatory treatment to small business is determined by the effect on:

- the benefits of regulation (costs of non-compliance)
- the cost of compliance for businesses
- the benefits from any increased competition resulting from reduced compliance costs
- the cost of enforcing and administering regulatory requirements
- the cost (and complexity) of targeting small business, including:
  - the cost of information collection
  - the risk of calibration errors when specifying a small business target group
  - the likelihood that business will alter their behaviour in response to thresholds.

Differential design of regulations alters regulatory outcomes

Enshrining different treatment for small businesses within the design of regulation may affect the standard embodied within legislation, and therefore alter the level of benefits that flow from regulation. In addition, there may be other potential drawbacks from allowing some businesses to comply with lower regulatory requirements, including:

- the costs for a regulator of administering different regulatory requirements or exclusions for small businesses, which may not be trivial. As found by Bradford:

  > … absent transaction costs, size based exemptions can be efficient. But exemptions do have transaction costs, and those transaction costs complicate the analysis, making it less likely that any particular small business exemption is efficient. (2004, p. 25)

- the cost of wasteful strategic behaviour by businesses seeking to escape regulation. For example:
  - in the UK, analysis by Chittenden et al. (2002, p. 37) found evidence of substantial distortion of business behaviour from the VAT registration threshold, particularly for businesses with annual turnovers between £30,000 and £65,000

  - in Australia, studies suggest that the average excess burden of payroll tax may roughly double (and the marginal excess burden at least triple) when distortions in business behaviour associated with the tax free threshold are taken into account (Dixon, Picton and Rimmer 2002; KPMG Econtech 2010, p. 63).
- the information costs of targeting regulation to small businesses and the unavoidable trade off between:
  - tiering that is well-targeted and, therefore, less likely to have calibration errors
  - the simplicity of universally applied regulation that while being net beneficial on average, could subject a large number of businesses to regulation that actually generates a net loss.
- the costs to businesses which must establish whether or not they are exempt or can avail themselves of lighter regulatory requirements.

Despite the considerations above, it is an empirical issue whether it is appropriate for regulators to alter the design of regulation for small businesses. Case-by-case evaluation is the appropriate approach, which precludes definitive conclusions — a requirement that the NSW Business Chamber also acknowledged when contemplating the application of regulatory tiering:

> A number of factors need to be considered to determine whether regulatory tiering is appropriate. … The Chamber's overall view is that the rationale for regulatory tiering needs to be considered on a case by case basis. (sub. 25, p. 2)

Previous analysis specifically considering the transaction costs and other pragmatic hurdles associated with regulatory tiering concluded that, in most cases, regulation should apply to businesses of all sizes but there may be greater scope to *deliver* regulations more flexibly:

> The most clear cut justification for easing the regulatory burden faced by small business can be found not in the differential application of regulatory requirements, but in the area of regulatory delivery. (Bickerdyke and Lattimore 1997, p. xvi)

Tiering of regulatory requirements for different sized businesses has been a central pillar of the US regulatory system for many years and has gained traction in other overseas jurisdictions, most recently in the UK and EU.[4] Designing regulatory requirements differently for small businesses occurs less extensively in Australia, with only 10 per cent of regulators required to implement special provisions for

[4] The Regulatory Flexibility Act (US RFA) of 1980 provides the basis for different regulatory treatment of smaller businesses. The RFA was later strengthened by the Small Business Regulatory Enforcement Fairness Act 1996, which allows small business representatives to challenge agencies on proposed regulations and their consistency with the RFA.

small business according to legislation or some other formal directive (figure 3.5). Based on the responses to the Commission's survey of regulators, such requirements tend to be:

- most evident in taxation, superannuation and financial regulation, and privacy and liability laws — implemented by around one-third of such regulators
- nonexistent for food safety (apart from exemptions for some small egg producers) and planning regulators.

Tailored delivery usually maintains regulatory outcomes

Treating small businesses differently need not necessarily involve regulating small businesses less strictly than large businesses or compromising the benefits of regulation to the community (NSW Small Business Chamber, sub. 25). In fact, it can allow a capable regulator to reduce compliance costs for small business, but also achieve higher rates of compliance — a win-win for business and the community.

As was previously concluded by the authors of an Industry Commission publication, if the flexible delivery of regulation is done well, it can:

> … decrease regulatory costs, by easing compliance and providing better information to those firms having the greatest difficulty with regulation. And unlike tiering, flexibility in the way regulations are delivered to businesses does not weaken the standard or objective of a particular regulation or tax — safety, emissions, tax rates etc — and so cannot plausibly lower the benefits of a regulation. In fact, by lowering compliance costs, it may increase actual compliance and increase social benefits. (Bickerdyke and Lattimore 1997, p. 47).

Submissions also recognised that flexibility in the delivery of regulations can preserve, or even improve, regulatory outcomes while easing unnecessary compliance costs on business. As was observed by the Australian Institute of Public Accountants:

> There is a difference between taking a different engagement approach and applying the law differently. The law should be enforced consistently, irrespective of who is being regulated. However, good regulators are aware that small businesses are different in management practices and resources. The way a regulator 'engages' can be different, yet still result in a fulsome implementation of the law. (sub. 29, p. 6)

The CCIQ similarly observed that for various reasons statutory instruments:

> …must be broadly developed on a one size fits all basis. Therefore it is vital that those responsible for implementing and enforcing regulation recognise and accommodate the particular circumstances of small and medium businesses … (sub. 16 p. 2)

Of course, if poorly executed, tailoring the delivery of regulations to small businesses could squander the potential gains from regulation for the community, or raise compliance costs for businesses. To minimise the risk of inappropriate tailoring, regulators must:

- respond promptly to any change in business conduct that could dilute regulatory outcomes
- monitor whether any additional regulatory administration costs are offset by the reduction in compliance costs for small businesses (and any societal benefits from improvements in rates of compliance).

Although tailoring might initially put increased pressure on a regulator's resources, over the longer term, tailoring the delivery of regulation can actually reduce administrative costs for regulators. For example, the upfront cost of developing simple and concise guidance material (chapter 5) can reduce reliance on physical inspections as a relatively high cost means of educating small businesses (chapter 4). Also, compared to adopting a strict definition of small business, in order to exclude small businesses within the design of regulation, tailoring is less rigid, with small businesses usually able to self-identify whether they need extra assistance.

Summary

In summary, any different regulatory treatment for small business should have a realistic prospect of delivering net benefits to the community, which requires assessment on a case by case basis. While small business may have distinct characteristics that affect their costs and ease of complying with regulation compared to large business, their size does not alone provide a cogent basis for regulators to *automatically* treat their regulatory obligations differently. Rather, regulators must have the capacity to weigh up many different factors, which are likely to vary substantially across industries, regions and over time.

The appropriateness of discriminating based on business size is likely to be increased if it provides a low cost, reliable and easy to implement proxy for a range of other factors that also drive the benefits of regulation. For example, looking at the size of a business may provide a useful window into the relative risks a business's activities pose for public safety and community welfare. (The relationship between business size and regulatory risks is discussed in section 3.6.)

DRAFT RECOMMENDATION 3.2

Governments and regulators should provide different treatment for small business wherever this would maximise net benefits to the community. When designing such regulation, governments and regulators should undertake formal regulatory impact analysis, including consultation with small businesses and the community, and specifically consider:

- ***the potential to reduce unnecessary compliance costs for small business, including transitional costs that might affect the appropriate pace of implementation of regulatory requirements***
- ***the administrative cost, complexity and potential for distorted business behaviour from altering the content of regulation for small businesses***
- ***the likely change in compliance outcomes and any risk to regulatory objectives.***

Equity and social considerations

Section 3.2 established that small businesses often face cost disadvantages when complying with regulation compared to larger businesses, hence tilting the size distribution of business to favour larger market shares. While such disadvantage does not necessarily provide economic grounds to treat small businesses differently, it may give rise to distributional (or equity) concerns.

Concerns among small businesses are likely to emerge when new regulatory requirements are introduced. Further, small business owners may be particularly aggrieved when the implementation of new compliance requirements imposes substantial fixed (or indivisible) costs, and especially if they are provided with an insufficient transition period or not properly consulted about the likely impacts on their business.

Despite the potential for the introduction of new compliance obligations to lower the returns to an owner and deter new entrants, it is not clearly of concern if additional compliance costs are the minimum necessary to achieve regulatory objectives and can, at least, partially be transferred to consumers. At the margin, however, an increase in regulatory compliance costs may mean that the profitability of a small business declines, such that the owner decides the return on their time and effort is inadequate, and therefore ceases trading. The Commission would be interested in hearing any examples of such outcomes.

The demise or loss of small businesses is a natural and expected outcome of a market environment, resulting from shifts in consumer preferences and changes in

technologies — often spurred by the formation of new or increased profitability of other small businesses.

Assuming the basis for introducing new regulation is well justified (although this is not always the case (PC 2012c)), governments should seek to address distributional concerns as directly as possible. Assistance should not attempt to prop up small businesses that are no longer sustainable over the long term, and should avoid distorting prices and competition. For example, it may be appropriate to assist a small business owner to retrain and gain other employment. Further, because the owner of a small business typically contributes most, if not all, of the operating capital, they may be able to access other forms of welfare support until they 'get back on their feet'.

3.6 Does a risk based approach result in the efficient treatment of small businesses?

The previous section established that to be justified, any instance of different treatment for small businesses must deliver net benefits to the community, with business size alone not providing a cogent basis to deliver compliance and enforcement differentially. Rather, a range of business characteristics should be considered. Apart from evaluating business compliance costs and their own administration costs, regulators should also assess the risk to regulatory objectives presented by any particular group or type of business.

Among a range of potential determinants of risk, regulators must resolve whether small businesses generate more or less externalities (harm to the community) than larger businesses, including whether they are more or less likely to comply. As is widely accepted:

> … to decide if regulation should be lenient towards small firms, we need to first understand whether small firms are less likely, equally likely, or even more likely to engage in illegal behaviour. … If, for example, the empirical evidence shows that small firms are in fact more likely to engage in illegal behaviour, then even if the firm's costs of compliance may be higher, societal benefits from imposing reporting requirements on small firms would also be greater. (Anginer et al. 2012, p. 3)

This section assesses whether a regulator's focus on risks results in the appropriate treatment of small business. Appendix D discusses the broader merits, and means, of regulators implementing a risk based approach when delivering regulation.

What is a risk based approach?

A risk based approach to delivering regulation ensures lower risk businesses can operate without unnecessary intrusion from regulators. In principle, it seeks to align the costs and benefits of regulation. In particular, under a risk based approach, the compliance costs for business and administration costs for regulators will be proportionate to the risks posed to regulatory outcomes and, in turn, to the community. For example, under a risk based approach, lower risk businesses may be subject to fewer inspections and less frequent reporting obligations, which can reduce costs for both businesses and the regulator. Conversely, higher risk businesses may face additional compliance costs, particularly if scrutinised more closely by regulators.

In some regulatory areas, primary legislation or other regulatory instruments require regulators to adopt a risk based approach. But, even if legislation or statements of ministerial intent do not specifically mention a risk based approach, most regulators:

- have sufficient discretion to embed a risk based approach into their decisions and engagement practices, including when defining what constitutes acceptable regulatory outcomes from their compliance and enforcement activities
- are faced with budget constraints that necessitate the targeting of their regulatory effort and resources to activities yielding the greatest possible reduction in risk to achieving regulatory outcomes — that is, focussing on higher risk businesses.

Based on the application of accepted steps (appendix D), a risk based approach provides a process by which regulators can systematically identify, analyse and appropriately respond to public risks. Such a structured approach to evaluating risk allows regulators to allocate available resources (and impose compliance costs on business) to achieve regulatory objectives most efficiently. Importantly, the use of a risk based approach commands recognition that:

> Not all risks can be reduced to zero and tradeoffs in risk reduction measures are inevitable. (OECD 2010, p. 11)

According to the 2013 PC regulator survey, 70 per cent of regulators adopt a risk based approach to guide their compliance monitoring and enforcement, which was applied most frequently to determine inspections and auditing activity.

While as a longer term proposition the adoption of a risk based approach should deliver administrative efficiencies that may reduce resourcing pressures for regulators, its implementation is not costless given:

- the added complexity and need for adequate data and information to accurately measure risks, which can impose costs on both regulators and business who may have to submit more detailed information

- the need to train staff in how to perform risk assessments and develop systems that translate those risk assessments and scores into efficient and effective compliance and enforcement activity.

As such, some regulators could initially require additional resourcing to develop and implement a sufficiently structured and robust risk based framework — not only to refine the allocation of their existing compliance and enforcement activity, but also to give proper attention to the compliance pathways they offer to lower risk businesses. Currently, less than 20 per cent of regulators monitor the costs imposed on business from their administration and enforcement practices (PC regulator survey 2013). Hence, the majority of regulators would have no reliable information upon which to tailor the development of appropriate compliance pathways for lower risk businesses — many of which may be small business.

Regardless of the resourcing available to regulators, given the costs to implement and continually improve a risk based regime, regulators should pursue refinements only to the extent that it can deliver *net* benefits to the community (appendix D). Greater sophistication in risk analysis would generally be more feasible when:

- there are existing sources of information and intelligence on the risk profile of different businesses
- the consequences of a risk are particularly high, but derive from a diverse population of businesses
- compliance and enforcement resources are limited, so targeting of regulator effort to high risk businesses is essential to reduce priority risks and allow regulatory objectives to be met.

What is the relationship between business size and risk?

For small businesses, the impacts of regulators adopting a risk based approach are not inherently obvious — it is an empirical question that is likely to vary across individual businesses and also depending on the industry, region, the area or objectives of regulation and over time.

On the one hand, the *consequence* of harm posed by smaller businesses is generally less than larger businesses, with 14 per cent of regulators that treat small businesses differently considering lower risk to be a factor warranting different treatment for small businesses (figure 3.6).

However, the assessment of risk should also consider the *likelihood* of harm materialising. In particular:

- some smaller businesses may have lower knowledge of their compliance obligations or have less incentive to invest in compliance
- some larger businesses may have more sophisticated knowledge of their compliance obligations and also have business incentives that align with compliance, such as to minimise reputational damage associated with an adverse event.

In these circumstances, the lower likelihood of small businesses complying may present a greater threat to regulatory outcomes *not* being achieved — a view held by around 30 per cent of regulators that treat small businesses differently (figure 3.6).

In some regulatory areas or industries, a business's size may provide a sufficiently robust, albeit indirect, predictor of risk. There is evidence of a variety of regulators affording less regulatory attention to (or requiring less compliance activity from) small business, given their assessment of small businesses posing a more limited risk of potential harm. For example:

- the Australian Tax Office (ATO) considers the majority of small businesses present a low risk to tax revenues. Based on the ATO's risk differentiation framework, 86 per cent of SMEs are classed as low risk taxpayers, while 11 per cent are categorised as a medium risk and 3 per cent as higher risk
- the *Privacy Act 1998* (Commonwealth), as enforced by the Office of the Privacy Commissioner, automatically excludes small businesses unless the scope of their business activity falls within identified categories deemed as a higher risk (such as if they handle or trade personal information; provide health services or operate a residential tenancy database; or fall within anti-money laundering or counter terrorism legislation)
- small bars in New South Wales and Victoria are generally assessed as being lower risk, with access to streamlined licensing processes and reduced fees
- the risk prioritisation system adopted by the anti-money laundering regulator, AUSTRAC, exempts small businesses with fewer than five employees, and otherwise only regulates small business undertaking higher risk activities, including micro lending businesses (Fast Access Finance, sub. 20; AUSTRAC, sub. 30)
- small egg producers in NSW and Tasmania are exempted from having to hold a licence or participate in quality assurance programs (sub. 28; PC 2009b).

In conclusion, in situations where the risk and size of a business are positively related, the application of a risk based framework to compliance and enforcement may appear to result in the different treatment of small businesses by a regulator. However, such

an outcome simply reveals that the regulatory treatment of small business is appropriate — reflective of the costs and benefits of regulating small business.

Why might some small businesses present a higher risk?

Some small businesses may present a very high risk and are deliberately given extra regulatory attention. One factor that may contribute to higher risk is a lack of comprehension among small businesses about the risks associated with certain activities. For example, the NSW Food Safety Authority assessed that small independent bakeries may not always have adequate knowledge of hygienic practices relevant to the type of products they sell, particularly Vietnamese style pork rolls (which resulted in the largest Salmonella outbreak in Australia) (NSWFA 2008). The Food Authority consequently undertook intensive education of targeted bakeries to reduce the likely incidence of adverse events in the future.

Repeated non-compliance or adverse regulatory outcomes can also indicate higher risk. Rather than simply misunderstanding regulatory requirements and the importance of reducing the incidence of adverse events, some small businesses may compromise their compliance in an attempt to reduce regulatory burdens. The National Transport Commission (NTC) drew attention to the possibility of more systemic non-compliance among owner-operated truck drivers, who generally face fierce competition, tight profit margins and have strong incentives to cut costs, including by not complying with regulation:

> Owner operators interviewed for a recent project state that margins are tight and competition can be fierce, encouraging some to either overload their vehicles or speed up their trips to enhance profitability … owner operators can be vulnerable to significant financial stress. Threat of repossession of financed vehicles and loss of the family home where it is offered as collateral are real concerns for owner drivers. (NTC. sub 1. p. 1)

In summary, based on the scale of potential harm, at first inspection an individual small business may not be viewed as a priority for regulators. However, regulators should also consider the likelihood of non-compliance, which could give rise to an assessment of higher risk.

How should regulators handle lower risk small businesses?

There are various options for regulators to impose a lower compliance burden on low risk small businesses, while broadly maintaining compliance with a regulatory standard. Sometimes, such options involve a shift away from classic statutory regulation towards either self- or co-regulatory approaches. For example, regulators may devolve or delegate certain regulatory responsibilities to third parties, including

to an industry or non-government body. Handing over such responsibility can also lower the costs of administering regulation, since other parties may have superior knowledge and expertise about how best to manage risks. It can also leverage off the pride and loyalty within a profession (Bartle and Vass 2005) and take advantage of established conduits for communication — for example, a small business may be less threatened and more receptive to advice and direction coming from an industry organisation than they would a regulator (chapter 5). Market based mechanisms may also provide an efficient option to manage some relatively low risk activities.

However, as discussed in chapter 4, there are reasons for regulators to be cautious about delegating the detailed implementation and achievement of regulatory objectives to third parties. Principally, concerns relate to the potential for conflicts of interests — that is, whether such approaches correctly prioritise the public's interests over the private interests of a business or industry. Nevertheless, such challenges can generally be avoided if delegation is limited to the handling of relatively low risks and effective systems are established to support transparency and public accountability.

In fact, co-regulatory approaches are becoming more common as a complement to a risk based approach, and also with the rising concern about regulatory burdens. For example, the English Farming Regulation Task Force (Macdonald 2012) suggested that regulators use membership of an accredited private assurance scheme as a means to assess risk and targeting of inspections. Likewise, recognising that market provided services are usually lower cost, many Australian building, food and vehicle safety regulators recognise assessments by private inspectors.

Alternatively, regulators may be able to make relatively simple changes to their own administration of regulation that reduces costs for low risk small businesses. For example, as discussed in chapters 4 and 5, many regulators reduce the frequency of reporting obligations, allow self-assessment and reduce onsite inspections.

In addition, some regulators operate accreditation programs to profile the risk status of small businesses. But, rather than using accreditation for the conventional 'gatekeeping' purpose of determining a business's right to operate, such programs are used to differentiate between businesses. For example, importers and exporters who become accredited under the Australian Customs Service's Accredited Client Program are deemed to be low risk and receive tailored arrangements, including faster goods clearance, reduced costs and more efficient document processing (King & Wood Mallesons 2012, p. 82).

Regulators should be careful not to overlook low risk small business

Regulators may be tempted to overlook the compliance and education of low risk small businesses under a risk based approach, since the return to the regulatory resources allocated may not be viewed as worthwhile. However, such a strategy fails to recognise the incentives and capacity of small businesses, including:

- the importance of effective deterrence through surveillance and enforcement activity to discourage non-compliance by small businesses that perceive they may escape regulatory attention
- that many small business face challenges in understanding and executing regulatory requirements, particularly more complex obligations.

Concerning the first point, weak compliance behaviour from small businesses usually arises because there is an expectation of not being caught. This accords with studies that typically find enforcement activity has a cumulative deterrence effect on the consciousness of regulated small and medium size businesses. For example, as observed by the CCIQ (sub. 16) and similarly found by Gunningham et al. in the area of environmental regulation:

> … deterrence was of far greater concern to small and medium-sized enterprises than it was for large ones … large firms proactively sought out solutions that substantially mitigated compliance costs (and occasionally even saved money overall) in ways that boundedly rational small companies, particularly electroplaters, did not. (2005, p. 313)

The latter point simply recognises that a regulator's engagement with small businesses, including via inspections, provides a conduit for education and communication. Excessive withdrawal of a regulator's engagement under a risk based approach could therefore undermine regulatory outcomes, especially if a small business finds it harder and more costly to obtain information regarding their compliance obligations. Studies find:

- many small businesses welcome inspections to be reassured they are meeting compliance requirements and to draw on inspectors' knowledge (NAO 2008).
- in the absence of inspections, small businesses may have low awareness of what regulations apply to them, not know where to search for advice from government or regulators, and find regulatory language and the demarcations between the roles and responsibilities of regulators confusing (BRE 2008).
- under a risk based approach the drop off in inspections may compromise effective and efficient deterrence, and actually increase costs for some small business. As summarised by Europe Economics:

> Open and proactive contact with FSA supervisors may reduce compliance costs and increase compliance quality … However, the FSA's risk based approach to

> monitoring will have reduced the regularity of contact with supervisors for many smaller firms: this finding suggests that this reduction may be generating costs for firms as well as benefits. (2003, p. vii)

While it is clear that a regulator should devote some attention to facilitating the compliance of low risk small businesses, the question is — how much? While this is an empirical matter, it can be noted that the returns to procuring the compliance of low risk small businesses may not be especially high, so a regulator must invest prudently in procuring their compliance. (Approaches to compliance and enforcement are explored in chapter 4.)

3.7 Conclusion

Small businesses generally have more limited compliance capacities than larger businesses and can face disproportionate costs in fulfilling regulatory obligations. Given these disadvantages, there are clear reasons why all regulators should carefully consider ways to reduce the compliance cost burden on small businesses and improve the outcomes from regulation to the community. Any such endeavour need not involve regulating small businesses less strictly, but rather, would mostly involve regulating them more flexibly, closely guided by information on:

- the cost burden for small businesses and the extent to which they may be disproportionately affected by particular compliance obligations compared to larger businesses
- the relationship between a business's size and the risk they present to regulatory objectives (assessing both the magnitude and likelihood of potential harm to the community) and considering any alternative key drivers of risk
- whether compliance costs for small businesses are generally commensurate with the level of risk presented
- the effectiveness of guidance material, checklists and other sources of communication that have been made accessible to small businesses (chapter 5)
- the overall change to the cost of administering regulation, since better engagement may be more expensive for regulators to provide.

4 Compliance and enforcement strategies

Key points

- The regulatory burden borne by businesses, including small businesses, is substantially impacted by regulator approaches to managing compliance and enforcement.
- Most small businesses want to meet their compliance obligations and want to see regulations enforced effectively and consistently within their industry.
- For many businesses, the level of risk presented by their activities determines the extent to which their compliance is monitored and there is typically some degree of 'escalation' in regulator response to non-compliance.
- However, some businesses are incurring unnecessary compliance costs because regulators are not always consistently and systematically implementing a risk based approach to compliance management and enforcement.
- Compliance costs for business and administration costs for regulators could be reduced, while maintaining (or even enhancing) regulatory outcomes, with the wider adoption of leading practices, including:
  - greater efforts to facilitate compliance and more consistent use of discretion to ensure minor breaches are dealt with in a proportionate manner
  - reducing the number of inspections, where justified by risk assessments, and better coordination of inspection activity with other regulators
  - appropriate recognition of industry and other third party certification processes and outsourcing of inspections, where cost effective and supported by suitable transparency and accountability mechanisms
  - public commitments to target timeframes for key processes and decisions
  - increased transparency and accountability of processes and decisions to ensure impartiality and greater consistency.
- Key differences between regulated businesses and between regulators — for example in the nature of the industry, the risks being regulated or institutional arrangements — mean that the merits of applying different practices, at a detailed level, need to be considered by regulators on a case-by-case basis.

4.1 Introduction

The adoption by regulators of leading practices in compliance management and enforcement can contribute greatly to the achievement of the regulation's underlying objective, and can reduce the costs of attaining a particular level of compliance. By contrast, poor regulator practices can discourage compliance, make inefficient use of scarce government resources and add to business costs and delays. Even where regulation is appropriate and well designed, poor enforcement practices can risk rendering it ineffective, or unduly burdensome, or both. Indeed, as discussed in chapter 1, the practices of the regulator can have as much impact on business compliance costs as the regulation itself.

The ability of individual regulators to deliver effective and efficient compliance and enforcement strategies can be constrained, to varying extents, by a range of factors outside their direct control. This includes, for example: their overall level of resourcing; the clarity of their powers (and delineation with other regulators) and government objectives; and the range of enforcement tools and discretion with which they are provided (chapter 2). The focus of this chapter is primarily on what regulators can control — how they interpret the guidance and responsibilities they are given and how they use their powers, resources, tools and available discretion.

The chapter highlights a range of good practice principles and possible leading practices. However, because of the significant differences between regulators in terms of their size, the activities they regulate, the risks they seek to mitigate and their institutional and governance arrangements, there is no single best practice model. While this means that the merits of applying a specific compliance and enforcement practice need to be considered on a case-by-case basis, there does appear to be substantial agreement in Australia and internationally on many better compliance and enforcement practices and guiding principles that have wide application, irrespective of the regulator or regulatory area.

While there are examples of special treatment or assistance for small business in relation to aspects of regulator engagement, generally the Commission has found that better practices are no less applicable to many larger businesses. A fundamental guiding principle for regulators, therefore, should be ensuring that the burden imposed on all businesses is the minimum necessary consistent with achieving regulatory objectives. Central to ensuring compliance and enforcement practices are targeted and efficient is the consistent adoption of compliance and enforcement approaches which appropriately take into account the risk to regulatory outcomes that is posed by different business activities (section 4.2). These need to be reflected in regulator strategies and requirements imposed on business designed to ensure compliance (section 4.3) and, once a breach of compliance occurs, in the

enforcement responses of the regulator (section 4.4). Aspects of the quality of regulator engagement (such as timeliness, consistency, transparency and accountability) also have a major influence on compliance costs for businesses — these are discussed in section 4.5. The chapter is supported by more detailed explanatory material and examples related to the use of different enforcement tools in appendix E.

4.2 A compliance and enforcement approach commensurate with risks

A well designed approach to compliance and enforcement can lower costs for both business and the regulator, while at the same time maintaining or increasing overall compliance, thereby facilitating greater achievement of the underlying objectives of the regulation. Such an approach will necessarily require the regulator to make some kind of assessment of the risk that is posed by individual business activities, and the compliance and enforcement approach that will be taken in response to these different risk activities. In some cases, regulators assessing risk may adopt a formal risk based framework (see appendix D); whereas in others, they may only consider risk as part of a more informal attempt to target limited regulatory resources at activities likely to yield the greatest possible improvement in overall regulatory outcomes. While a more formal risk based approach is generally most appropriate, an informal approach has the potential to improve the targeting of compliance and enforcement efforts, and both can be generically termed 'risk based' approaches.

The consideration of risk in compliance and enforcement activities necessarily acknowledges that some adverse outcomes may occur. As noted in chapter 3, regulators have limited resources so securing 100 per cent compliance (even if possible) is not usually feasible, nor is it likely to be an efficient use of resources. Regulators should make assessments of both the likelihood and impacts of non-compliance across the sectors and individual businesses they regulate and allocate their compliance and enforcement resources so as to generate the greatest net benefit to the community. In practice, this means targeting the biggest problems by devoting proportionately more surveillance or inspection resources to monitoring the compliance of those activities and businesses that:

- have the greatest potential to impose the highest costs on the community if they are not compliant with regulations
- are more likely to have low levels of compliance (rather than those, for example, with a good compliance history).

Enforcement responses, when incidents or breaches occur, also need to be consistent with a risk management approach (section 4.4).

Developing a formal risk based regulatory framework can be a complex and resource intensive process, involving rigorous risk assessment and profiling processes. Thus, when developing and implementing risk based compliance and enforcement approaches, regulators must consider the costs as well as the benefits. The appropriate level of investment in developing systems, data collection and risk analysis will depend on the expected benefits — in terms of resource efficiencies, greater consistency in regulatory decisions and reduced transaction costs for businesses — that are likely to flow from such an investment.

Using a risk based approach to guide compliance and enforcement resources is likely to result in the greatest gains for the community in regulatory areas where businesses present diverse risks (for instance, in taxation or environmental regulation). However, a risk based approach can also be net beneficial when used in areas where risks are more uniform across businesses (appendix D).

The Commission has found that most Australian regulators do, at least to some extent, adopt a risk based approach in their compliance management and enforcement policies. However, the adoption of a risk based approach is less prevalent among smaller regulators, and the degree of sophistication and consistency in the application of risk frameworks varies significantly.

There is more extensive use of advanced risk profiling and risk based enforcement among regulators in the food safety, occupational health and safety fields and also by the Australian Taxation Office, whereas liquor regulation is an example of an area that makes rather less use of risk based approaches to enforcement (appendix D).

Of concern, however, is the apparent gap that often exists between what is set out in principle in agency policy documents and what is implemented in practice:

> … few would argue against … risk based regulation … However there is more debate about whether regulators have taken the appropriate practical steps to achieve best practice regulatory behaviour. (NSW Business Chamber, sub. 25, p. 5)

This view is consistent with VCEC's finding, in relation to Victorian regulators, that there is 'a perception among stakeholders that risk based approaches are not universally applied.' (VCEC 2011b, p. 112). There can be a number of possible explanations for this, including a lack of commitment and leadership at senior levels, deficiencies in the training of enforcement officers, or a paucity of evidence and analysis to inform technical judgements about the determinants of risk (chapter 6).

Evidence from the Commission's survey of Australian regulators suggests that the risk based approaches used by many regulators are not highly structured or formalised. Although 70 per cent of regulators claimed to adopt a risk based approach, of these:

- over half did not make the details of this approach available to business
- 85 per cent did not monitor the costs imposed on businesses — an important aspect of ensuring compliance costs are proportionate to the risks a business poses
- 55 per cent did not give enforcement officers discretion in choosing the severity of sanctions used following a compliance breach (PC regulator survey 2013).

From these responses, it appears that there is considerable scope for many regulators to implement more effective risk based approaches, including more explicit consideration of the compliance costs imposed on businesses and opportunities to reduce those costs.

A fairly common perception is that regulators are generally too risk averse in their compliance and enforcement decisions (see, for example, Small Business Development Corporation (WA), sub. 22 and ACCI, sub. 5). To some extent it is not surprising that regulators would err on the side of being strict in their enforcement activities given the incentives and pressures they face from governments and communities (chapter 2).

In areas where there is a lesser risk of severe consequences, a higher risk tolerance level will be appropriate. There is, however, a concern amongst stakeholders that compliance and enforcement practices are generally not sufficiently adapted to the nature of the activities being regulated (or tailored to the specific circumstances of an industry or business) to allow for lower risk activities. Too often a 'one size fits all' approach seems to be adopted (Office of the Australian Small Business Commissioner (ASBC), sub. 10; ACCI, sub. 5).

As noted in chapter 2, a regulator's risk tolerance can be influenced by public opinion, media attention (particularly following adverse events) and either explicit political direction or the regulator's perceptions about the attitude of the government or a responsible minister. The importance of governments clearly stating their expectations of the regulator in terms of how risks are to be managed and, in particular, of explicitly acknowledging that some level of risk is unavoidable, is discussed in chapter 6.

4.3 Ensuring requirements on business are the minimum necessary

The specific approaches adopted by regulators to engender business compliance with regulation depend to some extent on the area of regulation, the nature of business activities being controlled and the specific objectives and requirements of legislation. As noted by the Australian National Audit Office (ANAO), some strategies are more appropriate than others for particular compliance checks:

> … on-site inspections are well suited to gathering evidence of compliance with manufacturing standards. A desk audit of a procedures manual would not adequately confirm that a manufacturer was achieving production quality standards. (ANAO 2007, p. 7)

The compliance and enforcement activities of regulators that impose requirements on business can be categorised as:

- assessments, approvals, authorisations or accreditation for particular products, processes, occupations, business operations or activities (for example, permits, development approvals, registrations, licensing or other permissions)
- reporting obligations — that is, provision of information and data to demonstrate compliance (leading practice approaches to coordinating and streamlining reporting obligations imposed on businesses are discussed in the next chapter)
- inspections, audits and investigations.

These requirements impose costs on business that are one off or ongoing and costs can take many forms, including: staff time associated with gathering information, form filling or record keeping; investments in additional equipment or procedures to monitor hazards or manage risks; or lost profits or business opportunities associated with delays. As noted in chapter 2, these costs can be exacerbated by the regulator's posture towards business. Non-compliance with these requirements can result in sanctions or other enforcement actions which also impose costs on business (section 4.4).

The regulator's primary focus must be on achieving the objectives of regulations. The goal, therefore, cannot be one of minimising the burden on business; rather it must be to ensure that the only costs imposed on business are those that are necessary to achieving the outcomes sought — costs that cannot be avoided or reduced.

Some evidence of failure to achieve adequate compliance

While the Commission has identified substantial scope for reducing *unnecessary* compliance burdens on business arising from regulator practices — and suggestions for improvement and some leading practices are identified in this and subsequent chapters — a number of participants have questioned the effectiveness of some current regulator practices in managing risks and achieving adequate compliance.

Drawing on the 2012 ACCI National Red Tape Survey, the NSW Business Chamber notes that 'around 50 per cent of businesses nationwide said that they had to comply with regulations that were at least somewhat poorly enforced' (NSW Business Chamber, sub. 25, p. 5).

Master Electricians Australia argues that registered training organisations are not meeting regulatory standards in the delivery of training:

> It is an ever increasing problem that electrical apprentices are not receiving the level of training through Registered Training Providers (RTOs) that is required in order for them to become fully competent tradespeople.
>
> … training regulators across Australia need to utilise their monitoring and enforcement tools and ensure that all RTOs facilitate training to the standard required to deliver competent tradespersons. (Master Electricians Australia, sub. 8, pp. 7–8)

Non-compliance can go undetected for a number of reasons, including poorly designed inspection or other compliance checking procedures or, in some cases, inadequate resources (chapter 2). If the level of non-compliance is significant, it may result in a failure of the regulation to achieve its objectives. Further, wherever compliance is uneven, those businesses that do the right thing will potentially be at a competitive disadvantage relative to those that do not bear the compliance burden. Over time this can undermine confidence in the regulator and potentially lead to more widespread non-compliance.

The Regulation Taskforce (2006) recognised that regulators are faced with competing policy objectives and that trade-offs sometimes need to be made, including between the goal of reducing risk and the goal of lessening compliance burdens. It recommended (recommendations 7.14 and 7.15) that governments provide regulators with clear direction, in relevant legislation or in 'statements of expectations', accepting the reality that such trade-offs are inevitable (see chapter 6). A more rigorous and consistent application of risk based policies (for example, greater focus on businesses most at risk of non-compliance) could achieve higher compliance and also reduce overall costs. However, for some regulated activities or particular businesses it may be the case that more stringent approval processes, increased reporting or more frequent inspections will be appropriate.

Encouraging voluntary compliance

While there is a full spectrum of business attitudes to compliance, generally most businesses are willing to comply. Indeed, businesses will often be highly motivated to comply with regulatory requirements for reputational or customer relationship reasons. Although the incentive to protect a reputation can be stronger for larger businesses (chapter 3), a poor reputation can also have a major impact on the profitability of a small business (or in the extreme can cause it to fail). The consequences can be greater (and more difficult to undo if a regulator makes an error), in a world with the internet and social media enabling very widespread and quick dissemination of opinions and reviews. This is also why 'name and shame' enforcement strategies can potentially be such a harsh sanction for non-compliance by a small business.

Despite the motivation and attitude towards achieving compliance possessed by many small businesses, often they do not have the knowledge or capacity to comply and struggle to understand their obligations (chapter 3). One of the most important strategies then for regulators is to ensure compliance obligations are clearly communicated and that appropriate guidance and advice is available, including on the consequences of non-compliance (chapter 5). Many small businesses welcome some level of inspections as an opportunity to draw on the inspector's knowledge and get tailored advice and guidance or obtain reassurance that they are doing things the right way (inspections are discussed further below).

Participants emphasised the importance of regulators adopting an educative and facilitative approach to compliance. The Institute of Chartered Accountants (sub. 29), for example, suggested that many small businesses would find it easier to comply with complex and confusing laws if regulators took a more educative approach.

As noted by the ACCC in its submission, 'prevention of a breach … is preferable to taking action after a breach has occurred and consumers or businesses have suffered harm' (sub. 26, p. 1) and similarly Freiberg (2000, p. 8) points out '… enforcement should always be a weapon in the compliance armoury, but it should not be the first or only weapon'.

Submissions highlighted a number of examples of regulators adopting a cooperative and educative approach to compliance. These included:

- the conciliatory approach adopted by the National Measurement Institute and AUSTRAC in dealing with minor innocent breaches (Department of Industry, Innovation, Science, Research & Tertiary Education, sub. 18; Fast Access Finance Pty Ltd, sub. 20)

- the Australian Taxation Office's assistance and education in relation to Business Activity Statement preparation (Housing Industry Association, sub. 24)
- the ACCC's approach to enforcement in relation to price impact claims, following the introduction of the carbon price:

  > Given the difficulty involved in calculating the impact of the carbon price, the ACCC … took a pragmatic approach to enforcement in this area (ACCC, sub. 26, p. 3). [In the first 100 days following the commencement of the carbon price] The ACCC issued over 40 formal and informal warning letters to traders in various sectors and sent out over 50 educative letters to traders providing them with information and guidance material about carbon price claims and the role of the ACCC. (ACCC, sub. 26, p. 7)

While many regulators do recognise the value of a proactive educative approach to securing compliance, it can be a challenge, particularly for smaller regulators. There can be a tendency for some to focus on 'what we've always done' and the minimum required, rather than devoting resources to education strategies and actively promoting compliance, which in the short term can be more costly, but would be likely to have longer term benefits.

A number of submissions stressed the importance of regulators understanding the challenges small businesses face and appreciating what motivates and influences them (see, for example, Strong Strategies, sub. 19 and NSW Business Chamber, sub. 25). The work of the United Kingdom Behavioural Insights Team was identified as an innovative model for finding ways of encouraging, supporting and enabling businesses to make better choices for themselves (DIISRTE, sub. 18).

Some regulators have successfully implemented reward and incentive strategies that further encourage businesses to demonstrate a strong commitment to compliance. This can take the form of reduced frequency or less onerous inspection or reporting requirements for businesses with a good track record of compliance. The National Transport Commission will shortly release its Compliance Framework, which embodies the use of concessions, subsidies and grants to incentivise compliance (sub. 1). The Local Government Association of Queensland advocated that regulators facilitate the display by businesses of 'a sign/permit that recognises compliance, and possibly the achievement of a rating or ranking' (sub. 27, p. 10). Such a practice is common in some jurisdictions for businesses demonstrating good food safety practices (PC 2009b).

The Commission considers that regulators should generally adopt an educative and facilitative approach to achieving compliance, including rewards and incentives for businesses with a good compliance history, unless this would be inconsistent with the goal of maximising the overall community net benefits from regulation. Such an

approach will generally reduce compliance costs for small business and increase voluntary compliance.

Streamlining assessment and approval processes

Licensing, registration and approval processes are considered by many businesses to be one of the major sources of compliance costs and 'what many businesses think of when they hear the words 'red tape'' (NSW Business Chamber, sub. 25, p. 7).

Submissions identified certain processes or requirements that, it was contended, are unnecessarily complex and/or burdensome. A sample of the concerns raised are provided in box 4.1, but the Commission does not take a position in this report on the veracity of any particular concern.

Box 4.1 Participants views about unnecessarily burdensome requirements

- The 'overly legalistic and prescriptive' processes of the Australian Securities and Investments Commission for the registration of self managed super fund auditors (Institute of Public Accountants, sub. 29, p. 6).
- Complexity and vagueness of Australian Quarantine and Inspection Service requirements (Australian Chamber of Commerce and Industry, sub. 5).
- The Australian Pesticides and Veterinary Medicines Authority (APVMA) is 'extremely risk averse' and inflexible in its assessments of applications for the registration of veterinary medicines and pesticides; excessive or unpredictable in its demands for information; its processes do not sufficiently recognise appropriate overseas assessments and are too costly for applicants; and decisions are based on too narrow a consideration of costs and benefits (Hills Orchard Improvement Group Inc, sub. 9). The Commission notes that APVMA is working through the second tranche of Better Regulation Reforms with the Department of Agriculture, Fisheries and Forestry (DAFF 2013).
- Multiplicity of licences required by electrical contractors 'and the processes for applying and maintaining each and every licence has become extreme' (Master Electricians Australia, sub. 8, p. 7).
- The high cost of annual repeat registrations under the requirements set by the Migration Agent's Registration Authority's Code of Conduct (Migration Institute of Australia, sub. 14).

The Commission is also aware, including from its recent benchmarking studies (for example on *Planning, zoning and development assessment* (PC 2011b) and *Local Government as Regulator* (PC 2012b)) that similar concerns are widespread in relation to assessment and approval processes of local governments. The Business

Council for instance submitted the following comments to the Commission's *Local Government as Regulator* study:

> The increasing complexity [of the regulatory system] is particularly evident in regards to planning and zoning where the documentation required to support development applications has continued to grow in volume and complexity … (sub. 38, p. 3, submission to PC (2012b))

Governments, or regulators where they have discretion to change requirements, need to consider whether there is scope (without compromising achievement of objectives) to reduce the compliance burden of approval, registration or licensing processes by, for example:

- rationalising the number of registrations and licences required or consolidating core licences — the Commission notes that the NSW Government recently commissioned IPART to examine licences (broadly defined) and identify priorities for reform to reduce regulatory burdens. Governments should also give consideration, on a case by case basis, to whether a single licence could be developed to cover certain business activities that currently require multiple licences (box 4.2)
- ensuring governments cooperate to mutually recognise licences, registrations and approvals wherever possible — Victoria, Queensland, South Australia and Western Australia have introduced such arrangements, for example in relation to mobile food vendors which do not have to register with multiple local governments (PC 2012b)
- extending the period of licences and registrations so that the requirement for renewal is less frequent — the Office of the Australian Small Business Commissioner suggested five or ten year licences could be considered (sub. 10), but given that licence renewal is an opportunity to establish ongoing compliance with requirements, there must be an appropriate evaluation of risks and the costs and benefits of different licence periods
- making requirements clearer and simpler
- ensuring all significant costs and benefits are appropriately taken into account in making assessments and determining approvals
- reducing the requirements that lower risk businesses or products (those, for example, that have been approved overseas; or can demonstrate a record of a high level of performance, competency, internal quality assurance processes) need to meet to have an application approved.

Box 4.2 **Combining licences where a business type typically holds the same licences**

For some activities, businesses are required to hold multiple licences covering different aspects of their activities and deal with a number of different regulators. Where it is common for businesses of a given type to hold the same suite of licences there may be merit in consolidating the different licences into a single combined licence. This could have the advantage of substantially reducing the licensing-related compliance burden on businesses.

One possible application of this principle, for example, could be a single licence for restaurants that covers both food safety and the service of liquor. In considering whether a single licence is appropriate for any particular business activity, governments and regulators would need to establish whether the benefits of such a change would be likely to outweigh the costs for the community as a whole. A case by case assessment would be required, but a number of general issues would need to be considered, including:

- Where the licences to be consolidated are currently administered by more than one agency, it is likely that the regulator responsible for the area of greatest risk would be the most likely choice to assume regulatory responsibility for the combined licence. For instance, in the example cited above, the food safety regulator might assume full regulatory control for licensing a restaurant, including its service of alcohol.
- The administration and enforcement of the combined requirements need to be within the capacity of the agency that assumes regulatory responsibility for the combined licence. This means that if a regulatory area is highly specialised, it may not be efficient for another agency to assume partial responsibility in this area.
- There may potentially be a greater burden placed on those businesses that do not require all of the licences that are combined within a single licence and therefore have to satisfy additional requirements associated with the broader licence.

Better targeting and coordination of investigations and inspections

For many regulators, investigations, audits and inspections are the most widely used tools for checking compliance. They are often the primary way small businesses 'experience' regulations and regulators. Around 85 per cent of PC regulator survey respondents undertake inspections as part of their compliance management strategies.

Audit and inspection activity is also a significant source of regulatory burden, particularly in light of their typically recurring nature. Costs are incurred by business in preparing for audits and inspections (including retrieving documents);

staff time spent with inspectors (often senior management with a high opportunity cost of their time); and in administrative activities that flow from the inspection.

Audits and inspections are also costly for regulators, in terms of administrative costs preparing for and undertaking such activities. Given these costs for business and regulators it is very important that audit and inspection activity is targeted and based on appropriate risk management systems. In practice this should mean that higher risk businesses get audited/inspected more frequently and/or are the subject of more in-depth (and costly) investigations or inspections than lower risk businesses.

The Office of State Revenue (OSR) in NSW has found that improved targeting of compliance activities, based on better data drawn from WorkCover and the ATO, has reduced the number of audits not resulting in an additional tax liability. In 2011-12, only around 10 per cent of targeted businesses not registered for payroll tax were found upon investigation to not be liable for payment of the tax. This compared with the few years preceding where the businesses found to not be liable averaged more than 50 per cent. Better targeting reduced the number of businesses being subjected to unnecessary investigations and associated compliance costs and large savings in audit costs for the regulator. (OSR NSW pers. comm., March 2013).

There are concerns amongst stakeholders, however, that many regulators do not sufficiently differentiate the relative risk profile of businesses when planning audit and inspection programs. For example, a history of good compliance is not always taken into account in determining inspection frequency. This is consistent with findings of the Commission's *Local Government as Regulator* benchmarking study, for example, that the frequency of swimming pool inspections by local governments often did not take sufficient account of the risk categorisation of the business and its compliance history (PC 2012b).

In addition to regular scheduled visits (for example annually or once every six months), risk based inspections can be part of special targeted campaigns or in response to complaints or a particular event. There is also a role for inspections that are not strictly risk based. The threat of a random inspection or spot check provides an additional incentive for businesses classified as low risk to maintain their compliance and also makes allowance for the fact that risk assessments are not perfect and rogue businesses may otherwise 'slip through the cracks'. Such approaches also recognise that risks change over time.

Table 4.1 summarises the PC regulator survey findings on the use of inspections by regulators. It is apparent that inspections following complaints and targeted inspections based on risk assessments are the inspection strategies used by the

highest proportion of regulators. Where the latter strategy was used it accounted for the highest proportion of overall inspections.

Table 4.1 **Use of inspection strategies**

	Per cent of regulators that undertake inspections & use specific inspection strategy	*Per cent of regulator's overall inspections*[a]
Following a complaint	82	10
Targeted campaign based on risk assessment	65	43
Other targeted campaign	44	10
Random spot check	56	10
Regular visits (e.g. inspect every 6 months)	54	25
Other	24	25

[a] Based on the median of regulators' responses.

Source: PC regulator survey 2013.

Since an objective of compliance programs should be to help businesses comply, there is an argument that inspections should be announced so that businesses have time to prepare and get the most value from the inspection. On the other hand if a business has been in serious breach of regulations it is important that this does not go undetected (because the business had time to temporarily raise their standards prior to an announced inspection). Generally there should be a mix of announced and unannounced inspections, as is reflected in the practice of most regulators responding to the Commission's survey. However, of those regulators reporting that they used announced inspections, such inspections accounted for around 90 per cent of all inspections (PC regulator survey 2013).

More generally, regulators need to strike a balance in their risk based inspection programs between use of proactive measures (that is, preventative audits and inspections to check ongoing compliance) and audits and inspections that are reactive (that is in response to complaints or a particular event). Also, in responding to complaints about business practices, regulators need to be wary of complaints that may be frivolous or vexatious.

Better coordination of inspection activity with other regulators

A particular issue for many businesses is the cumulative burden they face as a result of the number of separate inspections of their business carried out by multiple government authorities. In some cases the regulators have overlapping responsibilities and there is duplication in the inspections:

> [There] [c]ontinues to be significant overlap and duplication of audit and inspection effort, particularly in regard to food safety, export and quality assurance; for food producers, manufacturers, transporters and retailers this represents one of the most time consuming and inefficient aspects of their compliance. There is no coordination between jurisdictions in relation to reporting, documentation and audit processes – whilst each agency applies a 'full-cost recovery/ fee for service' model and charges businesses licence fees, audit fees and documentation processing fees. (Chamber of Commerce & Industry Queensland (CCIQ), sub. 16, p. 4)

Streamlining of licensing and other requirements (including potentially the consolidation of multiple licences into a single licence for some activities) would go some way towards addressing the cumulative burden of regulation for small business. However, to the extent that businesses are required to deal with a range of different regulators, it is important that coordination mechanisms are in place to alleviate problems of overlap or inconsistency. Around half of the regulators responding to the Commission's survey said they routinely coordinated inspections with one or more regulators (PC regulator survey 2013).

In some regulatory fields, coordination will be required between regulators across jurisdictions or operating within different tiers of government. The enforcement of many state laws is devolved to local governments (for example, waste management, planning, building and development laws (PC 2012b)) and in some areas of regulation (in some states), enforcement is undertaken by agencies at both the state and local government level, for example food safety.[1]

Coordinating and streamlining inspection activity can result in significant savings for regulators and businesses. Strategies include 'joining up' inspections, coordination in scheduling or recognition of inspections carried out by other government or private bodies (see below). Many regulators appear to be aware of overlap and duplication in inspections and are actively trying to address the problem through formal agreements, for example, the Memorandum of Understanding between the Victorian departments of Sustainability and Environment and Primary Industries (VCEC 2011b, p. 106) or through other general mechanisms for cooperation such as forums of regulators. The NSW Food Authority has a number of measures in place to facilitate coordination.

- The Authority's Local Government Unit interaction with councils and the Food Regulation Forum
- Food business notification information is shared between councils and Authority
- The Authority maintains a MOU with DAFF/AQIS regarding export registered facilities to avoid double regulating

[1] For a discussion of considerations that are potentially relevant in determining an efficient allocation of regulatory functions between tiers of government see PC (2012b).

- The Authority maintains a MOU with Queensland to avoid double licensing of fishing vessels operating in both jurisdictions
- Joint operations with fisheries, Office of Environment and Heritage, NSW Police, Liquor Gaming and Racing, NSW Health, Local Government, NSW Fair Trading. (NSW Food Authority sub. 28, p. 13)

One approach to minimising the burden of inspections is the concept of delegated inspections. This approach, which has had some positive results in the Netherlands (Blanc 2012), involves one regulator, when undertaking its inspections, acting as the 'eyes and ears' for one or more others. In Australia, Dairy Food Safety Victoria undertakes some limited risk assessments for the EPA while undertaking its food safety related inspections. It then provides the EPA with aggregated information on areas in which businesses may require more attention, enabling the EPA to better target its enforcement resources (EPA Victoria, pers. comm., 4 June 2013). Some local governments also undertake checks on behalf of state health departments (PC 2009b).

For such approaches to be effective, inspectors may need to receive additional training that would equip them to at least spot the most critical problems. It is likely that in some areas of regulation there would be legislative or other legal barriers to such arrangements and perhaps resistance from regulatory officers, both those being asked to take on additional inspection responsibilities, and those who may feel their role is being usurped.

Coordination between regulators is discussed further in chapter 6 in relation to regulator capacities and sharing of experiences. The next chapter also discusses coordination issues with a focus on information requests, including the concept of a 'lead regulator' as a mechanism for simplifying and rationalising business engagement with regulators.

Overall, the Commission has found that efficient delivery of regulation will generally be enhanced when the frequency, complexity and comprehensiveness of audits, investigations and inspections of businesses are commensurate with risks. However, regulators also need to strike an appropriate balance in the use of preventative and reactive action and also random and targeted measures.

To reduce the burden associated with unnecessary or inefficient inspections, governments and regulators should implement measures to ensure there is: appropriate recognition of low risk activities and businesses with a consistently strong history of compliance, for example by requiring less frequent or comprehensive inspections; and cooperation and coordination in audits and inspections, including through joint inspections and inspections by one regulator on behalf of another.

Making better use of industry and existing certification processes

Outsourcing some aspects of compliance monitoring or management (such as inspections) to third parties, or relying on or recognising existing private, government, or overseas certification processes can in certain circumstances lower costs for business and/or regulators.

The Commission found that some regulators are engaging contractors — for example, around 20 per cent of respondents to the Commission's survey said that their agency engaged contractors to carry out inspections or on-site visits (PC regulator survey 2013). Building certification, for example is commonly undertaken by private certifiers in Australia, although states and territories differ in the range of areas in which private certifiers are empowered to act (PC 2012b).

Often a regulator, when choosing to outsource activities, will be primarily motivated by a lack of in house skills, or the need to achieve cost savings or other efficiencies in their operations. However, businesses can indirectly benefit, for example, where there are resulting improvements in timeliness or other aspects of quality.

There can also be more direct benefits for business. For example, there will be cost savings for a business where products they sell that have already satisfied rigorous overseas certification processes are approved for sale in Australia without the requirement for further assessment (for example, the Therapeutic Goods Administration in its regulation of medical devices, in some instances accepts certain manufacturer compliance certificates issued by overseas regulators).

Some participants called for greater recognition of existing accreditation processes or professional qualifications in determining registration or other requirements. For example the Migration Institute of Australia (MIA) considers that migration agents with certain levels of accreditation (that demonstrate their competency and clean record) under the Institute's tiered membership scheme should be exempt from 'the burden of annual repeat registration costs' and that streamlined registration requirements and reduced fees should apply for lawyer agents — their Legal Practicing Certificate should be accepted as evidence they have already complied with many of the requirements for annual registration (MIA, sub. 14, p. 3). The Commission recently examined the compliance burden for lawyers practising in the area of migration law and recommended that those with a current practising certificate be exempt from the regulatory requirements of the Migration Agents Registration Scheme (PC 2010a).

Some examples of industry accreditation processes that are currently used as the basis for an exemption from, or a reduction in, licensing/registration requirements were highlighted by participants, including:

- the Great Barrier Reef Marine Park Authority (GBRMPA 2010) recognises the ECO Tourism Australia Certification Program — operators with certification under this program are referred to as 'high standard operators' and can apply for extended 15 year terms for their Marine Parks permit
- various state regulators recognise the Australian Tourism Accreditation Program (ATAP) — for example, operators in Victoria, Western Australia and South Australia with accreditation are eligible for extended licences for access to National Parks. (ATAP Victoria 2010; South Australian Tourism Industry Council 2013; WA Department of Environment and Conservation 2012)

In the Commission's view, regulators should systematically consider the recognition of existing industry and other third party certification processes when determining compliance requirements for business. They should also consider the scope for outsourcing inspections and other compliance monitoring (but not enforcement) activities to industry.

Where any outsourcing or third party processes are relied on, the regulator remains responsible for ensuring regulatory requirements are being satisfied. It is essential, therefore, that the regulator has appropriate monitoring and quality assurance systems in place to ensure standards are maintained and regulatory objectives are being met. For example, where private inspectors are utilised, there must be systems in place to certify their competency, create the right incentives for them to operate in the public interest and impose appropriate sanctions when they do not meet their obligations. Governments must also ensure that there are no unnecessary legislative or other constraints on the capacity of regulators to adopt such strategies where appropriate.

Alternative approaches to managing compliance

Some regulators, for example in the food safety area, monitor compliance indirectly, by checking that appropriate management systems, processes or control procedures are in place, rather than direct checks on outputs. The principle behind such an approach is that with the right systems in place there is a strong likelihood that desired outputs and regulatory outcomes will be achieved.

Compared to traditional models for verifying compliance, the potential benefits of such approaches include greater flexibility and reduced compliance costs for business, lower administration costs for regulators and the potential to build

capacities and influence culture within businesses. The literature suggests that these regulatory approaches lend themselves more readily to some industry sectors than others and are particularly worth considering when dealing with diverse and hard to assess risks that can make it difficult to specify desired outcomes in regulatory standards or observe business compliance with those standards (see for example, OECD (2010), Gunningham (1999) and Gunningham and Sinclair (2011)).

Management systems approaches have been used quite extensively in Australia and overseas, for example, in the occupational health and safety and food safety areas. The food safety regime called HACCP (Hazard Analysis and Critical Control Points) adopted in Australia and many other countries is one of the most prominent examples. Whilst the degree of flexibility under management system approaches varies significantly, generally businesses are expected to:

> … produce plans or adopt management systems that comply with criteria stated by the regulator, such as to identify hazards, develop options for risk mitigation, establish procedures for monitoring and correcting problems, train employees in these procedures, and develop measures for evaluating and continuously improving the firm's management with respect to the stated social objective. Firms are sometimes expected to obtain approval or certification by government regulators or third-party auditors of their management practices and their compliance with their internally generated plans and procedures. (OECD 2010, p. 163)

In most cases, the adoption by regulators of management systems compliance approaches simply reflects requirements set out in legislative frameworks. However, in other cases regulators have chosen to adopt a compliance regime with elements of a management approach as an alternative to more traditional compliance approaches.

The NSW Food Authority submitted information on the use of the food safety supervisor (FSS) model in the regulation of retail food businesses in that state:

> … NSW ensures that each retail food business has the capacity to operate safely by requiring each business to have one trained food safety supervisor (FSS) for each premise it operates. The training involves two nationally accredited units of competency and is usually delivered in one day. Arrangements to deliver the training through Registered Training Organisations are overseen by the Authority whereas compliance with FSS requirements is overseen by councils. (NSW Food Authority sub. 28, p. 7)

The NSW Food Authority contrasted the FSS model with the requirements in some other states for businesses to document and implement a food safety plan (FSP), against which they are audited. According to the Authority the main industry body, Restaurant & Catering NSW, 'supports FSS as a lower cost alternative to FSP requirements' (NSW Food Authority sub. 28, p. 7). However, there have also been

concerns about the costs for businesses, and particularly small business, of complying with the FSS requirements. These include the cost of attending a training course including lost work time and the need, in 24 hour food businesses or where staff turnover is high, for a business to train a number of FSSs (PC 2009b). Further, FSS requirements may not be entirely compatible with a risk based approach, since requirements are universally applicable to all businesses, irrespective of their history of compliance or the type of food they serve.

Depending on the specific design, there can be greater scope under a management system approach (and even more so under models such as the FSS model above) to build awareness within regulated businesses of the underlying rationale for regulatory requirements and the outcomes they seek to achieve. This builds capacities and can lead to businesses being more proactive and innovative, rather than adopting a narrow compliance checklist approach. If the regulator is not prescriptive about systems and processes that a business must have in place, a management system approach 'leverages the private sector's knowledge about its particular circumstances and engages firms in developing their own internal procedures and monitoring practices that respond to risks' (OECD 2010, p. 159). Businesses may also be more likely to comply with procedural requirements that they have designed or substantially influenced, rather than requirements simply imposed on them by regulators.

While some small businesses would have the necessary capacities to take advantage of the flexibility such approaches offer and would benefit from reductions in compliance costs, more typically any benefits are likely to be outweighed by set up and other costs. As was noted in chapter 3, while small businesses appreciate flexibility, they may often not have the knowledge or resources to apply to developing their own plans or procedures and can prefer the certainty that comes with greater prescription.

A still more light handed approach involves regulators accepting self assessments or self declarations of compliance with no additional requirements for businesses to demonstrate compliance. Self assessments are commonly used in taxation/revenue areas. The ATO, for example, initially accepts the information lodged by small business, but reserves the right to scrutinise the accuracy of the information at a later date, for instance as part of risk based audit strategies. The Brisbane City Council (2010) also allows self assessment of compliance for restaurants deemed as low risk and, to reduce the regulatory burden on home-based businesses, local government can employ a self assessment process for determining whether development approval is required (PC 2012b).

More generally, in relation to development assessments, each state has introduced track-based development assessment systems based on the Leading Practice Model developed by the Development Assessment Forum. Six 'tracks' were developed to allow applications to be streamlined commensurate with the level of assessment required to make an appropriately informed decision. One track accepts self assessment by the applicant:

> … where a proposed development can be assessed against clearly articulated, quantitative criteria and it is always true that consent will be given if the criteria are met, self assessment by the applicant can provide an efficient assessment method. (PC 2012b, p. 436)

Under a risk management approach regulators need to make judgements about the extent to which they can rely on businesses' own systems or self declarations to achieve regulatory outcomes. Management plans that look to be suitable on paper, may not be effective in practice, or indeed may not be followed. Consideration therefore needs to be given to the optimal level and nature of auditing or checking that regulators must carry out as an assurance mechanism and also to appropriate sanctions for non-compliance to discourage 'gaming' or strategic non-compliance.

DRAFT RECOMMENDATION 4.1

To increase voluntary compliance and reduce compliance costs for small business, regulators should ensure — subject to the overarching goal of maximising community net benefits from regulation — that:

- ***they are adopting an educative and facilitative approach to achieving compliance***
- ***licensing, registration, and other processes and requirements are as simple and streamlined as possible***
- ***unnecessary requirements are removed, for example, by rationalising licences or requiring less frequent or comprehensive inspections for low risk businesses***
- ***they cooperate and coordinate to reduce the cumulative burden of regulation, for example through mutual recognition of approvals and permits or joint or delegated inspections***
- ***existing industry and other third party certification and inspection processes are recognised when determining compliance requirements for business.***

Governments must ensure that there are no unnecessary legislative or other constraints on the capacity of regulators to adopt such strategies where appropriate.

4.4 Ensuring enforcement responses are effective and proportionate

It is widely accepted that enforcement will be most efficient — that is, net benefits for the community will be maximised — when regulators have access to a range of enforcement tools and are able to tailor their responses to breaches or potential breaches of regulation in a proportionate way.

One of the key concerns raised in this study has been that the enforcement response of regulators is often out of proportion with the nature of the breach and its consequences and that there is insufficient focus on outcomes and the 'bigger picture':

> Where genuine mistakes or oversights have been made which can be easily rectified/changed by businesses owner whilst the enforcement officer is on premises, no leniency is provided and business is immediately breached (e.g. blown light bulb in fire exit sign which business owner offered to change immediately was not allowed and the business was issued a breach notice and fine). (CCIQ, sub. 16, p. 5)
>
> One of our case studies also provided an example of a business who was fined for only submitting one, rather than two, electronic backup copies. (CCIQ, sub. 16, p. 7)
>
> There is a perception amongst small business owners that regulators choose to focus their enforcement actions on minor matters, such as administrative errors made by contractors, as opposed to concentrating on the bigger picture. In the context of the electrical industry, electrical safety should be the ultimate intention behind any form of regulation. … Such administrative omissions are more likely a result of small business not having the time or resources to dedicate to understanding what their obligations are, rather than a blatant disregard for the law. (Master Electricians Australia, sub. 8, p. 5)

Escalating enforcement

Leading practices in enforcement tend to involve a mix of 'persuade and educate' approaches (section 4.3) and tougher sanction based approaches. This recognises that the reason for, and consequences of, non-compliance will vary significantly and that regulators should be able to draw on a range of enforcement tools. It also recognises that:

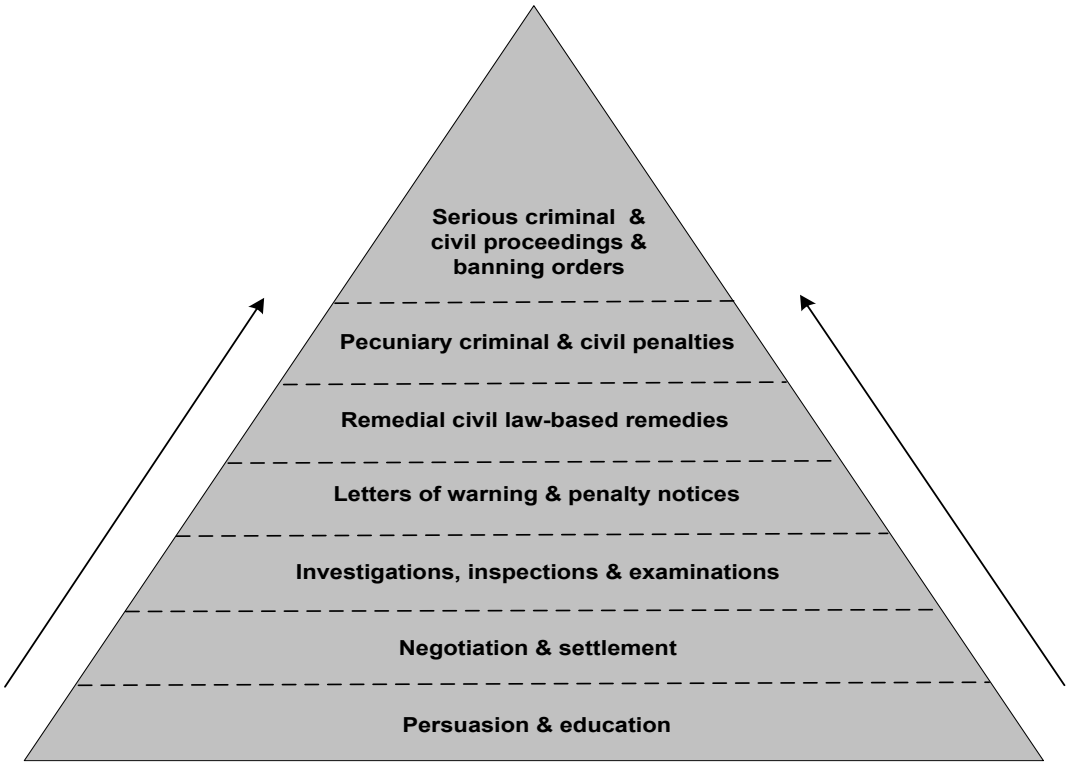
> … an enforcement strategy based solely on deterrence would antagonise the many businesses that are willing to comply, as well as risk a subculture of regulatory resistance if the focus on punishing is deemed unfair. On the other hand, a regulator with a pure advise-and-persuade strategy could embolden recalcitrant businesses that intentionally choose not to comply. (PC 2011a, p. 11, appendix H)

Many regulators apply an 'escalation' model where they start with a soft approach, but signal to businesses their commitment to escalate their enforcement response

and apply tougher sanctions whenever lower levels of intervention fail to secure compliance. These models use what are commonly termed 'enforcement pyramids' (figure 4.1), with most regulated entities subject to action at the bottom of the pyramid, and fewer and fewer businesses subject to the higher levels of sanction or penalty further up the pyramid. This principle is reflected in COAG's *Best Practice Regulation* guide:

> … enforcement options should differentiate between the good corporate citizen and the renegade, to ensure that 'last resort' penalties are used most effectively (rarely) but model behaviour is encouraged. (2007, p. 16)

Figure 4.1 **Example of an enforcement pyramid**



Sources: PC (2010b); adapted from Gilligan, Bird and Ramsay (1999); Ayres and Braithwaite (1992).

As an example of escalation in practice, WorkSafe Tasmania (part of the Department of Justice) advised the Commission that the lowest level of their enforcement pyramid — 'improvements though information and guidance' — accounted for 86 per cent of all enforcement actions in 2011-12, whereas infringement notices and prosecutions, the two most severe levels of enforcement tools available to them, together accounted for only 3 per cent of all actions (Department of Justice, pers. comm., 26 February 2013).

Enforcement pyramids will appropriately vary across different fields of regulation — for example, in those areas where non-compliance has catastrophic or extremely

costly consequences (for instance in the area of aviation safety regulation), enforcement policies tend to make less use of 'soft' elements and move very rapidly to tough sanctions, higher up the pyramid.

Apart from the level of risk or detriment associated with a particular breach, regulators need to balance a number of considerations in determining an optimal enforcement response. These include factors specific to the regulator, industry, or area of regulation, and also to the individual circumstances of particular businesses. Some of these factors are discussed further in appendixes D and E, but include:

- the resources available to the enforcement agency and the resources involved in different sanction options
- the ease of detecting breaches of different regulations or proving offences
- the rate of turnover of firms in a particular industry
- public attitudes to risk
- the size of the firm and its capacity to comply
- the compliance history of businesses and mitigating or aggravating circumstances.

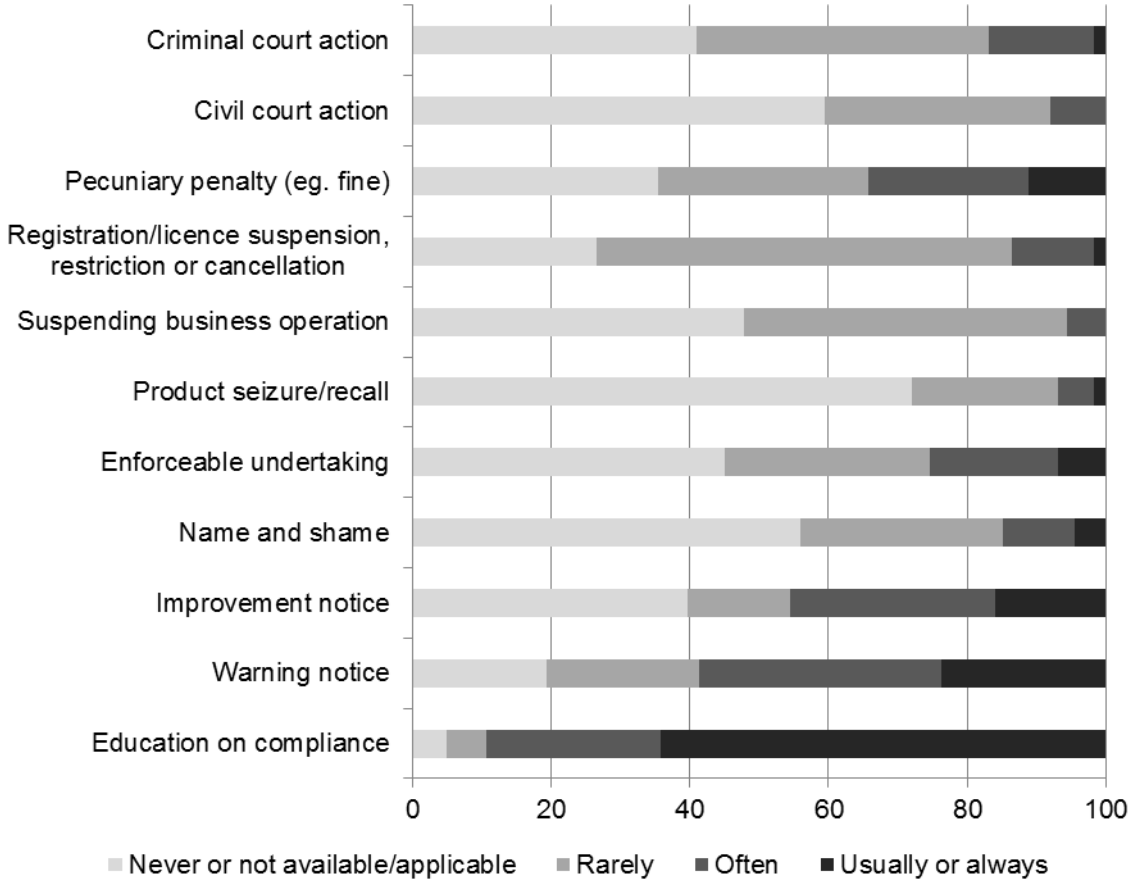
The enforcement powers of some regulators, such as the new National Heavy Vehicle Regulator, recognise that the individual or business that is technically in breach of a regulation may not be the only one in the supply chain that is culpable for the noncompliance. They seek to ensure the right incentives are created for all key parties in the supply chain to behave in a manner that contributes to positive compliance outcomes. The concept of 'chain of responsibility' in the context of heavy vehicle regulation enforcement, for example, means 'a consignee that unloaded over-mass vehicles or a scheduler that forced drivers to speed to meet deadlines would be just as culpable for the noncompliance as the traditional target of enforcement: the driver' (National Transport Commission, sub. 1, p. 5).

The range of available enforcement tools varies

The range of enforcement tools available to regulators varies significantly across regulatory regimes and between individual regulators. Beyond education and advice, common tools include: verbal warnings; written directives; negotiated/administrative resolutions; improvement, prohibition and ban notices; enforceable undertakings; adverse publicity (including 'name and shame' approaches); licence suspensions and cancellations; infringement and penalty notices; and prosecution. Figure 4.2 shows the extent to which different types of enforcement tools are used by regulators, while some of the key issues around their

use are outlined in table 4.2. Key features, strengths and weaknesses of different tools are discussed in more detail in appendix E.

Figure 4.2 **Regulators' frequency of use of different enforcement tools**
Per cent of regulators



Source: PC regulator survey 2013.

Some regulators have discretion to use a wide range of tools. The NSW Food Authority, while noting that the adoption of an escalating compliance and enforcement policy by local councils in NSW is not mandatory, submitted the following comments on the tools potentially available to enforcement officers:

> Auditors and inspectors have discretion under this [enforcement] policy to apply appropriate enforcement tools commensurate with the significance of breaches detected. These tools may include provision of information, warning letters and improvement notices. Further escalation requires consultation with management and may then include the issuing of penalty notices, prohibition notices, seizure of goods/products or collection of evidence for prosecution. (NSW Food Authority sub. 28, p. 12)

Table 4.2 **Enforcement tools**

Category	*Issues*	*Use*
Warnings and improvement notices	• Cost effective and timely to administer. • An effective first step in addressing compliance breaches in many instances.	• Frequently used by many regulators.
Public notifications — commonly referred to as 'name and shame'	• Used where there is a perceived public interest in identifying offenders. May also provide a greater deterrence value. • Needs to be applied judiciously — the impacts on businesses can be severe, and can be difficult to redress if the sanction is applied in error.	• Not used by many regulators, but more common in areas such as food safety and the environment.
Enforceable undertakings	• Allows tailored remedial actions in response to a compliance breach. • Allows the regulator and business the opportunity to negotiate the most appropriate way to address non-compliance.	• Used, for example, by ASIC and the ACCC, but not widely used by other regulators.
Trading restrictions	• Includes licence suspensions or cancellations, the imposition of additional licence conditions, as well as product seizures or recalls. • Can be a very severe form of enforcement that prevents a business from operating. Should typically be used where less severe tools have been ineffective, or there is an immediate public danger posed by the business activity.	• Used by a wide variety of regulators, but typically infrequently.
Pecuniary penalties — refers to the imposition of infringement notices or on the spot fines	• Useful as a formal, yet administratively efficient and timely, enforcement tool. • A key issue is getting the value of fines commensurate with the scale of the compliance breach.	• Frequently used by many regulators.
Court action (civil and criminal)	• Can lead to a broad range of remedies, including injunctions, fines and imprisonment. • Can be drawn out and costly. • Would typically be used where lower forms of enforcement have been ineffective (or have been challenged).	• Infrequently used by most regulators.

Source: Appendix E.

Some other regulators do not have the tools they need to ensure a proportional response to non-compliance. Indeed, some 30 per cent of respondents to the Commission's survey of regulators said their agency did not have a sufficient range of enforcement tools and some regulators have only one type of enforcement tool available. The regulators most likely to report that they did not have a sufficient range of tools to administer regulation were in the areas of superannuation, gaming and racing, building and construction, and liquor.

Where regulators consider they have an insufficient range of enforcement tools, most commonly they see the need for more tools in the mid-range of sanctions, such as improvement notices and enforceable undertakings (PC regulator survey 2013).

One consequence of a regulator having a limited number of tools, or tools that do not allow a low cost and/or commensurate response, can be that enforcement is rarely exercised. For example, if the only available sanctions are criminal prosecution, many detected violations will go unpunished because the regulator deems they are too harsh and/or not worth the significant expense associated with criminal prosecution. This significantly diminishes the threat or deterrence value of enforcement.

Regulators should, within a range prescribed by legislation, have flexibility to adjust the size of penalties such as fines, depending on factors such as the severity of the breach, compliance history and scale of operations of a business. This is to ensure that the prospect of a penalty being imposed remains an effective deterrent for very large activities, but does not impose a burden on small business that is out of proportion with the significance of the breach.

The discretion to choose a light handed response to a breach or to not impose any sanction for minor or initial breaches of regulations, can reduce costs for regulators as well as businesses. It can also, by securing the trust and cooperation of businesses, lead to higher overall levels of compliance. A significant challenge for regulators, however, is to ensure that enforcement officers are making considered and impartial judgements when exercising their discretion and that discretion does not lead to problems of inconsistent interpretations. The principles of good regulation developed by the Council of Australian Governments (COAG) include the following in relation to use of discretion:

> *The exercise of bureaucratic discretion* — good regulation should attempt to standardise the exercise of bureaucratic discretion, so as to reduce discrepancies between government regulators, reduce uncertainty and lower compliance costs. However, this should not preclude an appropriate degree of flexibility to permit regulators to deal quickly with exceptional or changing circumstances or recognise individual needs. (PC 2012b, p. 627)

Various oversight and accountability mechanisms can help ensure discretion is used in a manner consistent with regulatory and community objectives and the risk of corruption is reduced (section 4.5).

Regulators will generally have greater discretion (and be required more often to exercise their judgment in determining whether a business is compliant) where regulations or standards are process, performance or outcome-based, rather than being written prescriptively. Indeed, determining compliance with requirements specified in broad performance terms can be challenging for enforcement officers. Sometimes a perceived lack of flexibility in a regulator's processes and practices is largely a reflection of a lack of confidence or capacity to use their discretion — for example, 'limits in skills and capacity of staff to respond to legitimate concerns and

make informed choices between different approaches to modifying behaviour (for example, between education and penalties)' (VCEC 2011b, p. 109).

The Commission considers that appropriate guidance and training for officers in the use of discretion is critical and can be a key driver of better regulator practices, in particular more responsive and flexible enforcement. In addition to the development by regulators of tailored guidance for their staff, governments also need to make available general guidance on how discretion should be used and monitor regulator practices for consistency with such guidance (chapter 6).

DRAFT RECOMMENDATION 4.2

Governments must ensure that regulators have access to a sufficient range of enforcement tools to enable them to respond to compliance breaches flexibly and in a graduated and proportionate way.

4.5 Improving the quality of processes and decision making

Some aspects of the quality of regulator processes were touched on above in relation to ensuring requirements imposed on business are the minimum necessary (for example streamlining of processes and targeting of investigations and inspections). This section discusses timeliness, consistency and impartiality in regulator processes and decision making. These are critical factors in determining how regulation ultimately impacts on business — for example, through licence/registration applications, development applications or other assessment and approval processes — and they have been the focus of many of the concerns raised by participants in this and other recent Commission studies (for example, PC 2009b, 2011b, 2012b).

Another common quality-related concern is the apparent inability or unwillingness of some regulator staff to provide small business with assistance on what would constitute compliance. To the extent that this reflects capacity and competency issues (including excessive risk aversion of staff) the discussion in chapter 6 is relevant; more generally the communication of information about compliance obligations is discussed in chapter 5.

Timeliness

Several participants raised concerns about lack of clarity in expected timeframes for certain regulatory processes and the uncertainty, frustration and cost impact

resulting from unexpected delays (see, for example CCIQ, sub. 16 and Small Business Development Corporation, sub. 22). According to a recent Council of Small Business of Australia (COSBOA) survey, 54 per cent of small businesses respondents found regulator processing times to be excessive (COSBOA, sub. 31). These concerns are consistent with those raised with the Commission in recent benchmarking studies (see, for example *Planning, Zoning and Development Assessments* (PC 2011b) and *Local Government as Regulator* (PC 2012b)).

Delay costs for business take a number of forms, for example: additional interest payments on loans and other holding or standby costs; forgone profits and interest on profits relating to existing activities; and the costs associated with opportunities forgone. Businesses value certainty and stress the 'importance of an 'early no', especially when considering whether proposed projects or approvals are potentially viable' (VCEC 2011b, p. 100). Delays can be a major problem for both big and small businesses. In a recent Australian survey of business chief executive officers, waiting for a regulatory decision was nominated as the most costly stage of the compliance process (Australian Industry Group 2011).

Some delays are caused by factors outside a regulator's control, for example, an approval or application process may be delayed because an applicant has not submitted all of the required information or has not responded in a timely way to requests by the regulator for further information 'stop the clock' provisions are used by many regulators to ensure that delays caused by the applicant do not count against the regulator's timeliness performance. The Commission has, however, previously found evidence that some regulators use such provisions in inappropriate or inefficient ways (PC 2012b).

While some delays will be unavoidable, there would appear to be scope for many regulators to improve timeliness. First, stronger commitments to target timelines for key regulatory processes or activities would go some way towards addressing business concerns about lack of clarity and certainty.

When drafting new or amended legislation, it would generally be good practice to include statutory time limits. In principle, this should impose a strong discipline on regulators to perform their activities in a timely manner. Overall, around two thirds of survey respondents said their agency was subject to time limits mandated in legislation or regulation. The use of mandated time limits does, however, vary across regulatory areas — for instance, while all taxation or superannuation-related regulators and over 90 per cent of regulators in the area of building and construction reported mandated time limits, this was the case for only 45 per cent of food safety regulators (PC regulator survey 2013).

Governments and regulators can also commit to target timelines for standard processes and activities, in public statements or documents — for example, in: government statements of expectation and regulator statements of intent (see below); and service charters, corporate plans and/or annual reports. Overall, less than half of the Commonwealth and state and territory regulators surveyed by the Commission said that public commitments to target timeframes applied to their agency, although there were some differences by regulatory area. It was most common in the areas of industrial relations and occupational health and safety, and less common in the areas of planning, heritage or land use; gaming and racing; and environment protection (PC regulator survey 2013). Further, the Local Government Association of Queensland noted that:

> It is … a common practice for councils to apply service delivery charters which set out the timelines involved in a process which include expected response times to applications and enquiries. (sub. 27, p. 6)

Ideally, and particularly for non-standard applications, regulators should routinely communicate expected timeframes (the timeframes that would apply if the regulator has received all required information) to applicants, including all key milestones. As soon as the regulator is aware there is likely to be any deviation from those timelines the applicant should be notified (with reasons given for the delay). Around half the regulators responding to the Commission's survey said they provided regulated businesses with advance notice of expected timeframes. This was most common amongst agencies in the areas of taxation and industrial relations, but utilised less often in the areas of planning, heritage or land use; superannuation; and gaming and racing (PC regulator survey 2013).

Some other leading practices for improving timeliness are listed below:

- track based assessment and allowing non-contentious applications to be fast tracked (NSW Business Chamber, sub. 25; PC 2012b)
- pre-lodgement meetings (for example on a development application) with advice provided in writing (PC 2012b)
- monitoring by regulators of the timeliness of their decisions and processes (and benchmarking of their timeframes with comparable regulators/processes) and any complaints related to timeliness
- tracking progress of referrals to other agencies (21 per cent of regulators responding to the PC regulator survey use this practice)
- public reporting of performance against timeliness benchmarks (46 per cent of regulators use this practice (PC regulator survey 2013))

  - where timelines are not being met a commitment to strategies for reducing times wherever appropriate — this would increase accountability and create a stronger incentive to improve performance (chapter 6)
- consideration of fee waivers or discounts where statutory timeframes are not met (DAFF 2011a, p. 44)
- selective use of 'silence is consent' policies — if a regulator does not respond to a complete application within a certain timeframe, the application is deemed to have been approved — this is used, for example, in the ACT for development applications requiring referral to another body (that body's support for the application is assumed if no response is received within the statutory timeframe) (PC 2011b).

DRAFT RECOMMENDATION 4.3

Regulators must undertake their regulatory activities in a timely manner, so as to minimise the compliance cost for businesses associated with delays. In addition to the use of statutory time limits wherever possible, regulators should be required to:

- ***commit publicly (for example in service charters or annual reports) to target timeframes for key processes***
- ***to report on their performance in meeting targets***
- ***routinely communicate expected timeframes to businesses in relation to individual applications***
- ***consider other measures to improve timeliness, such as tracking of referrals to other agencies and the use of pre-lodgement meetings.***

Consistency and impartiality

Regulations should be enforced and requirements interpreted by the regulator in a manner that is consistent and non-discriminatory.

Inconsistency can disadvantage one regulated business relative to another. It also creates uncertainty, which can lead to some businesses doing more than is required in order to make absolutely sure they are not in breach. While this can result in significant unnecessary compliance burdens for business, a potentially greater cost of uncertainty is its impact on investment, innovation and the growth of businesses.

Participants have raised concerns about inconsistent compliance advice and decisions between different officers and/or different regional offices and between local government councils. For example:

> Businesses … complain that there is lack of clarity and inconsistency related to the application of codes and standards. (CCIQ, sub. 16, pp. 5–6)
>
> Where regulations are applied by local government authorities how they are interpreted can vary massively from one LGA to the next — meaning it is hard to get consistency in meeting requirements. There are too many 'grey' areas or contradictions in some legislation. (Australian Chamber of Commerce and Industry, sub. 5, p. 12)

The Commission notes that state governments have produced some guidance to promote consistency between local governments. For example, New South Wales, Victoria and Western Australia provide specific guidelines to promote consistent decision making and assist local governments in assessing development applications for mobile telecommunications infrastructure (PC 2012b).

Participants have also raised various concerns about a lack of transparency or accountability in government processes and decision making by some regulators. The Small Business Development Corporation (WA), for instance, in its submission noted that the WA Government Red Tape Reduction Group had identified a lack of clarity about the government's processes and a lack of transparency and clear accountability and 'ownership' of decision making as major sources of frustration for business (Small Business Development Corporation (WA), sub. 22).

Regulators must be held accountable for the decisions they make. Processes for decision making need to be clearly defined and transparent, including internal and external review processes. Regulatory decision making can be distorted towards the interests of certain businesses or an industry as a whole at the expense of broader community interests, when a regulator becomes 'too cosy' with the entities it is regulating or, in the extreme, is 'captured' by certain interests. The potential for conflicts of interest can often be greater in smaller communities and with regulatory enforcement by local government where, for example, established relationships between business owners and inspectors is likely to be more common (the so called 'country cop' issue). Any overt corruption or conflicts of interest, or indeed perceptions of inappropriate conduct, can seriously impact on the community's confidence in a regulator and lead to increased uncertainty for business and reduced voluntary compliance.

Given the impact that regulator officers can have on the profitability or even viability of regulated businesses, the risk of corruption or other abuse of powers is very real. Regulators, therefore, must have systems in place to ensure such risks are minimised.

Regulators have adopted a range of strategies for ensuring consistency and impartiality in decision making. Training and preparation of appropriate guidance

material for staff, for example on the use of discretion and dealing with conflicts of interest, are critical (chapter 6). Other important mechanisms include:

- formal documenting and publishing of compliance and enforcement strategies and decision-making processes
- documenting of decisions (and reasons)
- subjecting some proportion of decisions to review
- implementing quality assurance processes (through adopting quality management systems such as ISO9000)
- separation of investigation and education roles from enforcement functions and centralising inspection programs (to reduce decentralised discretion)
- staff rotations (to reduce the risk of inappropriate relationships developing)
- ensuring community groups are able to participate and have their views taken into account.

In the PC regulator survey , the most common mechanisms used to 'reduce the risk of capture, corruption or bias in decision making' were the documentation of reasons for decisions, the use of review mechanisms and policies to report conflict of interest. Each of these three mechanisms was used by around 90 per cent of responding regulators. Audits and staff rotation policies were less commonly used. When asked to report on any additional mechanisms used, commonly reported mechanisms revolved around increased oversight — such as having multiple staff undertaking inspections — and review and appeal mechanisms.

The NSW Food Authority has implemented a number of measures to improve consistency and accountability:

> All food businesses receive a copy of any audit/inspection reports as they are generated during each audit/inspection and these are discussed with management. Businesses similarly receive copies of any follow up instructions or notices issued by the Authority or local councils. These processes include appeal mechanisms to ensure that businesses can have any disagreements relating to inspections or follow up properly considered … Licensed businesses are free to access any records held by the Authority in relation to their business. (NSW Food Authority sub. 28, p. 11)
>
> [The Authority conducts] an audit verification program to ensure the consistency and integrity of regulatory audits provided by commercial food safety auditors. The Authority also undertakes [reviews of] … audit reports prepared by commercial auditors. (NSW Food Authority sub. 28, p. 5)

The Attorney General in NSW has issued Internal Review Guidelines to assist agencies to conduct internal reviews of penalty notices fairly, impartially and consistently across Government (NSW Attorney General 2010b). The

Commission's *Local Government as Regulator* benchmarking report identified periodic external auditing of assessment decisions and processes as a leading practice (PC 2012b).

While transparency of decision making processes and documenting of decisions and reasons should be strongly promoted, regulators need to strike a balance between, on the one hand, achieving the primary objective of informing businesses and the broader community and, on the other hand, the protection of confidential information.

In some cases regulators have their own Code of Conduct (or Code of Ethics) for staff or a Service Charter. Specific acts also sometimes contain conflict of interest procedures or provisions which regulator staff (mainly executive level) must comply with. Another important accountability mechanism is ensuring fair and independent external dispute resolution mechanisms (chapter 5).

In addition, a wide variety of whole of government measures are used by Australian jurisdictions to identify and prevent corruption. These include Codes of Conduct/Ethics for public sector employees, Ombudsman Offices that can investigate complaints about public officials, Integrity/Misconduct/Corruption Commissions, such as the NSW Independent Commission Against Corruption (ICAC), and various other review/investigative functions within Government.

4.6 Conclusion

There is widespread agreement on many elements of what constitutes 'best' or 'leading' practice in compliance and enforcement. However, key differences between regulators, for example in the nature of the industry or risks being regulated or institutional arrangements, mean that the merits of applying any particular detailed approach need to be considered by individual regulators on a case-by-case basis.

Central to ensuring compliance burdens are not excessive is the consistent implementation of enforcement policies that are risk-based and allow the regulator to respond to compliance breaches in a graduated and proportional way. For individual businesses, the nature and frequency of inspections, reporting and other requirements should generally reflect both the likelihood of non-compliance and the consequences should a breach occur. Enforcement resources should be prioritised and targeted towards highest risk businesses or activities where there is the maximum scope to reduce hazards or any harm associated with non-compliance.

The appropriate use of different enforcement tools will vary depending on the area of regulation, the nature and severity of the risks as well as the capacity and willingness of businesses to comply. In many regulatory areas, there are likely to be compliance/administrative cost savings for regulated entities and the regulator, and improved compliance outcomes, when the regulator adopts a facilitative and educative approach to enforcement.

Where breaches do occur, the use in the first instance of warnings in conjunction with education/information on how to comply, will often be the most appropriate response, particularly for small businesses, where non-compliance can often arise from a lack of awareness of obligations. The use of stronger sanctions such as fines or withdrawal of a licence should be reserved for more serious breaches or where lower level responses have failed to improve compliance. In some cases there are legislative or other constraints on the range of enforcement tools available to the regulator, which necessitates a heavy handed response to relatively minor breaches (or alternatively creates an incentive for a regulator to take no action at all).

Most regulators in Australia do, at least in principle, adopt a risk management approach in determining their compliance monitoring activities and some degree of 'escalation' in their responses to non-compliance. However, the effectiveness of the implementation of these strategies by regulators varies substantially and the concerns raised by participants in this study and the evidence and findings of various other recent reviews and audits suggest that generally there remains considerable scope for improvement in regulator compliance and enforcement practices.

For many regulators there is scope to improve risk methodologies, data collection and assessments and such improvements could facilitate a better allocation of enforcement resources and, where appropriate, a lower compliance burden for business. The Commission recognises, however, the significant challenges involved in monitoring and appropriately differentiating risks — including the cost and complexity of gathering evidence on relative risks. The benefits of devoting additional resources to improving risk management approaches must always exceed the costs — including costs for the regulator and costs borne by businesses that may be required to provide additional information to inform risk assessments.

The Commission has found that there is likely to be substantial scope to reduce business compliance costs, while maintaining (and even enhancing) regulatory outcomes, with the wider adoption of leading practices in the following areas:

- ensuring that decisions about the nature and level of compliance obligations on business as far as possible *consistently* reflect an assessment of the relative risks posed by business activities

- greater efforts to facilitate compliance and more consistent use of discretion to ensure minor breaches are dealt with in a proportionate manner
- rationalising the number of inspections, consistent with risk assessments, and better coordination of inspection activity with other regulators
- appropriate recognition of industry and other third party certification processes and outsourcing of inspections where the benefits are likely to outweigh the costs
- public commitments to target timeframes for key processes and decisions
- increased transparency and accountability of processes and decisions to ensure impartiality and greater consistency.

Reporting obligations imposed as part of regulators' compliance monitoring are also a major source of burden for business. Opportunities to streamline reporting requirements and greater coordination and sharing of information by regulators are discussed in the next chapter.

5 Communication, information and consultation strategies

Key points

- The time spent by businesses understanding regulations can be substantially reduced, and the likelihood of their activities delivering good regulatory outcomes increased, when regulator communication is effective, and advice and guidance are accessible.
  - Given the growing number and range of regulations that businesses need to be aware of, a premium should be placed on brevity and clarity.
- Small businesses are much more likely than large businesses to rely on third parties, including industry and professional associations and intermediaries such as tax agents, to receive information on regulatory requirements.
  - Leading practice regulators are reflecting this in their communication strategies.
- Regulators should provide ready access to advice and guidance material via a range of modes, such as written guidance, websites, seminars and help desks.
  - Websites tend to be the first line of communication with business and third parties for many regulators. Provided they are well set out and maintained, comprehensive and easy to navigate, they can be particularly helpful to small businesses, many of which undertake compliance activity outside business hours.
- Data requests of business by regulators should: be the minimum necessary to allow the regulator to perform its function effectively; where possible be in the form that business use themselves; and avoid unnecessary duplication or the requirement for business to supply the same information repeatedly to a single regulator.
  - Coordinating information requests and sharing information, where appropriate, are leading practices for reducing reporting burdens.
- Local governments face substantial challenges in putting in place effective strategies for communicating with small business, due largely to resource constraints.
- Regulators should be prepared to tailor their delivery approach to reflect the diversity of characteristics of small businesses — such as for sectors that are regionally dispersed or have a high proportion of owners from non-English speaking backgrounds — subject to an assessment of the costs and benefits.
- Effective complaints handling and grievance processes — which have a degree of independence from the enforcement activities of the regulator, and which provide businesses with clear reasons for decisions — build business confidence in regulatory arrangements, encourage two-way communication and can lead to improved regulator engagement practices.

5.1 Introduction

Effective communication by regulators is essential for achieving good regulatory outcomes. Put simply, it is no good having well designed regulatory regimes if the businesses that are affected are either unaware of regulatory requirements or face substantial barriers in accessing information about them.

Accessible advice and guidance can reduce the time spent by small businesses understanding regulations and determining their compliance and reporting obligations. Well designed reporting requirements and ongoing information requests associated with licensing and the issuing of permits can minimise compliance costs for business, without undermining the regulator's capacity to ensure that regulations are being met.

Regulators also need to provide small business with information on their regulatory role, objectives, enforcement policies and sanctions for non-compliance. This can include documenting and communicating steps and timelines in decision making. Provision of such information promotes transparency. Similarly, the publication of key decisions (and their underlying rationales) can improve consistency of decisions over time and across decision makers in a regulator.

More broadly, by making it easier for potential new businesses to understand an industry's regulatory requirements, effective communication promotes market openness — increasing economywide competition, dynamism and productivity.

Regulators face many challenges in seeking to develop and consistently employ sound communication practices. In particular, meeting the needs of small business for clear, accurate and accessible advice requires careful judgment by regulators on where to devote staff and funding to achieve the greatest improvement to communication outcomes.

Industry participants, review bodies and regulators themselves have identified a range of areas where there is scope to enhance communication strategies. To the extent possible given the available evidence, this chapter identifies leading practices that can assist regulators to: better communicate regulatory requirements to small business; streamline reporting requirements; strengthen consultation and feedback — including complaints handling and appeal mechanisms; and better coordinate actions and the sharing of data to improve communication and information handling and remove unnecessary burdens on business.

Particular characteristics of small businesses — they are often diverse, difficult to either identify or contact and time poor — mean that in some instances a tailored approach by regulators in communicating with, and seeking information from, small

business, may lead to better regulatory outcomes and reduce unnecessary compliance burdens. More detailed supporting material on communication approaches is provided in appendix F.

5.2 Achieving better communication

There is broad agreement on the principles for effective communication of regulatory requirements to business. Clarity is crucial. In its recommendation on regulatory policy the OECD noted:

> Governments should have a policy that requires regulatory texts to be drafted using plain language. They should also provide clear guidance on compliance with regulations, making sure that affected parties understand their rights and obligations. (2012b, p. 24)

Other leading practices include flexibility, appropriate targeting, timeliness, accessibility, accuracy, comprehensiveness, appropriate resources, evaluation and continuity (box 5.1).

Box 5.1 Leading practices for informing small businesses about regulation

Flexibility — Information strategies should be designed to suit particular circumstances.

Appropriate targeting — Small businesses likely to be affected should be carefully targeted to receive information.

Timeliness — Information should be available to small businesses when they need it.

Accessibility — Information about the regulatory proposals should be easily available to the affected small businesses at low cost.

Clarity — Information should be communicated in a way which can be easily comprehended by small business.

Accuracy — Information disseminated to small business should be accurate.

Comprehensiveness — Information should tell small business what they need to know.

Appropriate resources — Information strategies should be adequately resourced.

Evaluation — Information strategies should be evaluated to monitor their effectiveness.

Continuity — Information should be provided to small business on an ongoing basis.

Source: Commonwealth Office of Small Business (2000).

Despite widespread acceptance of these principles, ensuring they are reflected in actual communication practices 'at the coalface' remains an ongoing challenge for regulators.

Small business concerns about regulator communication

The Commission heard a number of concerns about regulator communication with small business, including:

- regulators failing to communicate their requirements simply and clearly
- poor quality advice — inconsistent, erroneous or lacking in specificity, with regulators unwilling or unable to advise what constitutes adequate compliance
- time taken and costs involved in locating and understanding requirements
- too much written material leading to information overload and lack of clarity on priorities (box 5.2).

These concerns about regulator communication are consistent with those identified in other reports and surveys.

The Commonwealth Ombudsman (2011), for example, noted that most of the complaints received about government agencies arise from poor communication, including not writing letters in plain language, failing to provide key information such as the right to review and having no single point of contact, so that business owners have to repeat their concerns over and over again.

The ACCI (2012) National Red Tape Survey found that three of the top four most costly stages for business in complying with government regulatory requirements related to information and communication. While this was true for businesses regardless of size, small businesses were twice as likely to report that it is more costly to find information about regulatory obligations compared to medium sized and larger businesses. Almost one third of small businesses indicated that information from regulators at all three tiers of government is inadequate (ACCI unpublished).

Similar views were reflected in a number of other reports including: ANAO (2011b, 2011c, 2011d),Tasmanian Auditor-General (2012), NSW Auditor-General (2011), ACT Auditor-General (2011), AI Group (2011) and Regulation Taskforce (2006).

Box 5.2 **Small business concerns about regulator communication**

Regulators failing to communicate their requirements

As a new business, simply knowing what to do, when to do it and how to report has been problematic. (ACCI, sub. 5, p. 10)

[regulators should] [a]nswer their … phones without a 50 minute wait. Write the instructions on their websites very clearly and concisely and then have a go themselves to see if they work, or do like the food safe people and get regular people to test out their websites. (SBDC WA, sub. 22, p. 5)

Poor quality advice

Little to no guidance is given on the level of compliance that is expected from business in practice, with constant reference to key terms which are undefined — such as 'reasonable inquiries', 'assessment of unsuitability' and 'substantial hardship'. The regulator has shown no willingness to give clarity to these terms, instead referring the onus back on to business to be determinative of what is needed to comply. (Fast Access Finance Pty Ltd, sub. 20, p. 15)

Time consuming and costly to understand requirements

With the amount of regulation for pretty much every area the government get involved in — tax, employment, electricity etc. you need multiple degrees, unlimited time or tens of thousands of dollars to get someone else who has the degrees or time enough to care. In small business we don't have any of that. (ACCI, sub. 5, p. 10)

Too much information

[I]nformation is nearly always difficult to read and understand and certainly not engaging. These websites do not help with safety but, rather, inhibit safe practices … Assuming that the small business person has time to read and fully understand … pages of gobbledygook, is a common mistake made by regulators. (COSBOA, sub. 15, pp. 8–9)

Challenges for regulators in communicating with small business

The foregoing discussion highlights that despite efforts by regulators to improve communication with small business in recent years, there remains scope for improvement. In part, this reflects that the small business sector is notoriously difficult to engage with — small businesses are diverse and extremely time poor making it more challenging for regulators to effectively communicate with them compared with larger businesses (chapter 1). The Tasmanian Small Business Council notes:

> Communicating to and with small business operators is difficult if for no other reason than their time is at a premium. Their personal endeavour is the main source of revenue for the business. It is therefore extremely costly for them to attend information meetings and briefings. If they are away from their business they lose income, they have costs of travel and attendance and often have to pay a locum to 'hold the fort' at the place of their business. (sub. 13, p. 3)

One of the challenges for regulators is that small businesses frequently expect the regulator to find them and tell them about their regulatory requirements. On this, the Tasmanian Small Business Council notes:

> For most, they [small business] expect to be told that they have a compliance responsibility, the level of it and be informed using the mode of communication most often used in their sector. In many instances, just how they expect the regulator to know about their enterprise is anybody's guess. (sub 13, p. 2)

As discussed in chapter 3, small businesses generally lack dedicated resources with the necessary skills and training to determine their regulatory obligations directly from legislation or from detailed written guidance. Small businesses can sometimes lack the literacy skills to read long and complex guidance material. For example, ABS data suggest that 44 per cent of Australians aged 15 to 74 years old had literacy skills below the level required to read through dense and lengthy text and disregard irrelevant or inappropriate text content (NSW Business Chamber, sub. 25, p. 7). The NSW Small Business Commissioner, for example, noted:

> Given the limited resources, capability and sophistication of most small businesses, a significant proportion of small business will not have a sufficient understanding of what it needs to comply with certain regulations. (sub. 12, p. 2)

The 2013 PC regulator survey found that the key constraints regulators faced in engaging specifically with small business were: small businesses' limited awareness of their regulatory obligations; the number and diversity of small businesses; and lack of time and availability of business owners or key staff (chapter 3).

Finally, providing advice and guidance to large numbers of diverse businesses can be very resource intensive. VicRoads, for example, estimates that around 30 per cent of its transport safety services effort is devoted to providing education and advice (NTC, sub. 1). With limited resources, selection of the most appropriate approaches to employ and the businesses to target will necessarily involve prioritising and some tradeoffs.

Modes of communication

Regulators employ a range of different modes through which they communicate with small businesses. The results from the PC regulator survey indicated that (figure 5.1):

- *websites, on-site visits and dissemination of information through industry groups* were the most commonly cited modes for effective communication with small business — with over four fifths stating these modes were either 'effective' or 'very effective'

  - of these, 'on-site visits' stood out as being around twice as likely to be rated 'very effective' practices for communicating with small business
- *seminars/workshops, helpdesks/advice hotlines and business focus groups and other consultative fora* were also commonly used and found effective (by a majority of regulators)
- *relationship managers* were used by around half of regulators and generally found to be effective
- *external 'one-stop shop' websites and social media* (e.g. Facebook and twitter) were less likely to be rated effective, with the majority of regulators who used these modes unable to assess their effectiveness with confidence due to lack of information and their relative newness.

There was some discrepancy between regulator and business perceptions of the usefulness of various communication approaches, with small businesses finding regulator websites less useful than advice from third parties (such as accountants and solicitors) or from other business owners (figure 5.2). Like regulators, small businesses generally considered information disseminated through industry groups to be a very effective form of communication on regulatory requirements. It should be noted, however, that third parties often draw on regulator websites for regulatory information to disseminate to small business.

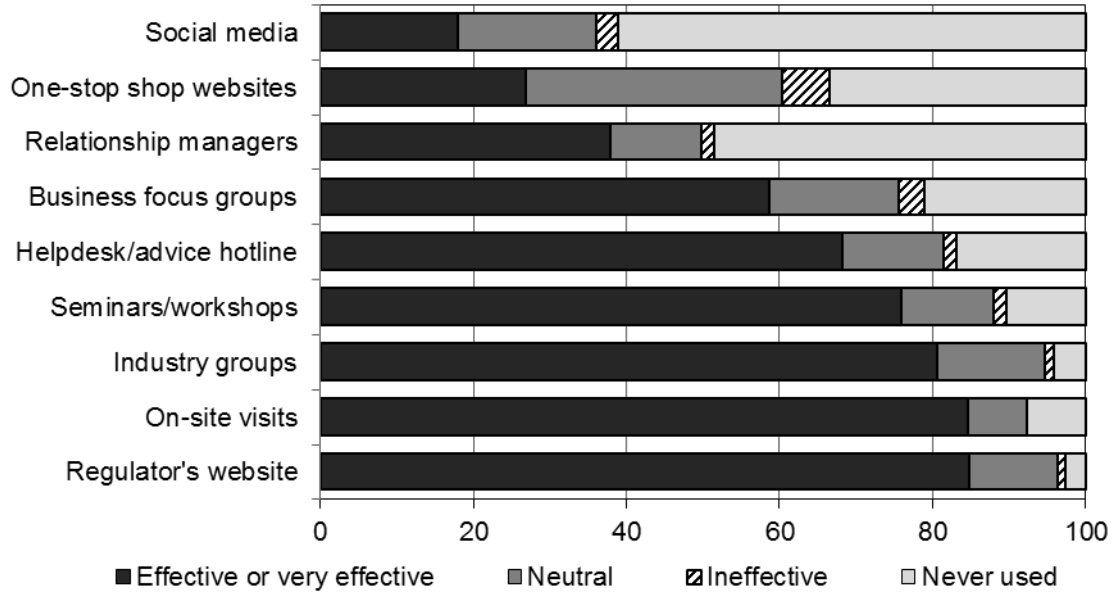
Key aspects of the effectiveness of some of these modes along with examples of their use are discussed below (table 5.1).

Written guidance

While not a discrete mode of communication per se, written guidance is an essential element of many different communications modes such as printed guidance manuals, websites and newsletters. The key to effective written guidance provided to business is that it interprets the legal requirements of regulation accurately, clearly and succinctly. Small business owners, the NSW Business Chamber notes: '… will usually prefer a simple overview of their obligations, an explanation of the regulations objectives, and a step-by-step guide to compliance' (sub. 25, p. 1). An example of such guidance is the AUSTRAC small business checklist (table 5.1). In addition to formal guides and checklists, other written material such as newsletters, reports and other documents can also be of assistance to small business so long as it is relevant, practical and written in plain language.

Figure 5.1 **Regulators' assessment of the effectiveness of different communication modes**

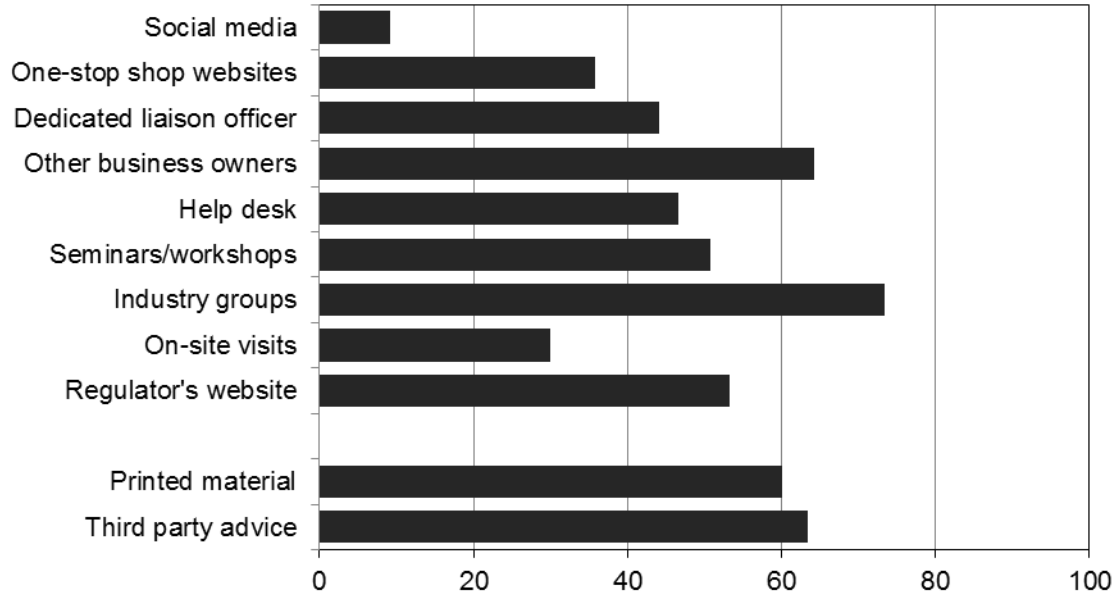
Per cent of response (n=187)



Source: PC regulator survey 2013.

Figure 5.2 **Small business assessment of the effectiveness of different communication modes**

Per cent of respondents who found the mode effective (n=120)



Source: COSBOA sub. 31.

Producing succinct guidance material that does not over simplify laws and points small business to more detailed guidance where it is appropriate requires careful

judgment and considerable skill in drafting. In the UK, for example, it was found that regulators often feel that comprehensive and detailed explanation is needed to avoid misleading business about the complexity of the law (NAO 2008). This point was recognised by the NSW Business Chamber, which noted that 'complex regulations will take longer to understand regardless of a regulator's efforts', but that it was nevertheless important for regulators to 'do what they can to improve their communications' (sub. 25, p. 6).

Even if all regulators endeavour to follow best practice in their guidance material, small businesses may still be burdened by the need to sort through and filter the 'overwhelming plethora' of material they have to deal with across all areas of regulation (Strong Strategies Pty Ltd, sub. 19, p. 3). However, such burdens will clearly be greatly lessened if, in preparing each set of guidance, regulators place a premium on brevity.

Websites

Having a good website is an essential precondition for communication with most businesses, regardless of size — either directly with business or via third parties. As many small businesses undertake their compliance activity after hours, when most call centres and information-help lines are closed, the ability to access information at their convenience through websites is important. However, as COSBOA warned:

> Many regulators tend to believe that having a website … is enough and they've done their job. Having a website helps, but certainly doesn't solve the communication challenge. (COSBOA, sub. 15, pp. 5-6)

To be effective, websites need to be well set out, comprehensive, easy to understand, provide information collated by business type and topic and have useful links (NAO 2008). Content and placement of information on websites also needs to be regularly reviewed and updated. In addition, businesses need to know the site exists and have access to the technology and skills to make use of them. For example, Australian Bureau of Statistics data indicate that around one quarter of businesses in the accommodation and food services sector do not have internet access (ABS 2013c). Hence, regulators need to take care to ensure that appropriate strategies are also maintained for less computer literate business owners and those without the necessary internet access.

Seminars and workshops

Seminars and workshops can be very effective means of providing: practical advice and guidance to business on regulatory obligations and how to meet them; advance

notice of impending changes; and tailored advice and training on specific aspects of the regulatory requirements. They can be effective where there are concentrated populations of small businesses that have similar interests and information requirements or for specific businesses that have been identified as requiring help. The Commission heard in discussions with regulators that small businesses can at times be more willing to participate in training sessions that are run by industry and professional associations (albeit often with behind-the-scenes support by the regulator) than training sessions run by the regulator alone.

Direct or personalised communication

There will be times when the only effective means of communication between regulators and business is direct or personalised, such as through face-to-face meetings, telephone conversations, emails and letters. Direct communication with business is effective where relationships between the regulator and regulatee are complex or require frequent exchanges. Although resource intensive, it also has the advantage of allowing tailoring of information to meet the needs of the individual business. This can be valuable where, for example, small businesses have limited experience or knowledge of regulatory requirements, such as start-ups, or (where translation services are available) have non-English speaking business owners.

Help desks and call centres

Help desks can provide businesses with a simple and low cost way of accessing the regulator. The Commission heard that, notwithstanding often long waiting times, in general these services work reasonably well for those firms that are able to set aside the time to call during business hours. A key to effective help lines is that regulators ensure that operators make efforts to employ an educative and facilitative approach rather than an adversarial one, reducing stress for small business. In addition, businesses need to be confident that, when seeking advice, they will face no adverse repercussions associated with revealing issues or problems with compliance. COSBOA (sub. 15) identified the ATO helplines, along with the Fair Work Ombudsman as receiving praise from its members for having professional and well managed processes and staff. Strong Strategies, also commented favourably on the ATO's helplines noting:

> It is to be noted and praised that the ATO staff has also undertaken training with Beyond Blue to understand how depression affects small business people and soften their approach so as not to be a significant part of the problem. This is also a best practice behaviour of a regulator that should be continued and expanded. (sub. 19, p. 7)

Table 5.1 **Modes of communication**

Mode of communication	*Circumstances when effective*	*Example of use*[a]
Printed guidance	• Firms are geographically diverse • Firms are low tech • Some general requirements apply to all/most firms • Regulatory requirements are not changing frequently • Industry association can assist in dissemination	ATO, Workcover Tasmania, AUSTRAC, Transport Commission
Websites & other electronic modes	• Firms have access to technology and skills • Regulatory requirements change often • Requirements vary between business types and require specific detailed examples • Regulator is known to business community (and therefore businesses will look for their website • Firms rely on after hours access to regulatory information	NMI, ACCC, Fair Work Ombudsman, NTC, Local Govt's publishing local laws
Seminars & workshops	• Concentrated population of firms • Large number of firms • Similar interests/themes amongst groups of firms • Firms able to get time away from their operations • Industry has large number of non-English speaking business owners	NICNAS, ATO, Workcover (NSW), Building Commission, HCSCC
Direct or personal communication	• Concentrated population of firms • Small number of firms • Requirements vary between business types and require specific tailored assistance • Industry has large number of non-English speaking business owners	OSR NSW, DSEWPaC Hazardous Waste, Land Development/ construction
Help desks & call centres	• Firms are geographically diverse • Large number of firms • Regulatory requirements change often • Requirements vary between business types and require specific tailored assistance	ATO, ASIC, ACCC, NSW Food Authority, Australian Customs
Use of intermediaries	• Firms lack knowledge/trust of regulator • Strong industry or professional associations • Industry has history of self regulation • Industry has large number of non-English speaking business owners	ACCC, ATO, NMI, DAFF, Transport Safety Vic, OLGR

[a] ACCC (Australian Competition and Consumer Commission), ASIC (Australian Securities and Investments Commission), ATO (Australian Taxation Office), AUSTRAC (Australian Transaction Reports and Analysis Centre), DAFF (Department of Agriculture, Fisheries and Forestry), DSEWPaC (Department of Sustainability, Environment, Water, Population and Communities), HCSCC (Health and Community Services Complaints Commissioner), NICNAS (National Industrial Chemicals Notification and Assessment Scheme), NMI (National Measurement Institute), NTC (National Transport Commission), OLGR (Office of Liquor, Gaming and Racing), OSR (Office of State Revenue).

Source: Regulator websites.

Use of intermediaries

Small businesses tend to rely heavily on trusted networks for information, including: industry and professional associations; business chambers; business intermediaries such as accountants; and family and friends. Overall, less than half of small businesses receive information about regulatory changes directly from the regulator or government agency (whereas the majority of large businesses do) (ACCI, sub. 5). Respondents to COSBOA's online forum identified industry associations as their most preferred source of information. Industry and professional associations generally have well established membership groups and effective methods in place that are well suited to communicating messages on behalf of regulators. These can include industry newsletters and other publications; industry expos and training sessions operated in conjunction with the regulator. Given this, communication strategies by regulators that are directed through trusted intermediaries can be more effective than those targeted directly at small business.

Social media and other electronic modes of communication

Social media such as Facebook and twitter, as well as other tools such as smartphone applications, webinars (web based seminars) and email, can provide a more succinct, targeted and user friendly means of communicating advice and information to business — particularly with younger and more technologically literate small business owners. The Civil Aviation Safety Authority, for example, uses twitter to inform business and the community of developments in aviation safety regulation including forthcoming workshops and other education initiatives.

However, COSBOA's online forum (sub. 31) found that social media was small businesses' least preferred source of information from regulators. Similarly, a review of ACCC communications with business found that:

> Of the 'new media' approaches suggested, it is perhaps the least 'new', an e-mail alert or bulletin, which is most popular … In contrast, social networking sites, blogs and online video clips are at best only the interest of a smaller minority. (ORC International 2012, p. 23)

While not yet a primary means by which regulators communicate with business, social media and other electronic modes of communication clearly have potential for improving communication between regulators and small business in future years (appendix F). The Commission would be interested in hearing any examples of where social media and other 'new media' approaches have been successful in supporting regulator communication.

Regulator strategies for better communication

Key strategies employed by leading practice regulators to improve communication with small businesses include: better targeting of businesses; tailoring both the form, and mode of delivery, of information to improve its usefulness; building stronger relationships; and continuous improvement. Cooperating with other regulators to improve information provision and streamline information collection is also important for improving communication and discussed later in the chapter.

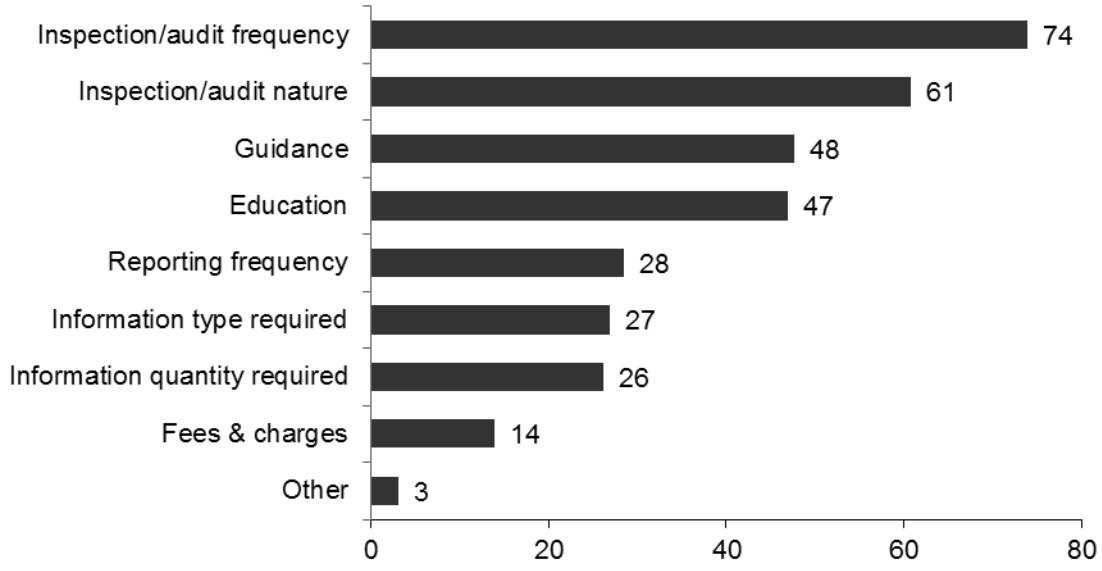
Effective targeting of business

Employing a risk based approach means that regulators should target their communication efforts towards those businesses or sectors where both the risks of adverse regulatory outcomes are greatest and the payoffs from additional information provision are highest. It is not always the businesses with the greatest risks of non-compliance or the largest potential impacts that should be targeted — providing additional information to high risk businesses that are already well informed of their regulatory obligations and how to meet them, yet choose not to comply, is unlikely to be an efficient use of regulator communication resources. In contrast, the payoffs from targeting communication efforts towards a large number of low risk small businesses may be worthwhile, since small businesses may be non–compliant simply because they find it difficult to ascertain their regulatory obligations.

Factors regulators need to consider include the nature of the industry sector, size and age of business, geographical location and the characteristics of the owner(s) of the business. Regulators also need to decide the frequency, mode and extensiveness of their communications with business. Interactions between regulators and business involve costs to both sides and should be the minimum necessary to achieve the desired level of compliance.

The PC regulator survey found evidence of regulators targeting their communication and information strategy based on the risk category of individual businesses. Overall, just under half of all regulators stated they used the individual business's risk category to determine the guidance provided and their education efforts (figure 5.3). Further, around one quarter of regulators stated they also used the risk category of the business to determine the amount and type of information the business reports to them. Regulators were less likely to use risk to target communication than to target inspections and audits. While there may be more limited scope for targeting of communications and less cost savings achievable, the Commission considers there is nevertheless scope for more widespread use of targeting in regulator communications.

Figure 5.3 **Use of risk category by engagement approach**
Per cent of regulators (n=187)



Source: PC regulator survey 2013.

That said, as noted in the previous chapter, regulators need to be mindful that a drop off in regulator interaction with some businesses under a risk based approach may, in the absence of other communication measures, increase costs for those reliant on regulator interaction (even that associated with visiting inspectors) for advice on regulatory requirements and how to comply. In the longer term, lower interaction may also reduce regulator knowledge and understanding of businesses and undermine business incentives to comply. Hence, ongoing monitoring by regulators will be needed to determine whether levels of advice and interaction with small business are appropriate, particularly in industries with high rates of firm entry and exit or those industries experiencing rapid technological or structural changes.

Tailoring — no one size fits all

In certain circumstances regulators may find they can achieve improved regulatory outcomes by tailoring advice to reflect differences in businesses that are regulated. This may include tailoring assistance and educative approaches (such as through workshops or on-site business advice) to facilitate understanding of regulatory requirements, and developing improved communication tools and software to ease compliance burdens.

The optimal degree of tailoring will depend on the relevant benefits and costs. For industries with a majority of small firms, the default communication and information strategy should be directed towards small business. However, even

then, small businesses are diverse in their needs, so additional tailoring may be needed. COSBOA noted that communications strategies designed with only big businesses in mind may not be effective for small businesses, and further, that:

> Communications and process designed, generically, for all small businesses will also fail due to the differing nature and needs of each sector. To communicate with a courier driver in the same way as communicating with a pharmacist is seeking failure not success. Process and communications must be designed for the specific industries and workplaces. (sub. 15, p. 4)

The most appropriate approaches will therefore depend on a number of considerations, including: the outcomes sought; the specific regulatory environment; industry and business size and diversity; business awareness of their obligations and experience with meeting them; and the capacity of regulated entities to use and access the mechanism. Clearly, before committing to a tailored approach, the regulator would need to be convinced that the expected benefits are likely to exceed the costs of establishing, maintaining and operating the communication mechanism.

Overall, the PC regulator survey revealed that a number of regulators provided some tailoring of different aspects of their engagement, including tailored forms or fact sheets, coaching, seminars or other training and simplified requirements.

One example of a tailored approach is the provision of guidance for non-English speaking business owner managers and others who have difficulties in comprehending regulatory requirements. There are many examples of regulators tailoring advice and guidance to take account of language barriers. For example the National Measurement Institute (NMI) noted it focuses its efforts on developing easy-to-understand guidance in multiple languages (box 5.3).

The food industry, with its high rates of non-English speaking small business owners, is good example of the importance of tailoring. This was emphasised in a review by the ACT Auditor-General which noted that while public information typically included a notice that interpreting and translating services are available, it is not provided in languages other than English, noting, 'It is therefore important that information on food safety be given in languages that reflect the cultural diversity of food businesses in the ACT (2011, p. 23).

Tailoring is also important for streamlining information collection from business (discussed in the following section). Regulators can tailor the information and reporting requirements to different sizes or types of businesses in a variety of ways — for example, providing forms which suit the circumstances of the business, instead of providing one complex form that meets the needs of the most difficult

case. Alternatively, they could introduce reporting requirements which take into account firms' transaction costs in meeting them.

It should be noted, however, that such flexibility would involve some costs to governments, since there are administrative costs in tailoring information or other attributes of the delivery of a regulation. It is therefore important that the resources expended can be justified by the benefits gained.

Box 5.3 **National Measurement Institute's approach to communicating with small business**

To increase transparency and raise awareness of proposed (or potential) changes to regulation, the National Measurement Institute (NMI) regularly consults with industry associations and makes all of its consultations public on the its website. This allows small business owners to keep abreast of proposed changes in their own time and provides for industry input into the decision making process. Furthermore, as trade measurement is a technical topic, an ongoing priority for NMI is to find ways to explain legislation and compliance requirements in simple, easy-to-understand language (in both English and translated material). For example, a number of industry specific brochures have been published and translated into five different languages, and distributed to Migrant Resources Centres nationwide. NMI also provides an interpreting service to aid small business owners should they require it.

To increase its reach within the diverse small business sector, NMI has implemented a direct communication campaign that supports regular communication with servicing licensees via an online newsletter. In line with the approach adopted by the Australian Tax Office, NMI seeks to inform businesses of its strategic approach to compliance, outlined in its recently released: National Compliance Plan 2012-13, which is published on the NMI Website.

Source: Case study provided to the Commission by the Department of Industry, Innovation, Science, Research and Tertiary Education, sub. 18.

Building stronger relationships

The relationships between regulators and small business can have a substantial impact on the quality of communication. Relationships characterised by timely interactions, technical competence, courtesy and respect can engender trust which can, in turn, facilitate better information flows — improving businesses' understanding of regulators' procedures and compliance expectations as well as regulators' understanding of the motivation and abilities of businesses to meet their compliance obligations. Stronger relationships can also reduce administrative and compliance costs, provide a means for regulators to receive early warning of emerging issues and potentially increase levels of voluntary compliance (ANAO 2007).

But relationships can also pose risks, potentially undermining regulator credibility and the effectiveness of the overall regulatory regime. Such risks are likely to be greater where there are large firms in the industry which could exert, or be seen to exert, an undue influence on regulators.

Client service charters set out the parameters of what business can expect from their relationship with the regulator — examples include the Therapeutic Goods Administration (TGA), Australian Taxation Office (ATO) and Australian Fisheries Management Authority (AFMA). Client service charters need to be updated as part of regulator continuous improvement processes. The ACCC (2013), for example, recently released a new client service charter. Key changes included reducing the timeframe for responding to correspondence, using plain language in communicating the ACCC's role and streamlining of feedback processes.

The use of relationship managers, can help build mutual respect and trust, provide effective guidance and foster associations between key personnel in business and regulators (ANAO 2007).

Another leading practice that can help build trust and strengthen relationships is separation of the education and compliance arms of a regulator. In its submission to this study, Housing Industry Association (HIA) noted that when the ATO provides education and assistance to businesses preparing their business activity statements:

> …[it] gives an undertaking that there will be no audit activity arising from such assistance having been given. This type of approach should apply across the board. (sub. 24, p. 1)

Time pressures and sometimes severe resource constraints mean that approaches such as dedicated relationship managers or separate compliance arms will not always be feasible, particularly for small regulators. However, in general, relationships between regulators and small businesses are enhanced where: relationship outcomes are defined and agreed; all parties understand their roles, commitments and obligations; modes of interaction are available that facilitate two way communication; and procedures for handling disagreements are in place.

Continuous improvement

To ensure they are as effective as possible in communicating with small business, regulators need to actively monitor the take up and usefulness of various communication strategies, and then use the resulting information to continuously refine and improve existing communication practices. The one sided nature of some types of communication means that without being proactive regulators will find it difficult to know how well various approaches are working in practice.

The results from the PC regulator survey indicate that the vast majority (around 90 per cent) of regulators monitor business understanding of the regulations they administer. Such monitoring can involve directly seeking feedback from business on the effectiveness and usefulness of different communication practices in providing advice and guidance on their regulatory obligations (discussed later in the chapter).

Regulators also examine data on regulatory outcomes, such as changes in incidences of non-compliance or incorrect submission of data or forms following the use of different communication practices. The Commission heard that ATO, for example, evaluates the effectiveness of its communication approaches, including seminars and workshops, through both direct feedback from participants as well as scrutiny of subsequent changes in regulatory outcomes — such as changes in the rate of correctly completed returns (indicating improved understanding of requirements) for the targeted business populations.

The Commission also heard examples of regulators reviewing the usefulness of their call centres, including monitoring waiting times, quality of advice, satisfaction levels within business and other relevant aspects bearing on their effectiveness (for example, ACCC and ATO).

These efforts notwithstanding, the Commission heard that there was scope for further efforts by regulators to assess the effectiveness of communication practices. The SBDC (WA), for example, called for regulators to review how accessible they are to the public, in particular whether 'clients are placed on hold regularly and for long periods, whether phone numbers and email addresses are provided on their website or simply provided as an online contact form' (sub. 22, p. 8).

A particular area that would benefit from review would be the effectiveness of regulators' websites. These vary significantly in terms of their layout, ease of finding relevant information, and provisions of contact details. In some cases there is so much information that it is difficult to find relevant documents. In other cases, websites have so little information (for example, local government websites) that business have to either go into the office to receive documents or request they be posted or emailed (COSBOA sub. 15, SBDC (WA), sub. 22).

Given how heavily most regulators rely on websites as a first step in communicating regulatory requirements to business, ongoing monitoring of website effectiveness is a key leading practice.

The need for better information on the reach and influence of guidance was a key finding of the UK's Hampton Review which recommended that regulators: 'work together to support research on the effectiveness of different communications

methods and develop better means of monitoring the take up of guidance' (NAO 2008, p. 21). Given the costs and difficulties in assessing the effectiveness of different approaches, as well as the potential benefits associated with the sharing of any hard won lessons, such cooperation among Australia's regulators would also have merit. This issue is discussed further in chapter 6.

Many regulators employ sound practices in communicating information, advice and guidance to small business on how to meet their regulatory obligations, but there is scope for more consistent application of leading practices by most regulators.

DRAFT RECOMMENDATION 5.1

Regulators should ensure information and advice on regulatory requirements is readily available, up-to-date, reliable and provided in brief, clear and user friendly formats, using language that is easy to comprehend. Where the benefits are likely to outweigh the costs, information and advice should also be tailored to consider factors that affect the compliance capacities of small businesses, such as the prevalence of business owners from non-English speaking backgrounds.

5.3 Streamlining reporting requirements

Studies overseas indicate that businesses find supplying information to regulators to be the most burdensome aspect of complying with regulation (IFF Research 2012). The information businesses provide is essential in allowing regulators to act effectively, including analysing and prioritising risk and making well informed, reliable and consistent decisions.

The challenge for regulators is to gather the information they need without imposing unnecessary costs on business.

Most Australian regulators collect compliance information from business. The PC regulator survey found that 50 per cent of regulators require businesses to submit documents (such as spreadsheets). In addition 37 per cent of regulators stated they receive compliance information from business on standard paper forms and 34 per cent receive information on standard electronic forms. Inspections and on-site visits were the other main way in which compliance information was collected (chapter 4).

Strategies to reduce reporting burdens

The Commission heard a number of concerns from small business about excessive, inconsistent, duplicative or overlapping information or paperwork requirements, including: being asked to provide information for no apparent reason; being asked to report too frequently; excessive paperwork, badly designed forms, inability to lodge electronically; inconsistent information collection or reporting requirements; having to supply the same or closely related information in different forms to different regulators; and supplying the same information repeatedly to a single regulator (box 5.4).

Box 5.4 Small business concerns about information reporting

Reporting the same information

> The major difficulty for our business is coping with the additional burden of compliance and reporting the same information … on an ongoing basis. (Chamber of Commerce and Industry of Western Australia, sub. 7, p. 4)

Time consuming

> The specific information is not always something you knew ahead of time you would need to itemise so gathering it is very time consuming. This takes you away from your core tasks. (ACCI, sub. 5, p. 10)

> [T]here are multiple definitions of reportable units, wages being an example. Such measures should be defined in exactly the same way whether it be for PAYG, superannuation, workers compensation or pay-roll purposes. (Housing Industry Association, sub. 24, p. 2)

> Requirement to hand deliver [development applications] to Council as hard copy (+ excessive extra copies) AND on CD. [and] NO email lodgements available. (ACCI, sub. 5, p. 10)

Reporting redundant information

> The information that we have to compile for building licences is repetitive and not used by the councils that demand it … (ACCI, sub. 5, p. 10)

> The recent addition of an annual return which requires us to document all subcontractors we use each time we pay them seems pointless and an example of getting small business taxpayers to do the accounting for the government. (ACCI, sub. 5, p. 11)

A number of participants called for improvements in regulators' administrative systems so that data requests are minimised through standardising, streamlining and reducing information and reporting requirements. For example, the Western Australian Chamber of Commerce and Industry noted:

> A key issue is that business reporting requirements are different across regulators and the inconsistent approach can lead to additional reporting requirements and an increase in the administrative burden. Removing any duplication would assist to alleviate the administrative burden on small business. (sub 7, pp. 4–5)

The *Taskforce on Reducing Regulatory Burdens on Business* (Regulation Taskforce 2006) stated that there was considerable scope to streamline business-to-government reporting. It recommended that the Australian Government ensure agencies use consistent terms and rationalise existing reporting requirements.

Regulators employ a range of strategies to streamline reporting, some examples of which are included below (table 5.2).

Table 5.2 **Regulator strategies for streamlining reporting requirements[a]**

Strategy	*Example of use*
• Regulators make use of e-reporting, central portals and other web based tools	DMP (WA) — e-reporting and forms (Mineral Titles Division)
• Risk assessment are used to determine the level of information required	Building Commission (Vic) — risk based data collection
• Illustrative examples of record keeping provided	ATO — *Record keeping for small business*
• Forms are simple and easy to navigate and include guidance on completion	NMI — forms are kept to a limited number of pages or in electronic format
• Standardised forms across local governments	Food safety (NSW Food Authority), SA Govt, Municipal Assoc. of Vic.
• Data collected in the form that businesses use themselves	ATO — SBR (MYOB)
• Design of forms and guides is based on consultation with business	NSW Police Firearms Register — stakeholder involvement in completing guides for business
• Electronic forms — pre-filled information and/or allow business to re-use past form multiple times	ATO — SBR

a ATO (Australian Taxation Office), DMP WA (Department of Mines and Petroleum), MYOB (Mind Your Own Business), NMI (National Measurement Institute), SBR (Standard Business Reporting).

Source: Regulator websites.

Electronic lodgement

A wide range of business-to-government interactive services is currently available online. Many businesses and intermediaries (such as accountants) complete aspects of their reporting obligations to government by electronic means. Electronic reporting through agency specific portals has evolved over time, and businesses have become more adept at using this approach (PC 2011a). Some examples are included in box 5.5.

Box 5.5 **Mechanisms for electronic reporting**

- Small to medium size businesses are typically required to lodge a number of forms with the ATO. Tax file number declarations, pay-as-you-go payment summaries, business activity statements and employment termination payment summaries are examples.
  - The ATO Electronic Lodgement Service (ELS) provides online services in income tax return lodgements, activity statements and Australian Business Number applications. The Electronic Commerce Interface can lodge bulk data and employer obligation reports such as multiple activity statements in a single transaction, tax file number declaration reports, bulk superannuation reports and claim forms for excise fuel grants (ATO 2012a).
- The GST Simplified Accounting Method (SAM) was introduced for small food retailers when the GST was first implemented in 2000. It was designed to reduce the compliance burden for small businesses. In a recent review of SAM commissioned by the ATO, Chant Link and Associates (2011) found that it was an important tool for many small businesses, with many relying on SAM to complete their BAS and tax returns.
  - The study also found that tax agents were of the view that the ATO communicated well with them in relation to changes in requirements through use of tax agents' portals; email communications and seminars.
- ASIC has informed the Commission (2012a) its electronic channels receive around 2.5 million lodgements annually. Several software products are compatible with lodging ASIC reports.
- State revenue offices have a range of online reporting arrangements (for example, Western Australia's Revenue Online lodgement service) that are widely used by businesses.
- The Superannuation Clearing House, established in July 2010 enables small businesses to pay all their employees' superannuation to a single location in one electronic transaction, rather than to different individual super funds. As at October 2012, 33 000 employers had signed up.

Sources: ATO (2012a); PC (2012a); PC (2011a); Chant Link and Associates (2011).

Standard Business Reporting

An initiative designed to reduce the burden on business of reporting information to government is Standard Business Reporting (SBR) (box 5.6). SBR is designed to facilitate direct reporting to government via financial, accounting and payroll software. Development occurred through a process of consultation and collaboration with Australian and state government agencies, software developers, accountants, bookkeepers and the broader business community, drawing on earlier work by the ATO.

Box 5.6 **Standard Business Reporting**

In 2008, COAG agreed to support the Standard Business Reporting (SBR) program as a mechanism to reduce the burden on business of reporting to government. The development of SBR reflected a recognition in Government of:

> … a serious lack of standardised terms used across multiple government reports; businesses often have to interpret terms for one agency that have a different meaning in another, or use a variety of terms for different agencies that actually mean the same thing. (Australian Government 2012, p. 1)

It was estimated that small business that adopted SBR would reduce the time required for reporting from an annual average of 38 hours to 26 hours — an estimated 12 hour reduction annually from SBR. SBR has been operational since July 2010. Its development has cost the Australian Government approximately $170 million.

The Commission recently reviewed SBR (PC 2012a) and noted that to date, the take up rate of SBR by business has been very low, and the benefits being achieved are small relative to the potential available. However, the Commission assessed the potential benefits from a wider uptake to be substantial — in the order of $500 million per year — and noted that greater commitment from participating government agencies could substantially improve the take up rate of SBR and the realisation of benefits.

In this regard, the ATO has recently committed to adopt SBR technology across the reports lodged to the ATO by June 2015, and ASIC has also signalled its intention to expand the capabilities of its SBR platform, although no funding has been committed.

Source: PC (2012a).

SBR was intended to reduce the reporting burden for business by:

- removing unnecessary and duplicated information from government forms
- utilising business software to automatically pre-fill government forms
- adopting a common reporting language, based on international standards and best practice
- making financial reporting to government a by-product of natural business processes
- providing an electronic interface to enable business to report to government agencies directly from their accounting software, which would provide validation and confirm receipt of reports
- providing business with a single secure online sign-on to the agencies involved (PC 2009).

Until recently, the take up rate of SBR by businesses has been low due to a number of implementation issues (PC 2012a). However, the Australian Government stated

in March 2013 that there had been a sharp increase in SBR lodgements in the 2012-13 financial year (Bradbury 2013).

The Commission, in reviewing SBR, noted there may be further benefits, subject to cost benefit analysis, from the wider application of SBR methodologies for reporting to government and in business reporting (PC 2012a). The value of extending SBR methodologies to other fields is likely to be of most benefit where there is a wide array of data collected by multiple agencies across a number of jurisdictions (PC 2009a). In addition to reducing reporting burdens, the use of standard definitions and language give greater rigour and confidence in the data that is produced. In consequence, regulators may feel they do not need to collect as much data in the knowledge that the data collected can be relied upon for regulatory purposes. Further, better quality data also assists in designing and operating risk based compliance programs, with flow on benefits in reporting burdens — particularly for highly compliant businesses (PC 2009a).

A major factor in the success with which regulators are able to streamline reporting requirements for business is the extent to which they coordinate their activities and share information. This is discussed in the following section.

DRAFT RECOMMENDATION 5.2

The widespread application of standard business reporting principles — beyond the collection of financial data to information requests by regulators more generally — would substantially assist in streamlining business reporting. Accordingly, regulators should ensure data and information requests of business are:

- ***no more than they need to regulate effectively***
- ***tailored around data businesses are already collecting***
- ***not already available or collected by another regulator.***

Further, regulators should make it as easy as possible for small business to complete and lodge forms, including through the use of IT to streamline reporting.

5.4 Promoting regulator coordination and information sharing

It is often the case that more than one regulator is involved in the regulatory process for a particular business. Where regulators do not coordinate with other regulators to address inconsistent, duplicative or overlapping requirements, the costs for a

small business in understanding and complying with requirements can be higher than they need to be, for example, it may be that the business:

- reports the same data to multiple regulators in the same or different format and frequency (discussed earlier)
- undergoes multiple inspections by different regulators (discussed in chapter 4)
- must read and understand multiple sets of compliance information and guidelines on related or overlapping areas
- needs to find ways to comply with conflicting sets of requirements from different regulators.

Small business raised a number of concerns about lack of regulator coordination and information sharing (box 5.7).

Box 5.7 Small business concerns about lack of regulator coordination and information sharing

> There is a breakdown in communication and information sharing across all levels of governments. There is a strong silo mentality amongst government officers. Perhaps all government officers must have private sector experience to truly understand how difficult it is to make things work without having to repeat your story to 50 different bureaucrats across three government agencies. (ACCI, sub. 5, p. 11)
>
> In order to renovate the premises there are five different and conflicting governmental regulatory bodies to thread a way through — ranging from heritage … local council zoning, state and federal workplace rules and then building codes — it is much easier to do nothing! (ACCI, sub. 5, p. 11)
>
> The cumulative burden of regulation occurs when regulatory policy development is done on a departmental basis rather than a whole of government basis. This problem is exacerbated due to jurisdiction overlap and duplication … regulators should find ways to maximise the use of existing business data and improve information sharing between regulators, after considering legal and other cost implications. (ACCI, sub. 5, p. 14)
>
> [S]mall businesses seem to be subject to regulation sources in various 'fiefdoms'. These fiefdoms can exist and operate across all three layers of the Australian political structure (Australian Motor Industry Federation, sub. 23, p. 9).

Coordination and cooperation between regulators

Better coordination is an important way that governments can address the widespread concerns about the rising cumulative burden on business. As the CCIQ noted:

> [T]he most important and profound way to improve regulator engagement and help regulators to better understand the needs and the context in which small businesses

operate is through a focus on cumulative burden. Every regulator should be guided to consider what other agencies already impose on small and medium businesses when developing and designing their regulatory programs, policies and engagement strategies (sub. 16, p. 2)

Regulators employ a range of formal and informal methods of improving information sharing and coordination. The PC regulator survey found that around 60 per cent of regulators routinely cooperated with at least one other regulator to coordinate information collection (table 5.3). Broadly similar proportions of regulators cooperated so as to present information to business in a common format or location (such as a single website) and in providing education to business. Cooperation was highest among regulators in sharing compliance data and developing information for business.

Table 5.3 **Regulator cooperation in information collection and provision**

Per cent of all regulators who routinely cooperate with others, by jurisdiction[a, b]

Form of cooperation	*Local council(s)*	*State/territory (same jurisdiction)*	*State/territory (different jurisdiction)*	*National regulator*	*Any jurisdiction*
Coordinating information collection	11	33	34	32	59
Sharing compliance data	10	47	47	40	72
Developing information for business	17	45	42	39	67
Presenting information to business in a common format/location	11	31	26	20	52
Providing education to business	14	37	35	22	56

a Local councils were excluded from this survey. **b** Columns are not additive as respondents could nominate more than one category.

Source: PC regulator survey 2013.

Cooperation was also greatest for regulators at the state/territory and national level, with only around 10-15 per cent of regulators routinely cooperating with local councils.

The Commission also heard examples of regulators working together to share information. For example, the Western Australian CCI notes that the recently released Environmental Assessment and Regulatory System which is used for submitting and tracking environmental applications and compliance reporting for project approvals is a good example of regulators sharing information:

… [b]usinesses only need to provide information on their approval to one agency as this is then shared across a number of agencies required to approve the application. In addition, this system allows businesses to see at what stage of the approval process their documentation is and at which agency. (sub. 7, p. 5)

The ACCC also notes that it deals regularly with other state and federal agencies on small business issues, and seeks to ensure that, wherever possible, a uniform and cooperative approach is developed:

> At the regional level, local ACCC Education & Engagement Managers in most states participate in their local government business information network, a forum where local, state and Commonwealth agencies coordinate delivery of information and advice to small firms in that jurisdiction. (sub. 26, p. 8)

The Commission's study into the role of local government as regulator (PC 2012b) identified the benefits that arise when state government agencies (such as the NSW Food Authority) provide information explaining the underlying basis of regulations to assist resource constrained local governments, as well as the public, in understanding the higher level policies. Similarly, the Office of the Liquor and Gambling Commissioner of South Australia provides explicit advice to prospective liquor licence applicants on the approvals that they need to get from local governments.

That said, a number of studies have confirmed that there is scope for greater coordination and information sharing between regulators. Examples include:

- The COAG Business Advisory Forum Taskforce (2012) identified significant duplication and overlap in business reporting requirements to government. This included company notification processes; taxation (including payroll tax); information sought by the Australian Bureau of Statistics; reporting in relation to employees and some energy efficiency reporting (sub. 18).
- The NSW Auditor-General's (2011) performance audit on the transport of dangerous goods noted that very little information was shared between agencies and that better information and sharing would assist agencies to manage risk.
- The Victorian Auditor-General's Report into the management of freshwater fisheries called for regulators to improve their information base by 'working with, and sharing relevant information with, other entities that have complementary responsibilities and interests' (2013, p. viii).

However, coordination and data sharing by regulators is not costless. So there is an optimal level from a community-wide perspective.

Lead agency model

The use of 'lead agencies' can be an effective mechanism for simplifying and rationalising business engagement with regulators.

In instances where a number of regulators administer a regulatory scheme, one regulator (the 'lead agency') should take primary responsibility to ensure effective coordination to reduce duplication of effort and fragmented approaches to enforcement and improve overall regulatory outcomes. All states and territories have arrangements in place to specify responsibilities of each agency — in Western Australia, for example, these are provided by the Department of Premier and Cabinet (2009); for Australian Government agencies, one source of such information is Australian Public Service Commission (2005).

A novel twist on the lead agency model in operation in the United Kingdom is a 'primary authority' scheme. Under this scheme, businesses (and more importantly for small business, industry associations from later in 2013) which engage with multiple local regulators can select one as their 'primary authority', develop an agreed compliance approach, and then apply this approach for compliance with every other local regulator with which they engage (BRDO 2013).

A good example of lead agency arrangements working in Australia is Victoria's arrangements for food safety regulation. Four agencies, the Department of Health, PrimeSafe, Dairy Food Safety Victoria and the Municipal Association of Victoria (representing local councils in Victoria) signed a Memorandum of Understanding in June 2012 that identifies lead agencies for different aspects of food safety.

For the lead agency model to work well:

- Partner agencies should ensure appropriate arrangements are in place that identify who will be the lead agency, under what circumstances, and the responsibilities of each regulator.
- Lead agencies should make information on their policies and procedures for administering their regulation freely available to other regulators.
- Lead agencies should also encourage consistent enforcement practices and procedures throughout the regulatory group and allow timely access by other regulators to relevant case information (Queensland Ombudsman 2009, pp. 54-56).

Despite the existence of high level principles in all jurisdictions, it is not always the case that regulators have worked together to determine the lead agency (see for example, Queensland Ombudsman 2009).

Complaints the Commission heard from business during this study about overlap and duplication between regulators suggest that this is an area of regulatory engagement that requires ongoing attention and in which there could be significant potential for net benefits. Clearly, for lead agency and other coordination

mechanisms to work effectively, timely and effective feedback from regulated business is essential.

5.5 Strengthening consultation and feedback

Sound processes for consultation and feedback with business are an essential element for effective regulator engagement. In its submission, the NSW Business Chamber noted:

> The key overarching principle to improving communication with business is for regulators to actually test the effectiveness of their communication strategies, by seeking feedback from businesses. (sub. 25, p. 7)

Effective consultation and feedback mechanisms allow business to provide information to regulators on: the source and magnitude of compliance burdens; the efficacy of the regulation in achieving its objective; and any unintentional adverse impacts, including interactions between different regulations and cumulative effects. In particular, the information supplied provides a reality check on regulators' understanding of impacts on business. It helps regulators to identify both the reasons firms have difficulty in complying and how they could achieve compliance. In addition, regular effective consultation and feedback can strengthen relationships and trust between business and regulator (ANAO 2007).

The principles of effective consultation are widely known (COAG 2007; OECD 2012b) and all Australian jurisdictions encourage regulators and government agencies to consult with business. COAG's Business Regulation and Competition Working Group, for example, recently endorsed a set of principles for effective consultation with small business (COAG 2012b). These include continuity, targeting, timeliness, accessibility, transparency, consistency and flexibility and evaluation and review (box 5.8). The SBDC (WA) called for this guide to be mandated and adopted across government, with individual agency heads held accountable for adhering to these principles (sub. 22). The Commission sees merit in this proposal. But to be effective it must be accompanied by adequate transparency and accountability arrangements. Initiatives to improve accountability and transparency are discussed in the following chapter.

The extent to which consultation reflects best practice principles varies across the myriad of regulators and the three levels of government. Concerns about regulator consultation practices that have been raised in submissions, include: minimal engagement with business; adversarial or officious attitudes; belated consultation with industry groups; and decisions made prior to the closing date for submissions

(see for example, Hills Orchard Improvement Group Inc, sub. 9; Australasian Association of Convenience Stores Limited, sub. 21).

Box 5.8 **COAG principles for achieving best practice consultation with small business**

Continuity — meaningful consultation with small business should be a continuous process that starts as early as possible in the policy development process.

Targeting — small businesses that are likely to be affected by proposed regulatory changes should be carefully targeted for consultation.

Timeliness — consultation should occur early in the regulation making process when the policy objectives and different approaches to an issue are still being considered.

Accessibility — information about regulatory proposals and the consultation process should be easily available to the small businesses that are likely to be impacted on.

Transparency — involving small businesses from the earliest possible stage in the policy development process will promote transparent and comprehensive participation.

Consistency and flexibility — consistent procedures can make it easier for stakeholders to understand and participate in consultation.

Evaluation and review — agencies should evaluate consultation processes to consider their effectiveness and continually look at ways of making them more effective.

Source: COAG (2012b).

These concerns have been mirrored in other studies. For example, businesses surveyed by AI Group (2011) identified problems with consultation processes being onerous, lacking in transparency, being insufficiently broad and lacking genuine commitment — with consultation undertaken just to be seen to be doing it.

A wide range of consultation tools is needed

As noted earlier, consulting with time poor and difficult to contact small businesses can be challenging. The Chamber of Commerce and Industry Queensland (CCIQ) made the point that most small businesses will not participate in consultation activities or make submissions (sub. 16). Similarly, the NSW Small Business Commissioner notes that small businesses acknowledge that they are difficult to engage with 'but still want their opinions known' (sub. 12, p. 6).

The PC regulator survey indicated that over the last two years, 44 per cent of regulators sought systematic feedback from small business — and 65 per cent from business regardless of size (figure 5.4). The most common method for seeking feedback from small business was consultative fora, which was used by 35 per cent of regulators. Surveys were also used by 30 per cent of regulators, and a few

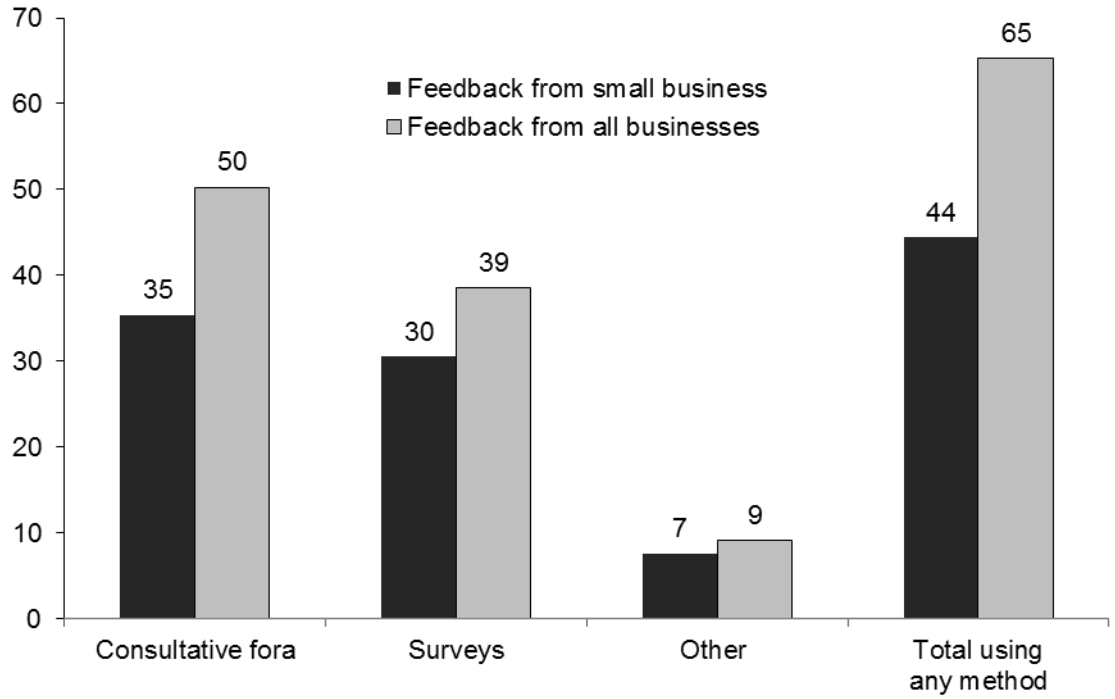
regulators employed other methods such as social media, audits and direct contact. The relative ranking of the different mechanisms for receiving feedback was the same for small business as it was for all businesses.

A key mechanism by which small business is able to provide feedback to regulators is through their industry associations. However, small businesses may not always be well represented by industry associations. The NTC notes for example, that 'industry bodies in some sectors can at times be overly representative of larger companies' (sub 1. p. 6). In addition, some small businesses will not belong to an industry association.

Given this, regulators should undertake a mix of broad and selective consultation to ensure feedback is reflective of the larger population of regulated entities. They should also gather information from a range of sources to provide a quality check on information collected. For some regulators, it may be necessary to adapt consultation approaches (such as through provision of additional online resources) to the needs of small business owners, such as those in regional and remote areas.

Figure 5.4 **Regulators who sought systematic feedback from business during the past two years, by feedback mechanism**

Per cent of regulators[a] (n=187)



[a] Numbers do not sum to totals as regulators were able to select multiple mechanisms.

Source: PC regulator survey 2013.

This point is reflected in the OECD recommendation on regulatory policy released last year which states that:

> Modes of consultation need to reflect the fact that different legitimate interests do not have the same access to the resources and opportunities to express their views to government, and that a diversity of channels for the communication of these views should be created and maintained. (2012b, p. 24)

A particular method employed by a number of regulators to overcome some of the impediments to consulting with small business is to make use of stakeholder consultative bodies.

The Regulation Taskforce (2006) recommended that all regulators whose decisions could have significant impacts on business or other sections of the community should maintain a standing high-level consultative body. The Taskforce argued that such bodies would provide a focal point for feedback to regulators about their performance, promote greater understanding and provide a mechanism for identifying emerging problems.

In its submission to this study, the Australian Small Business Commissioner emphasised the value of 'user groups' — regular meetings with businesses that have high levels of contact with the regulator, together with representatives from key industry and professional associations — noting:

> 'User groups' as well as being a forum for seeking views that will improve the administration by the regulator, and compliance by the regulated, can also be useful consultative bodies from a broader policy perspective. In this regard, consultation is … more than imparting information. It is receiving views, considering them and rationalising why, or why not, a particular view is adopted. (sub. 10, p. 7)

Examples of stakeholder consultative bodies include:

- The Australian Competition and Consumer Commission (ACCC) established a small business consultative committee (SBCC) as a forum to consider competition and consumer law concerns related to small businesses (ACCC 2013b).
- The Australian Taxation Office (ATO) established the Small Business Partnership as a forum for dialogue and consultation on issues of mutual concern regarding the administration of the tax system (ATO 2013).

In addition, Australian regulators have employed a range of different approaches for consulting with small business (table 5.4).

Table 5.4 **Mechanisms for consultation and feedback used by Australian regulators**[a]

Mechanism	*Examples of use*
Complaints portals	Office of the EPA (WA), Department of Finance (WA)
Temporary staff placements in business	PIRSA Fisheries and Agriculture, Construction Code Compliance Unit (Vic), Victorian Taxi Directorate
Stakeholder consultative bodies	ACCC, ATO Small-business partnership, Dairy Food Safety (Vic) Learning Network
Workshops and consultative fora	Worksafe (Vic) focus groups, Victorian Registration and Qualifications Authority, ACMA, TGA
Consultation databases and business registers	Victorian Government Business Consultation Database
Stakeholder surveys	Workcover annual telephone survey, ATO SME Perceptions Survey, ACCC perceptions research, ASIC stakeholder survey
Public inquires and formal reviews	Transport Safety Victoria (public calls for submissions), Victorian EPA (independent review of monitoring and enforcement)

[a] ACCC (Australian Competition and Consumer Commission), ACMA (Australian Communications and Media Authority), ASIC (Australian Securities and Investments Commission), ATO (Australian Taxation Office), EPA (Environmental Protection Authority), PIRSA (Department of Primary Industries and Regions SA), TGA (Therapeutic Goods Administration).

Source: Regulator websites.

Testing and transitional arrangements

An important time for regulator-business engagement is during the testing and transitional stage when regulators are developing and preparing to implement new or changed regulatory requirements. Engagement between regulators and business at this stage has the potential to yield large benefits for all parties. Regulators face uncertainty prior to introducing regulation regarding likely impacts and possible problems, and hence are receptive to business feedback on how the roll out might be made to work better. Further, as business concerns tend to be highest early on, due to the uncertainty about how the changes will affect them, they tend to be more willing to participate in consultation efforts.

Generally speaking, it is in the period leading up to, and immediately following, the introduction of new regulation that regulators invest the largest effort in consulting with business. However, consultation efforts are also significant when regulation is being reviewed.

As discussed in chapter 3, the costs small businesses face during transition to new regulatory arrangements can be high. The Commission heard examples of transition problems that may have been reduced or avoided with better consultation during the testing and transitional phase. For example, Australian Association of Convenience Stores (AACS) stated that the introduction of plain packaging for tobacco occurred

without adequate consultation with small business leading to a number of problems in implementing and complying with these requirements (sub. 21).

One approach that regulators use is to test new regulation by trialling it on a subset of the target group to gain an understanding of its effectiveness and impacts prior to consideration of wider roll out to the full business population. The success of this type of approach will ultimately hinge on the quality of the consultation, feedback and review mechanisms put in place to capture the practical lessons learned.

An example of this was the Drink Safe Precinct trials introduced in Queensland in 2010 to reduce alcohol related violence in key entertainment precincts in Surfers Paradise, Townsville and Fortitude Valley. The announcement of the trial included a commitment to a public evaluation of the trial and to improve data collection and the evidence base on what works to reduce alcohol related violence in Queensland over the long term (DPC 2012).

Phased implementation of regulation can also reduce adjustment costs for business and allow time for regulators to consult with affected business. For example, when Victoria's seafood regulator Prime Safe introduced regulation of the wild catch and harvesting sector, all businesses were licensed, but not subject to audit initially, to allow a transition time for businesses and for the regulator to consult with businesses to develop food safety programs and determine numbers of audits required (VCEC 2006).

The appropriate use of testing and transitional arrangements needs to be assessed on a case-by-case basis. As noted in chapter 3, the reduced adjustment costs for business and potentially higher rates of compliance need to be weighed against any associated costs, such as the costs borne by business and regulators in the testing phase, as well as the delays in the achievement of the regulatory objectives.

DRAFT RECOMMENDATION 5.3

Regulators should ensure that effective processes for consulting with small business are in place that allow businesses to provide feedback, at low cost, on the source and magnitude of compliance burdens; how well the regulation is achieving objectives; and any unintentional adverse impacts, including interactions between different regulations and cumulative effects.

To facilitate this, governments should ensure that already agreed principles for effective consultation, including those for small business recently endorsed by COAG's Business Regulation and Competition Working Group, are adhered to by regulators.

5.6 Better handling of complaints and appeals

Even with the best communication and information management systems and consultation processes, disputes between business and regulators may still arise. Effective mechanisms for handling business complaints and appeals are needed to enable poor decisions to be quickly and efficiently rectified before they become serious and/or systemic. The features of these are well accepted, and include accessibility, timeliness, fairness, confidentiality and impartiality (ANAO 2007).[1]

Good complaints handling procedures enhance fairness and openness in a relationship, particularly for business. Further, where the associated investigations lead to improvement in regulators' systems they can lead to reductions in compliance costs for business. For this to happen, however, regulators need to have mechanisms in place to allow for incorporation of lessons learned into administrative practices.

Regulators need to be clear to business about the avenues for lodging or making a complaint. The Commission heard complaints that suggest this is not always the case. For example, Hills Orchard Improvement Group (HOIG) noted:

> In HOIG's limited dealings with the APVMA we were surprised at their repeated assertion that their decisions were not subject to review or ministerial oversight. They failed to mention that their decisions could be overruled by an administrative tribunal or through a court decision. (sub. 9, p. 21)

Other reports (see for example Queensland Ombudsman (2009) and Ombudsman Western Australia (2010)) also identified areas where regulators could provide greater clarity on complaints processes to stakeholders.

The Commonwealth Ombudsman notes complaint handling systems in Australian government agencies have improved substantially over the past decade. The essential principles for effective complaint handling are provided in its *Better Practice Guide to Complaint Handling* (2009) — which are broadly consistent with the Australian Standard on Complaints Handling.[2] Western Australian government

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[1] As stated by the OECD in its recommendations on regulatory policy: 'Citizens and businesses that are subject to the decisions of public authorities should have ready access to systems for challenging the exercise of that authority. … In principle, appeals should be heard by a separate authority than the body responsible for making the original regulatory decision. Governments should, where appropriate, establish standard time periods within which applicants can expect an administrative decision to be made.' (2012b, p. 15)

[2] The Australian Standard on Complaints Handling (AS ISO 10002-2006) consists of three steps: enabling people to make complaints; responding to the complaints promptly, fairly and confidentially; and ensuring regulator accountability and processes for learning from complaints.

agencies must adhere to the Australian Standard on Complaints Handling. All other jurisdictions have in place similar requirements and provide support and information to regulators. For example, the Queensland Ombudsman's website provides resources to assist regulators to enhance their complaints management systems by adopting various best practice features. Advice for alternative dispute resolution in dealing with Australian Government agencies are provided by the National Alternative Dispute Resolution Advisory Council (2012).

The PC regulator survey found that:

- 88 per cent of regulators had a *complaints or feedback mechanism* for business — of which around two thirds allowed for lodgements of complaints online
- 79 per cent had internal, and 88 per cent had external, *formal appeal mechanisms.*

Internal review mechanisms have the potential advantage of higher speed and lower cost, relative to external mechanisms. As the ANAO (2007) notes, a sound internal review process:

- provides a timely and easily accessible form of review
- is less costly and time consuming to conduct, for the regulator and the applicant, than an external review or appeal
- manages the risk of reviewing officers being 'captured' by the regulatory organisation's culture, which results in few variations being made to original decisions
- provides lessons learned about decision making that the regulator can incorporate into its quality assurance system.

The Administrative Review Council notes that, 'A good system of internal review is one which is transparent in process and affords a quick, inexpensive and independent review of decisions' (ARC 2000, p. v).

One method of strengthening the independence of review mechanisms is for a regulator to set up a separate appeals division. Examples include:

- Civil Aviation Safety Authority's Office of Industry Complaints Commissioner was established to coordinate the handling of complaints about the actions and behaviour of its staff and is independent of the agency's operational division.
- The ATO recently announced it will be creating a separate appeals division with clear processes for objections and appeals with a focus on ensuring cases are handled in a timely manner (box 5.9). This change brings Australia's system in line with those of the US and the UK.

Formal external review mechanisms are usually defined in legislation and allow businesses to lodge disputes regarding regulatory decisions with an independent body. While such reviews have the advantage of strict separation and actual and perceived impartiality, they can be costly and may be suitable for only a limited number of disputes (ANAO 2007). Many of the disputes small businesses raise are unlikely to be suitable for such formal processes.

Box 5.9 **Australian Taxation Office — separate appeals division**

The Inspector-General of Taxation (IGT) recommended in 2012 that a separate appeals area be set up within the ATO following complaints about excessively prolonged appeals and a lack of independence by reviewing officers, who could be from the same team as the original auditors.

In his deliberations, the IGT identified a broader issue of a gap between high level commitment to effective engagement and what happens in practice:

> [A]t a high level, the ATO is committed to engaging with taxpayers to resolve disputes earlier. I have noted some examples in which the ATO's early engagement and appropriate use of ADR [alternative dispute resolution] has assisted to resolve matters in dispute either wholly or partly without the need for litigation … However, and notwithstanding the ATO's high level commitment, a number of the cases raised in submissions, and which were examined in this review, indicate a variance in the taxpayer experience when seeking to engage with the ATO to resolve disputes (2012, pp. i–ii).

In making the recommendation, the IGT identified a number of problems with the ATO use of ADR including: inexperienced ATO staff lacking awareness and skills to nip problems in the bud (requiring senior technical experts to come in later and sort things out); the information gathering approach of ATO was costly; costs for smaller taxpayers identifying appropriate escalation channels for engaging; and perceptions of a lack of independence of the objections process.

The ATO initially rejected the recommendation but the new Tax commissioner announced in a speech in March that it would be implemented (Jordan 2013).

From the perspective of business, the question of where the review body is located is less important than that it is seen to be a genuine body of appeal, where business concerns and challenges are treated seriously and with fairness. Data on outcomes provide an indication of how the appeals mechanisms are working. For example, the statistics provided by the NSW Office of State Revenue indicate that around 30 per cent of objections to assessments lodged with its Review Branch resulted in some action or change, either stemming from changes to earlier decisions or due to the collection of new information as part of the review process (OSR NSW pers. comm., March 2013).

Role of Small Business Commissioners in mediating disputes

In recent years, the governments of New South Wales and South Australia, following the lead of Victoria and Western Australia, have established Small Business Commissioners. The Australian Government has also recently appointed an Australian Small Business Commissioner (Australian Small Business Commissioner 2013).

Where they exist, Small Business Commissioners perform a range of roles including being a 'voice for small business' to government, conducting investigations into the treatment of small businesses, monitoring and reporting on the small business impacts of legislation and other issues affecting small business. Of the current Small Business Commissioners, only the Australian Government Small Business Commissioner's position is not legislated (table 5.5).

Table 5.5 **Small business commissioners in Australia**

	Cwlth	*NSW*	*Vic*	*WA*	*SA*
Legislated position	×	✓	✓	✓	✓
Advocacy role	✓[a]	✓	✓	✓	✓[b]
Dispute resolution role	×[a]	✓	✓	✓	✓
Conduct investigations into small business treatment	×	✓	✓	✓[b]	✓
Monitor and report on the impact on small business of legislation	×	✓	✓	✓	✓[b]
Monitor and report on emerging trends in market practices that have an adverse effect on small business	×	✓	✓	✓	✓

[a] The stated role of the Australian Small Business Commissioner is to provide advocacy and representation of small business interests and concerns to the Australian Government, including referral to business-to-business dispute resolution services. [b] At the request of the Minister.

Sources: Australian Small Business Commissioner (2013); *Small Business Development Corporation Act 1983* (WA); *Small Business Commissioner Act 2003* (Vic); *Small Business Commissioner Act 2011* (SA); *Small Business Commissioner Act 2013* (NSW).

A primary role of many Small Business Commissioners is to enable disputes to be resolved with minimal stress to small business operators. However, several participants canvassed a wider role. The CCI WA noted, for example, that there may be value in a greater role for the federal and state Small Business Commissioners to engage with small businesses when regulators make changes to existing regulation or develop new regulation (sub. 7). The benefits of regulators engaging with small business in developing regulation was reiterated by the SBCD (WA), which noted:

> To their credit, the WA Departments of Commerce, Transport, Local Government, and Regional Development and Lands have all been very forward in asking for the SBDC's input at various stages of their regulatory development and review process (sub. 22, p. 8)

Business SA also endorsed a proposal that the South Australian Small Business Commissioner play a role in reviewing the likely impact of Work Health and Safety Codes of Practice on small business, but noted that it was 'concerned that the Commissioner's office is not adequately staffed to meet this task' (sub. 3, p. 3).

The Commission's recent *Local Government as Regulator* study suggested that enabling Small Business Commissioners across all jurisdictions to play a mediating role between local government and business and to investigate systemic issues raised through complaints would provide business with a path of redress that is less formal, time consuming and expensive than judicial appeals, but more independent than an internal review (PC 2012b).

More broadly, effective complaints handing and appeals mechanisms, in addition to directly improving the quality of regulatory decisions, build respect, trust and openness between regulators and business, strengthening business confidence in overall regulatory processes, which, in turn, helps underpin the health of regulatory systems over time.

DRAFT RECOMMENDATION 5.4

Regulators should ensure that processes for lodging complaints and seeking review of decisions are readily accessible by small business. Appropriate mechanisms should have a degree of independence from the day-to-day operation of the regulator, provision for businesses to seek reasons for decisions taken, and processes that allow regulators to learn from complaints.

Further, governments should ensure that there are independent, low cost mediation services in place to facilitate the resolution of disputes and misunderstandings between small businesses and regulators.

- ***As a minimum, regulators must be required by legislation or ministerial direction to cooperate with the mediation agency and provide whatever information the agency reasonably seeks.***
- ***This function should be undertaken by Small Business Commissioners (including the Australian Small Business Commissioner with respect to Commonwealth regulators) where currently in place. Such processes would complement (not replace) existing statutory and administrative rights to have decisions formally reviewed and the functions performed by offices of the ombudsman.***

5.7 Conclusion

Ensuring that business can readily access and understand information about their regulatory rights and obligations is critical for effective regulation. Where information on regulatory requirements is clear and easy to find, overall compliance is likely to be higher, and the burden on businesses' often scarce management resources is also reduced.

The Commission found evidence that many regulators had in place sound communication strategies and practices that resulted in effective communication with small business. However, overall, there remains scope for more consistent application of these leading practices in the following areas:

- ensuring that information on regulatory requirements is readily available and understandable by small business — information should be up-to-date, reliable, widely available at minimum cost, in clear and user friendly formats, using plain language
- ensuring that regulator efforts to provide advice and guidance to small business, as well as seek consultation and feedback, are targeted and, as far as possible, guided by an assessment of the relative risks posed by business activities
- a premium is placed on brevity in all communications with small business, particularly given growing concerns by small business about information overload stemming from the cumulative burden of regulation
- greater efforts to streamline and rationalise data collection, consistent with risk assessments, and better coordination and data sharing, where appropriate, among regulators to reduce unnecessary reporting burdens
- tailoring of communication and consultation strategies to meet the differing circumstances and capacities of the variety of businesses, subject to an assessment of relative costs and benefits
- ensuring complaints and appeals mechanisms are accessible, timely, fair and impartial.

At this stage, the use of social media such as Facebook and twitter as a means of communicating with business should perhaps be less of an immediate priority for regulators than ensuring their website and email communication strategies are working well. That said, these approaches have potential for improved communication with small business in future years.

Finally, despite some notable exceptions, regulators in general appear to be underinvesting in research into the effectiveness of their communication and information strategies. Without this information they are unable to determine

whether they are making the best use of their scarce engagement resources. It cannot be assumed that the current pattern of funding is optimal. More systematic efforts by regulators to gather evidence on the effectiveness of their communication and information strategies is likely to yield substantial benefits. This issue is taken up in the following chapter.

6 Driving better regulator performance

Key points

- Improvements in regulator performance and the more widespread adoption of leading practices identified in this report are most likely where appropriate institutional, governance, transparency and accountability mechanisms are in place to ensure:
  - the removal of unnecessary legislative or other constraints on the capacity of regulators to implement flexible and responsive approaches
  - strong incentives for cultural change and continuous improvement.
- In particular, all governments should ensure:
  - good up front institutional and regulatory design, including:
    - consistent application of ex ante processes designed to ensure rigorous analysis of the impacts of regulation (including on small business)
    - roles and responsibilities and potential overlap or duplication are carefully considered when new regulatory functions are being established
  - clarity of objectives and expectations, including in relation to risk management
    - there should be explicit acknowledgment that some risk is unavoidable and that the regulator should be able to operate independently, without undue interference from government
  - regulators have adequate resourcing and effective leaders
    - leaders have the capacities and commitment to foster an organisational culture that appropriately balances risk mitigation and facilitation of business activity/economic growth, by minimising unnecessary compliance burdens
  - systematic performance monitoring and review
    - with emphasis on measuring effectiveness in achieving outcomes while minimising compliance costs
    - development of whole of government best practice regulator engagement principles (including in relation to the use of discretion) with appropriate oversight to ensure they are adopted
  - mechanisms, such as regulator forums, for ensuring better coordination and sharing of experiences and lessons learned.
- Regulators must have the necessary systems in place to ensure:
  - recruitment of staff with the right mix of relevant experience and skills and appropriate training and guidance for staff — including a focus on the underlying rationale for risk based enforcement and appropriate use of discretion
  - monitoring and review of effectiveness and costs of engagement approaches.

6.1 Introduction

Previous chapters have identified many leading practices in regulator engagement with business. However, there is considerable scope for their wider and more systematic adoption, both within and across jurisdictions. While recognising that important differences between regulators means that, at a detailed level, a good practice for one regulator may not necessarily be suitable for adoption by another, the Commission has formed the view that what constitutes good engagement, both in principle and practice, is generally well understood. However, various factors operate to create barriers or disincentives to the implementation of better approaches. This chapter focuses on some of the more important of these factors and identifies the main drivers of better regulator performance generally and engagement with business and small business in particular.

Essentially, broad and sustained improvements in regulator performance — including reducing unnecessary compliance costs on regulated businesses — are most likely to be achieved when governments:

- first, remove unnecessary legislative or other constraints on regulators
- second, put in place the framework conditions and mechanisms that create the incentives for the adoption of a regulator culture that is flexible and responsive and emphasises the importance of continuous improvement.

As discussed in chapter 2, there are a number of factors largely outside the control of regulators that influence and in some cases constrain the way they engage with business. Many of these relate to the design of the regulation that the regulator administers or the institutional and governance arrangements established at the time the regulator was created.

In designing regulation, policy makers must, for example:

- provide regulators with an appropriate range of enforcement tools and discretion to respond flexibly and proportionately to compliance breaches
- provide scope for businesses to develop alternative lower cost compliance solutions, but at the same time — for those businesses (particularly many small businesses) that prefer prescription and certainty — regulations should set out clearly the solutions that will be deemed to comply with the regulation.

Previous chapters have also emphasised the importance of governments ensuring the consistent application of *ex ante* processes designed to ensure rigorous analysis of the impacts of regulation (including on small business). These should also include careful consideration of how regulations will be implemented and enforced. Roles and responsibilities of regulators must also be clearly defined and potential

overlap or duplication carefully considered when new regulatory functions are being established. Where some overlap is unavoidable, mechanisms for cooperation and coordination between the relevant regulators should be established, ideally before regulations take effect. This will help avoid the imposition of unnecessary business compliance and regulator administration costs as will appropriate testing and transition arrangements (chapter 5).

The various factors identified above and discussed more fully in the earlier chapters, are clearly critical determinants of regulator performance and the compliance burden of regulation for business. They are largely 'up front' considerations relating to the establishment of a regulator or the early phases of implementation of regulation. The rest of this chapter discusses a range of other major drivers of regulator performance that tend to be more 'ongoing' considerations for the regulator and governments that impact on regulator capacities and the way they engage with business in the 'delivery' of regulation. These include:

- adequate resourcing, strong leadership and staff with the necessary skills and capacities
- appropriate transparency and accountability mechanisms to ensure regulators are motivated to discharge their responsibilities in a manner that best serves the community's interests
- clear communication of government objectives and expectations of regulators
- requirements for review and ongoing monitoring of regulators' performance and mechanisms for the sharing of experiences with other regulators, which create a culture of continuous improvement.

6.2 Regulator capacities

Adequate resourcing of regulators and ensuring staff have the necessary capabilities and capacities are key determinants of regulator performance. Even the best designed policies will not achieve desired outcomes if staff do not have the appropriate skills or if the right culture does not permeate throughout a regulatory agency.

Submissions raised concerns about aspects of regulator capacities. For example, the Chamber of Commerce and Industry Queensland (CCIQ) submitted:

> Poor understanding and business knowledge of enforcement officers; continual churn of enforcement staff; inconsistency of interpretation and application of standards, codes and regulatory requirements by enforcement officers; and inability of enforcement staff to accommodate innovative or new approaches which achieve same/similar outcomes. This means that audits and inspections require a degree of 'hand-holding' of the

> regulatory officers and repetitive process of having to explain the nature and practices of their business which increases the cost and burden of compliance. (CCIQ, sub. 16, p. 5)

Various audit reports have also identified gaps in regulator skills and capacities as a significant barrier to effective engagement (see for example, ACT Auditor-General 2011; Western Australia Auditor General 2011).

Leadership, including the values, attitude and commitment of the CEO and senior management are also critical influences on culture and the performance of a regulatory agency. Governments therefore, to the extent that they have a role in decisions about senior appointments, can indirectly have a major influence on the posture adopted by regulators in their engagement with small businesses.

The overall resourcing of regulators was discussed in chapter 2 and it is clear that many regulators consider resourcing to be one of the most significant constraints on their capacity to effectively engage with business. While regulators essentially must take their overall level of resourcing as a given, they can provide feedback to government where they perceive those allocations to be inadequate and, moreover, can seek clear guidance from governments on areas of priority for enforcement, perhaps via 'statements of expectations' (section 6.3).

Within overall budgetary constraints, regulators do have discretion to determine what staff they recruit, the allocation of staff between different functions, and how they go about ensuring those staff acquire and retain the knowledge and skills required to effectively discharge their responsibilities. Not surprisingly, larger regulators with greater resources have far more flexibility with respect to the approaches they adopt and indeed, as has been noted throughout this report, what may be cost effective strategy for a larger agency may not be a feasible option for a smaller regulator.

DRAFT RECOMMENDATION 6.1

Governments must ensure that regulators have sufficient resourcing to enable them to administer and enforce regulation effectively and efficiently. This includes ensuring regulators have the capacity to make appropriate use of educative and facilitative engagement practices. Clear guidance needs to be provided by government on enforcement priorities, given resourcing levels.

Building staff competencies

The skills, qualifications and experience of regulatory agency staff can vary widely depending on the area of regulation (for example health versus taxation) and the

specific roles being performed (for example administrative versus enforcement officers). Certain staff may need to have highly specialised technical or scientific skills and experience to effectively carry out their duties. It can be an ongoing problem for some regulators to attract and retain staff with these specialist skills, given that they will often be competing with the private sector, which is typically able to pay higher salaries. The inability to attract or retain appropriately skilled staff was identified as an issue by some 15 per cent of regulators. It was a more common concern in particular regulatory areas, such as in the building and construction area, where 50 per cent of respondents identified this as a barrier (PC regulator survey 2013).

A high turnover of regulator staff was noted by some participants as a particular issue, leading to a loss of technical capability and corporate knowledge and, as a consequence, inconsistency and delays in decision making. This reinforces the need for regulators to consider strategies that improve retention rates.

In its *Local Government as Regulator* report (PC 2012b), the Commission found evidence in many councils of high turnover, staff shortages and problems attracting suitably qualified staff in particular workforce categories. Such problems are particularly acute in some remote and regional areas. This impacts on the ability of local governments to administer and enforce some areas of regulation. The Small Business Development Corporation (WA), in a submission to the Commission's study, stated:

> Just like small business themselves, very small local governments often have problems attracting qualified and competent staff for specialised positions (such as managerial roles, town planners, engineers and building surveyors), particularly in regional and remote areas. The lack of appropriately skilled and experienced council staff can lead to poor or inconsistent decision-making, which can have a detrimental impact on small businesses. (Small Business Development Corporation (WA) submission to *Local Government as Regulator*, sub. 29, pp. 10-11)

The Commission's report identified a number of initiatives to address skill or staff shortages. These included:

- various forms of cooperation and coordination between local governments to achieve economies of scope and scale in resources and skills (for example, sharing of building approval services in Western Australia)
- the use of 'flying squads' such as the Rural Planning Flying Squad in Victoria that provides support to local councils undertaking regulatory functions relating to planning.

As noted by the Commission, such initiatives, as well as moderating the effects of skill shortages, can 'facilitate the transfer of knowledge, skills and processes across

council areas and encourage consistent decision making between different local governments' (PC 2012b, p. 169). Other mechanisms for coordination and sharing of knowledge and experiences are discussed in section 6.5.

Traditionally many regulator staff have come from a law enforcement background and this has influenced the culture of regulatory agencies, tending to be associated with a stricter and less flexible approach to enforcing compliance. While some knowledge of administrative law will be essential for many officers, for example those carrying out investigations or undertaking inspections, increasingly general investigative, education and communication skills are being recognised as important, particularly as agencies move from a strict compliance based approach to the adoption of a more facilitative and educative posture. The Western Australian Department of Fisheries, for example, now places greater emphasis in its recruitment on regulatory officers with communication skills and a broader understanding of natural resource management in an attempt to shift the cultural focus away from the traditional policing approach and toward sustainability of the fishery resource (pers. comm., 23 May 2013).

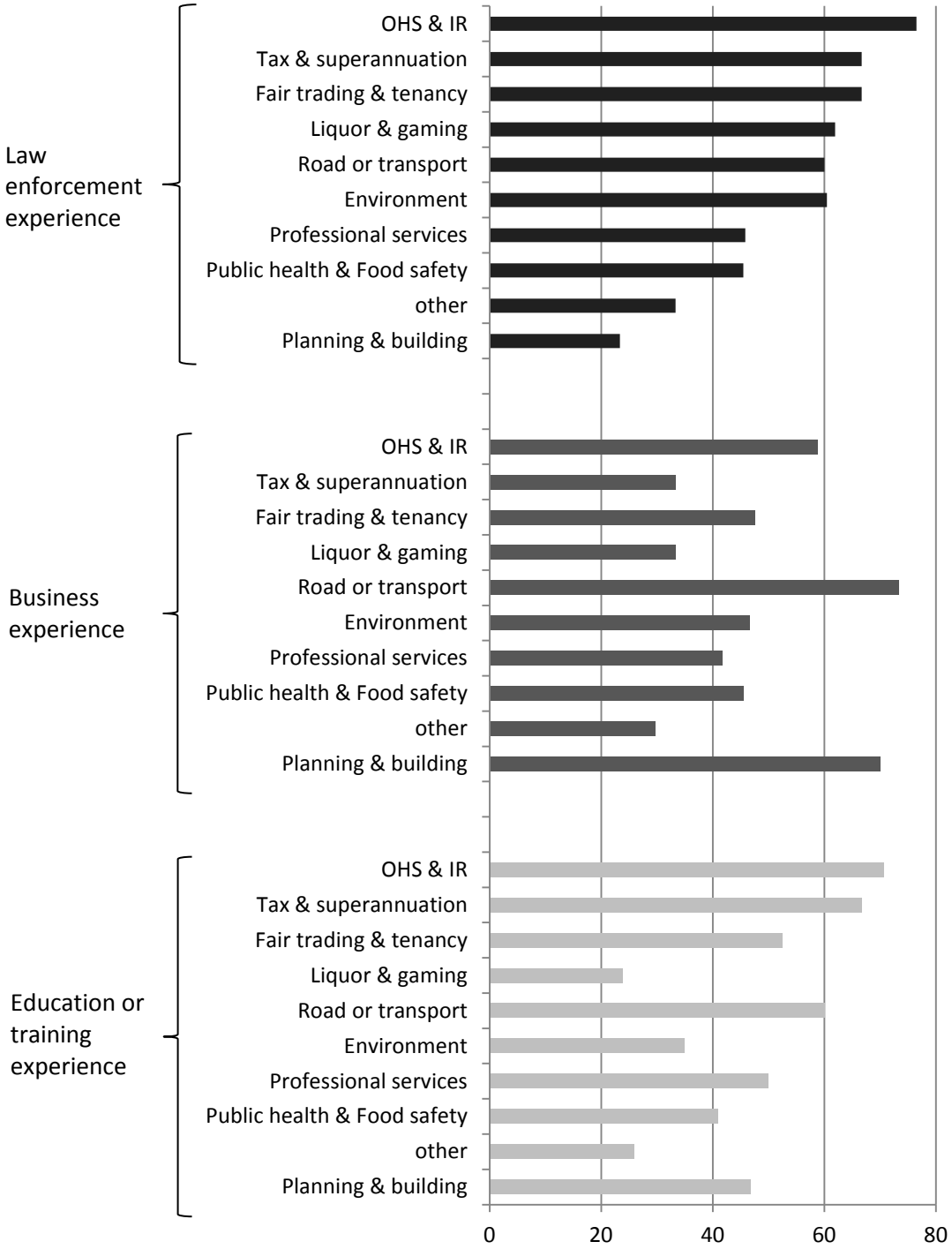
Around 50 per cent of regulators reported hiring some staff with skills or experience in law enforcement and a similar proportion have hired staff that worked in business in the area which the agency regulates. This compares with around 40 per cent of regulators indicating they have hired staff with skills or experience in education and training (PC regulator survey 2013). There are some significant differences between regulatory areas (figure 6.1).

Skills and knowledge will be, to some extent, acquired on the job or developed through appropriate training. However, recruitment policies and practices need to focus on achieving the right mix overall of relevant experience and skills and on identifying and addressing key gaps in capabilities.

Staff must also understand 'the nuances of the entities they regulate and the laws they are enforcing' (Institute of Public Accountants, sub. 29, p. 5). Participants have identified: commercial and technical knowledge; industry awareness; and understanding of the specific constraints faced by small business as particular areas for improvement. While, as noted above, many regulators have hired staff that worked in businesses in the area regulated, some participants have called for a stronger emphasis in recruitment on industry experience. Others have suggested the use of staff placements in businesses or industry associations to build understanding (see, for example, COSBOA, sub. 15). To date, such approaches appear to have been infrequently used by regulators. In the PC regulator survey, less than 20 per cent of regulators indicated they had either placed business staff within their agency

or their own staff within a business. Of those agencies that had used either practice, less than half reported that they considered that it had been effective.

Figure 6.1 **Strategies to ensure regulator staff have appropriate skills**
Per cent of regulators employing staff with particular experience



Source: PC regulator survey 2013.

In the United Kingdom the 'Trading Places' program seeks to build greater understanding between local authority regulatory services and the businesses they monitor, by facilitating two way learning experiences for regulator and business staff. This includes the opportunity for local authority staff to visit and experience first-hand the operations of participating businesses. After the first two years of operation nearly one-third of local authorities in England and Wales had participated in the program (LBRO 2011). Such a program may, however, have greater net benefits for regulator engagement with larger (rather than smaller) businesses.

Beyond knowledge and skills, staff must understand and have a commitment to the regulator's engagement goals and values. More difficult to achieve, they must also have the right 'attitude'.

> … some officers appear to have the view that their role carries with it a wisdom that should never be challenged. This can lead to overconfidence, an unwillingness to listen and in some instances: 'bully-boy' tactics. (Institute of Public Accountants, sub. 29, p. 5)

> This differs from agency to agency and from person to person but some regulators have a reputation for belligerence and bullying. This is mainly an issue at the Local Government level where health and planning issues are managed. (COSBOA, sub. 15, p. 5)

Improving guidance and training for staff

The Commission considers that improving guidance and training for enforcement officers could contribute substantially to addressing the gap between policy and practice in many regulatory agencies.

Staff should have ready access to a policy and procedures manual to provide guidance on such matters as: regulatory objectives; the application of a risk management framework; conduct of investigations; available enforcement actions and when they should be used; the appropriate use of discretion; record keeping; dispute resolution; and review processes. With appropriate oversight arrangements in place to ensure they are adhered to, such guidance documents can improve the quality and consistency of processes and decisions, to the benefit of both regulators and business. There can be further benefits for business if information about the regulator's compliance and enforcement policies is also publicly available (chapter 5).

There are a number of examples of better practice guides and frameworks, covering various aspects of compliance and enforcement. These have been developed for regulators within a portfolio area or as a guide for all regulators in a particular

regulatory area. For example, the Heads of Workplace Safety Authorities (HWSA) developed the 'National Occupational Health and Safety (OHS) Compliance and Enforcement Policy' to assist OHS regulators in each jurisdiction to implement effective enforcement practices (HWSA 2008).

A range of 'whole of government' good practice guidance material has also been developed by Australian governments for consideration by all regulators within a jurisdiction (section 6.4). Differences between regulators will mean principles and practices will not be universally suitable, so general guidance should, where possible, identify key considerations relevant to the application of a principle or practice.

Guidance on use of discretion

As noted in chapter 4, some flexibility in the use of compliance and enforcement tools can improve the effectiveness and lower the cost of regulations. However, regulator staff must show good judgment in the use of any discretion available to them.

The provision of appropriate training and guidance for staff on when and how to exercise discretion can significantly reduce the risk that decisions will be made that are not in the community's interests. It is also important that the use by staff of particular enforcement tools (for example fines or prosecutions) is not taken as a measure of their performance, since this can create perverse incentives — for example, to overuse enforcement actions, rather than trying to facilitate compliance. Indeed, an important strategy for changing organisational culture toward a more facilitative environment is to reward actions that are consistent with the desired culture.

More than 60 per cent of regulators indicated that their enforcement officers are provided with training and/or written guidelines on the use of discretion in determining responses to compliance breaches. Moreover, only two of the respondents that indicated that enforcement officers have some discretion, provided no guidance at all on the use of that discretion (PC regulator survey 2013).

Specific guidance on the use of discretion is sometimes contained in the enforcement manuals of individual regulators (for example, Tasmanian Department of Primary Industries, Parks, Water and Environment; Planning NSW; and the Building Professionals Board in NSW).

In addition to regulator specific guidance, there are a number of examples of general whole of government guidance on the use of discretion that have been developed for regulators and their staff. These include:

- guidelines published by the Western Australia Ombudsman on the *Exercise of Discretion in Administrative Decision-Making* (Ombudsman Western Australia 2009)
- *Caution Guidelines* issued by the Attorney General in NSW to assist enforcement officers in exercising their discretion when deciding whether to issue a caution or penalty notice under the *Fines Act 1996* (NSW Attorney General 2010a) — the NSW Business Chamber (sub. 25) suggested that consideration be given to developing a similar model guide for federal regulatory agencies
- *Enforcement Guidelines for Councils* developed by the NSW Ombudsman, include a chapter on *Using Discretion* (NSW Ombudsman 2002).

In box 6.1, the Commission has drawn on various sources to identify some key considerations in the use of discretion by regulators.

The Commission considers that suitable whole of government guidance on the appropriate use of discretion should be promoted and be readily accessible to regulators in all Australian jurisdictions. However, as such guidance will need to be general in nature, it is appropriate that all regulators also tailor their own guidance for their staff on the use of discretion. Such guidance and complementary training could cover examples of the exercise of discretion deemed appropriate or inappropriate in different scenarios relevant to the specific area of regulation.

Many regulators do provide written guidance and training on the use of discretion. However, concerns raised about poor judgments made by enforcement officers or an unwillingness to use the discretion available to them, suggests the need for greater efforts to ensure such guidance and training is both effective and consistently implemented in practice. A lack of information about the effectiveness of particular regulator strategies also indicates the need for periodic review and assessment of how discretion is being used.

Accountability mechanisms, such as processes that ensure decisions are potentially subject to internal review or random spot checks, are also necessary to maximise the likelihood that discretion will be exercised in a manner consistent with the efficient achievement of regulatory objectives and the interests of the broader community. The Brisbane City Council (BCC) is an example of a regulator that formally reviews their officer's use of discretion (BCC, pers. comm., 8 February 2013). Where problems are identified this can feed back into training and guidance

material. Knowing their decisions and management of cases may be subject to review also discourages any tendency for officers to be too lenient or, in the extreme, be captured by business interests (chapter 4).

Box 6.1 **Key considerations in the use of discretion**

In exercising discretionary powers, regulators and their officers must satisfy general administrative law requirements and should:

- comply with any specific legislative requirements and criteria set out in policies and procedures
- make policies and procedures related to the use of discretion transparent
- make rational, defensible decisions based on a risk management, outcome oriented approach:
  - rely on relevant supporting evidence, appropriately examined and verified
  - act reasonably and in good faith
  - act independently (and not under the dictation of a third person or body)
  - consider only relevant matters; giving appropriate weight to matters reflecting their importance; considering extenuating circumstances
- uphold equity, consistency and fairness:
  - avoid actual or perceived bias; identify and avoid conflicts of interest
  - treat like offences or circumstances equally, but some strategic or symbolic actions (such as picking a few for the sake of making an example) may sometimes be justified
- document processes, justify choices and explain reasons for key decisions
- subject decisions (some proportion chosen randomly and/or more significant decisions) to review and approval by senior staff
- provide businesses affected by processes and decisions with procedural fairness and opportunities for review and appeal.

Sources: Sparrow (2000); Ombudsman Western Australia (2009); Planning NSW (2002).

DRAFT RECOMMENDATION 6.2

To address gaps in staff skills and capacities regulators should:

- ***implement policies that focus on the recruitment and retention of staff with the appropriate industry knowledge and mix of enforcement, investigative and education/communication skills***
- ***ensure the provision of appropriate training and written guidance for staff, including on the underlying rationale for risk based enforcement and on the appropriate use of discretion***

- ***facilitate opportunities for staff to enhance their understanding of business practices and their awareness of the constraints on the capacity of small businesses to comply with regulations***
- ***implement cooperative arrangements with other regulators that facilitate the sharing of knowledge and resources (such as Victoria's use of 'flying squads' to support local governments).***

6.3 Transparency and accountability

Aspects of transparency and accountability have been discussed in earlier chapters. A general discussion of how these mechanisms impact on regulator incentives and business compliance costs was included in chapter 2. Various leading practices in consultation and communication of compliance requirements and enforcement policies, which are key facets of transparency, were discussed in chapter 5. A range of strategies and institutional arrangements for ensuring impartiality and accountability in decision making, including documenting of decisions (and reasons), reviews of decisions, service charters and Codes of Conduct were outlined in chapter 4.

Reporting, oversight and dispute resolution

Public reporting of performance, discussed further in the next section, can be a particularly powerful transparency and accountability tool, creating strong incentives for improved regulator behaviour and adoption of leading practices in engagement with business. Accountability of regulators for their performance will be further enhanced with independent oversight and monitoring of reporting and of progress in reforming engagement practices over time.

The oversight function could potentially be performed by audit offices in each jurisdiction, as suggested by the NSW Business Chamber (sub. 25). Alternatively, existing regulatory oversight bodies, such as VCEC in Victoria or the Better Regulation Office in NSW, could be given this responsibility.

The oversight body could also be charged with conducting reviews of regulators and could have input into the development and refinement of performance indicators (section 6.4). Publication of an annual report by the oversight body, even those located within a government department, could be a further tool for highlighting good and bad practices and in particular for disseminating information on innovative approaches adopted by regulators that could have wider application.

Another important accountability mechanism is ensuring fair and independent external dispute resolution mechanisms (chapter 5). This enables the community to challenge regulator performance and conduct and hold them to account. It helps tackle incorrect fact finding and prevents individual regulatory officers, in their decision making, from acting in excess of their jurisdiction, abusing their powers or failing to consider all of the evidence.

Governments must clearly set out their expectations of regulators

Clarity in governments' regulatory objectives and their expectations of regulators is also a key driver of better regulator performance.

A systematic risk based approach to managing and enforcing compliance is central to achieving regulatory objectives whilst ensuring administration costs for regulators and compliance costs borne by business are the minimum necessary. Earlier chapters have noted how regulators can be too risk averse and how their risk tolerance can be influenced by public opinion, media attention (particularly following adverse events), explicit political direction or the regulator's perceptions about the attitude of the Government or the responsible Minister.

It is clearly appropriate that community views and the policy priorities of governments are taken into account. Indeed, it is vital that regulators have a clear understanding of the government's objectives and expectations. Formal 'statements of expectations' (SOE) and corresponding regulator 'statements of intent', are increasingly being used by some governments to ensure clear communication of high level guidance, including with respect to treatment of risk and use of risk based approaches. Such statements should explicitly acknowledge that some level of risk is unavoidable and affirm the regulator's independence to implement its agreed risk framework and to take day to day enforcement actions free from political interference. The SOE for Energy Safe Victoria (ESV), in the form of a letter from the Minister for Energy and Resources, has a number of features that the Commission considers should be reflected in SOEs more generally (box 6.2).

Further, transparency surrounding the magnitude and consequences of risks and the approach of regulators to controlling risks can facilitate greater understanding within the community. In particular, the provision of information about the costs associated with reducing risks and the trade offs that must be made can change community perceptions and lead to acceptance of the need to tolerate a certain level of risk.

Box 6.2 **Energy Safe Victoria Statement of Expectation**

The SOE sets out the Minister's and the Government's objectives and priorities for ESV. It explicitly states an expectation that ESV should:

- use a range of regulatory tools, including risk based approaches
- remain focused on outcomes
- constantly seek out better and more efficient ways of regulating to achieve these outcomes while minimising the regulatory burden on industry and community
- participate in national and international fora to develop standards to support effective risk based regulation
- keep the minister informed of existing and emerging issues (the statement acknowledges the benefit of regular exchange of information and regular meetings between ESV and the Minister).

The SOE also acknowledges the Minister's recognition of ESV's independence:

> … [I] will support that independence in discharging your regulatory responsibilities and delivering the agreed regulatory program as outlined in the Corporate Plan. (O'Brien 2011, p. 2)

In relation to independence, ESV's letter of response to the SOE from the Director of Energy Safety, states:

> Discharging my statutory responsibilities, particularly enforcing compliance and ensuring safety risks are minimised to the lowest practical level, often requires ESV to take firm and sometimes unpopular action … whilst I acknowledge the important role of MPs and Ministers in facilitating outcomes and assisting constituents on specific issues and decisions, your recognition and support for ESVs independence is appreciated and will assist in ensuring ongoing clarity of role and the effective public administration of energy safety regulation. (Fearon 2012, p. 3)

Sources: Fearon (2012); O'Brien (2011).

DRAFT RECOMMENDATION 6.3

Regulators must ensure there is transparency and accountability in decision making and in the use of discretion, in order to minimise uncertainty and the risk of corruption or the inappropriate treatment of one business relative to another. Generally, this should include:

- ***formal documenting and publishing of compliance and enforcement strategies and key decision making processes***
- ***documenting enforcement decisions and reasons and (subject to meeting any confidentiality and privacy requirements) publication of significant decisions with broader implications or with particular educational or deterrent value***
- ***provision of a client service charter detailing what business can expect in their interaction with the regulator***

- ***ensuring all decisions are potentially subject to review and businesses have access to appropriate dispute resolution mechanisms.***

6.4 Evaluation, review and performance monitoring

There is likely to be significant scope to improve the engagement practices of most regulators — either to improve effectiveness in achieving regulatory objectives, achieving objectives at a lower cost, or both. Even for those regulators that are relatively more advanced in their adoption of leading practices, there is a need to remain open to new developments and, in particular, to adapt processes and practices to: evolving risks; changes in the 'maturity cycle' of the regulatory function or regulated activity; and changes in technology and business practices.

For this reason there must be mechanisms in place to monitor and evaluate policies, practices, staffing and capacities and to share experiences with other regulators. This can take the form of review and performance monitoring processes that are internal or external to the regulator, along with various formal or informal mechanisms for cooperation with other regulators. It should also include feedback mechanisms (discussed in chapter 5) that enable the regulator to systematically take account of input from stakeholders, including small businesses. Generally, monitoring, evaluation and review is a significant weakness for most regulators and indeed regulatory systems in Australia (PC 2011a).

The Commission recognises there can be significant challenges in evaluating performance and in particular determining the relative contribution that different tools or strategies make to achieving regulatory outcomes. A fundamental difficulty with any such exercise is determining the counterfactual — that is, what would have happened if the regulator had adopted a different approach? However, various methodological techniques are available and some of these were discussed in the Commission's study *Identifying and Evaluating Regulation Reforms* (PC 2011a).

Systematic reviews and performance evaluations

Responses to the PC regulator survey indicate that around 85 per cent of regulators have had their performance subjected to some sort of ongoing or periodic review. Typically, however, these are internal self-evaluations and they vary significantly in their nature and scope.

Around 50 per cent of regulators indicated that reviews had included an assessment of the effectiveness of the agency's engagement with business, but only one quarter considered the effectiveness of engagement with small business. There was some

variation across jurisdictions. The proportion of regulators reporting consideration of business engagement and small business engagement in reviews was highest in South Australia (around 80 per cent and 40 per cent, respectively) and the ACT (around 65 per cent and 40 per cent, respectively).

Internal reviews can be valuable and clearly have the benefit of the regulator having ownership of the process and findings, but as noted by VCEC:

> … any internal review risks losing rigour and objectivity, and may not have a realistic or informed view of good performance. In addition, it does not always create opportunities for regulators to share experiences and learn from each other. (VCEC 2011b, p. 127)

While the OECD draft best practice principles for the governance of regulators recognise the importance of regulators continuously monitoring and evaluating their own performance, 'for major and periodic policy reviews and evaluation of a regulatory scheme, including the performance of the regulator' it is suggested that they be carried out independently of the regulator (OECD 2013b, p. 29). External independent reviews typically provide greater scope for public participation, and perhaps consideration of a wider range of views and experiences of other regulators. They also provide a better opportunity to address institutional and governance arrangements.

However, the regulator may be less committed to any improvements recommended by an external review. While such reviews should seek to work with the regulator in a collaborative way, public reporting of findings and recommendations and follow up examinations of progress in implementing agreed improvement initiatives will help ensure regulators are accountable and potential reform benefits are realised.

Regulators should be genuinely committed to improving their performance and therefore, *in principle*, there is no reason why internal review processes or reviews commissioned by the regulator itself, cannot be rigorous and be open to considering the merits and possible application of a wide range of practices, both Australian and international. The Victorian Environment Protection Authority (EPA), for example, commissioned a comprehensive independent review (Krpan 2011) of its compliance monitoring and enforcement, which resulted in a number of major reforms (focused on building staff capacities and improving risk based approaches) being undertaken.

The review followed criticisms of the EPA's performance in reports by the Ombudsman and Audit Office. Such transparency, which shines a light on areas of performance that could be improved, can sometimes be necessary to encourage regulators to implement reforms. This is because, as noted in chapter 2, the incentives of regulators or the way they view success may not always align with the objectives of governments or the interests of the broader community.

Incentives for regulators to conduct rigorous reviews and to strive for continuous improvements — that generate net benefits for the community as a whole — can be strengthened by requiring regulators to regularly report publicly against a range of key performance indicators (see below). Governments can also commission reviews of regulator performance or mandate that reviews, meeting certain minimum design requirements, be regularly conducted.

In relation to external reviews, these can be regulator specific; industry or sector-specific (more typically); or they can compare aspects of regulation and regulator performance and practices either across different regulatory regimes and/or across jurisdictions for one or more regulatory regimes.

Bodies such as the Victorian Competition and Efficiency Commission (VCEC) and the Independent Pricing and Regulatory Tribunal (IPART) in New South Wales have considered aspects of regulator performance, including administration and enforcement issues, through their public inquiry programs. The Productivity Commission has also conducted a number of relevant studies in recent years, most notably in the series of performance benchmarking studies of business regulation (for example, food safety (PC 2009b); OHS (PC 2010b); planning, zoning and development assessments (PC 2011b) and local government as regulator (PC 2012b).

In addition, performance audit programs conducted by the ANAO and jurisdictional audit offices examine whether regulators use resources efficiently and effectively and also the extent to which they achieve legislative and policy compliance. State Service Authorities, Public Sector/Service Commissions and Ombudsman in various jurisdictions also assess the governance, accountability and performance of public entities, including regulators.

The Commission has drawn on evidence and findings from various recent studies and a number of audit reports in reaching findings about the scope for improvements in a number of areas, including: risk management; compliance monitoring; the application of enforcement tools; and the need for better transparency and accountability in decision making. While many of the reviews and evaluations have contributed to significant improvements in regulator engagement practices, they have been rather ad hoc. The Commission considers that governments need to do more to ensure that regulator performance is subjected to regular and systematic scrutiny.

The case for a systematic program of independent reviews of regulator performance

Governments should ensure that the performance of regulators, in administering and enforcing regulation, is periodically subjected to independent review. These reviews could, as appropriate, focus exclusively on administration and enforcement or the performance of regulators could be examined in the context of already scheduled broader reviews of the effectiveness and efficiency of regulations.

Such reviews could examine the systems and processes of the regulator, the quality of its decisions and the effect it is having on regulatory burdens and outcomes. This would provide business with confidence that regulators are being held to account for the way in which they exercise their powers.

Reviews could be undertaken by a body in each jurisdiction with sufficient independence, for instance VCEC in Victoria or IPART in NSW, or an existing audit or regulatory oversight body. A review function of this type would be similar to the Inspector General of Regulation that the Uhrig Review (2003) recommended be established by the Australian Government to investigate, where necessary, the systems and procedures used by regulatory authorities in administering regulation.[1]

The review body would be expected, in developing its review program and determining terms of reference, to consult widely, including with:

- bodies such as the Auditor General and the Ombudsman (including with a view to avoiding overlap or inefficiencies in scheduling)
- the relevant Small Business Commissioner (and in Victoria, also the Red Tape Commissioner)
- business groups (including those representing small business interests) and other community groups.

Reviews could be quite broad in scope or narrowly focused, but critical is ensuring that regulator arrangements are appropriate, proportionate, fit for purpose and risk based. In the United Kingdom, for example, the Better Regulation Executive carried out reviews of 36 national regulators between 2007 and 2009. The focus of the reviews was on the extent to which each regulator was conforming to the principles set out in the Hampton Review Report (and embodied in the UK Regulators'

[1] The proposal for an Inspector General of Regulation was modelled on the Australian Government Inspector General of Taxation, which is an independent statutory office that reviews systemic tax administration issues and reports to the Australian Government with recommendations for improvements.

Compliance Code — see below) in the context of its particular field of regulation and powers.

In December 2012, the Victorian Government announced its intention to commence a series of 'regulatory practice projects', where the VCEC will work with selected regulators to improve regulation administration on the ground:

> The focus will be on how regulation is enforced, including identifying best practice risk based approaches to reduce the red tape burden for compliant businesses. This new approach reflects the practical application of regulation is often as important as the existence and form of regulations. (Victorian Government 2012, p. 55)

In the recently announced *Commonwealth Government Framework for Regulators*, the Australian Government included greater emphasis being given by ministers and agency heads to reviews as one of a number of mechanisms for improving the administration of regulators. The Government in particular noted that regular reviews could be undertaken of the statutory and administrative frameworks supporting regulators to ensure that frameworks are consistent with policy objectives and provide regulators with appropriate access to contemporary regulatory tools, such as proportionate enforcement (Department of Finance and Deregulation 2012). Notwithstanding the Government's recognition of their value, currently there is no compulsion on ministers and agencies to conduct such reviews.

Sharing experiences with other regulators

Regulators can benefit greatly from opportunities to learn from each other through the sharing of information about their specific experience with communication, compliance and enforcement practices. Regulator capacities can be strengthened where knowledge about what has been effective or has not worked well is shared and where regulators work cooperatively together to identify ways to overcome common problems.

The sharing of knowledge, relevant experiences, policies, procedures, templates and guidance materials can also reduce administrative costs for regulators (including those associated with developing and trialling strategies). Business and the general community, as well as regulators, also benefit where costs — associated with engagement practices that have been demonstrated, by the experience of another regulator, to be unsuccessful or less effective — are avoided.

Examples of mechanisms that have been set up to share experiences, include:

- inter jurisdictional — Australian Consumer Law Regulators, Heads of Workplace Safety Authorities and Heads of Workers Compensation Authorities

- Commonwealth — the Council of Financial Regulators
- New South Wales — Better Regulation Office Innovation and Improvement in Regulation Services Group
- Victorian Forum of Primary Industry Regulators.

Further information about some of these forums is provided in box 6.3.

Box 6.3 **Forums of regulators**

Heads of Workplace Safety Authorities (HWSA) is a group of senior representatives of workplace health and safety regulators from Australia and New Zealand. HWSA work together to improve and harmonise work health and safety at a national level. HWSA promotes and implements best practice in policy and legislation, education, compliance, and enforcement. Similar to the HWSA, the Heads of Workers Compensation Authorities (HWCA) play a similar role for all Australian and New Zealand workers compensation regulators.

Australian Consumer Law (ACL) regulators meet regularly (for example the Education and Advisory Committee) to discuss a range of current issues, including those affecting small business, to ensure a consistent approach (ACCC, sub. 26). They also share intelligence through ACL Link — an online communication platform used by all ACL regulators.

The NSW Innovation and Improvement in Regulatory Services (IIReS) Group of regulators — Environment Protection Authority (EPA), NSW Fair Trading, NSW Food Authority, Office of Environment and Heritage, Office of Liquor, Gaming and Racing (OLGR), Roads and Maritime Services and Workcover — work together to deliver regulation that is business-friendly and achieves intended outcomes at the least cost to business. Established by the Better Regulation Office (BRO) in March 2012, IIReS has developed best practice principles which include: a risk based approach to regulation; regulatory effort that is focused on outcomes within an improvement framework; accountability to business for service efficiency; a clear understanding of business and community needs; and a capacity building culture within regulatory agencies. Members of the group also work with BRO to implement practical projects within their agencies, for example six IIReS regulators will undertake pilot projects in 2013 which will deliver guidance for all NSW regulators on Risk Based Mitigation and Outcomes. (BRO, pers. comm., 18 June 2013).

The Victorian Forum of Primary Industry Regulators (FOPIR), set up by the Department of Primary Industries in 2008, comprises seven portfolio regulators. The forum meets quarterly and aims to share ideas, problems and solutions, and to build the capacity of all regulators. Guest speakers are invited and forum members make presentations and also receive information from the Department on relevant issues. VCEC reported that the FOPIR appeared to have generated benefits 'with members regarding it as valuable' (VCEC 2011b, p. 116).

The Commission considers that forums of regulators of this type have considerable potential to facilitate the wider adoption of leading practices in communication, compliance and enforcement and other aspects of regulator engagement. They can also be an important mechanism for identifying and addressing overlaps and coordination issues. When such forums comprise a broader range of regulators — across multiple portfolio areas or government wide — they are sometimes called a 'community of practice'.

The Victorian Government has announced that VCEC will establish a community of practice for Victorian regulators to enhance cross regulator dialogue and pooling of experience and information (Victorian Department of Treasury and Finance 2013). While the Australian Government has identified portfolio based forums or a broader community of practice for Commonwealth regulators as mechanisms that could potentially enhance the administration of regulators, there is no formal public commitment by the Government to implementing such forums. Rather, it would appear that ministers and agency heads are being left to determine what will best suit the circumstances of individual regulators (Department of Finance and Deregulation 2012).

Governments should consider making greater use of forums of regulators. These could comprise portfolio or area based regulators (including as appropriate inter jurisdictional fora) and a broader community of practice. These forums would encourage regulators to exchange information and views, accelerating diffusion of good practice and building professional capability, for example, in relation to:

- stakeholder consultation and engagement — to support better consultation and engagement practices by identifying where a particular approach has worked (or failed)
- the application of risk based approaches — to support the broader application of risk based regulation by improving understanding of available tools and the enablers and barriers to adopting such approaches
- measuring and reporting performance — to assist in the development of a performance framework (see below), including addressing various methodological issues related to the gathering and reporting of performance information.

Small regulators particularly stand to gain from mechanisms that facilitate sharing of information and experiences because there is not the same potential that exists within many larger agencies to benefit from in house sharing of experiences and expertise.

Performance monitoring and reporting

The regular monitoring of performance using well defined indicators or measures of effectiveness and costs can be an invaluable source of information for a regulator on the appropriateness of its strategies and areas for improvement. When combined with public reporting, performance monitoring can greatly increase the transparency of the regulator's activities and support accountability. Greater transparency can provide a particularly strong impetus for better performance, including with respect to lowering the compliance burden of regulator engagement with small business.

The ANAO identified the following benefits of performance monitoring and reporting:

> Non financial performance information allows entities to assess the impact of policy measures, adjust management approaches as required and provide advice to government on the success, shortcomings and/or future directions of programs. …
>
> This information also allows for informed decisions to be made on the allocation and use of program resources. In addition, performance information and reporting enables the Parliament and the public to consider a program's performance, in relation to both the impact of the program in achieving the policy objectives of the government and its cost effectiveness. (ANAO 2013b, pp. 14, 18)

The Commission considers that there could be merit in regular and systematic benchmarking of the performance of regulators against common indicators, but comparisons of regulator performance have limitations (discussed below). Therefore, irrespective of any government wide performance monitoring, regulators should be encouraged to monitor their own performance against a range of performance indicators.

Regulator-specific

In all Australian jurisdictions, public sector regulatory agencies are subject to accountability and public reporting obligations (chapter 2). While the main focus of reporting is typically on financial performance, there is a growing emphasis in reporting requirements on non-financial measures of performance and increasingly on outcome and effectiveness measures.

For example, under the Australian Government Outcomes and Programs framework, all entities in the public sector with responsibilities for the delivery of government programs (including regulators) are expected to have key performance indicators which assist government to assess the impact of programs, and whether they might be better targeted to achieve more cost effective outcomes. Entities are

required to identify and report on appropriate outcome focused key performance indicators (KPIs) (ANAO 2013b).

Regulators that exist as separate legal entities (as opposed to being located within a government department) typically have their own websites, where performance information is more readily accessible. Furthermore, they generally report more detailed information than those regulatory functions that exist within portfolio agencies (which may have the level of detail of reporting of their activities diluted in broader departmental reporting). However, reporting by regulators, whether stand alone or not, on aspects of their administration and enforcement of regulation, and more specifically activities related to their engagement with small business, is generally limited. While a relatively high proportion of regulators (particularly large regulators) report overall compliance levels, there is often little or no evidence presented on how their activities are impacting on outcomes or the relative effectiveness of different measures.

Beyond the presentation of mandatory financial reporting, regulators typically have considerable discretion regarding what aspects of performance are highlighted in annual reports. Regulators not surprisingly have an interest in using the reports to promote the good work achieved in the last year and typically there is less focus on areas of performance that have been poor or the identification of areas that need improvement.

Notwithstanding the requirements for Australian Government regulators to report against indicators of outcomes, the ANAO (2013b, pp. 15, 19) has found that 'implementation within entities continues to require more focus and attention' and 'it is still difficult to get an accurate picture of the performance of programs'. Other key findings from recent ANAO work on performance measurement within the Australian Government are outlined in box 6.4. The Commission notes, however, that the Public Governance, Performance and Accountability Bill 2013, currently before the Commonwealth Parliament, if passed may, depending on the detail to be included in future rules, result in some improvements in performance monitoring and reporting by Commonwealth entities, including regulators. Annual performance statements, including information about performance in achieving objectives, would need to be included in annual reports tabled in Parliament. The draft legislation also proposes:

- standards for records about performance and management of those records with the aim of improving the quality and reliability of performance information
- a role for the Auditor General, at the request of the responsible Minister or the Finance Minister, to examine and report on an entity's annual performance statements.

Box 6.4 **ANAO findings on performance measurement of Australian Government agencies**

The ANAO has recently undertaken a pilot project to assess the status of the Australian Government performance measurement and reporting framework as a basis for implementation of a future program of audits of entities' key performance indicators, and to develop a suitable audit methodology. Some key findings of the ANAO based on the pilot, as well as earlier work on the development and implementation of performance indicators and various performance audits, include:

- many government agencies are finding it challenging to develop and implement effectiveness KPIs that allow for assessments of achievements against stated objectives
- significant differences between government entities can make it difficult for them to operationalize some homogeneous KPIs
- the need for leadership, greater investment and resourcing to strengthen performance measurement
- the need for improved guidance from the Department of Finance and Deregulation on performance measurement, including clearer standards or criteria for KPIs
- systematic review of KPIs can lead to improvements in the quality and credibility of indicators.

Sources: ANAO (2011a); ANAO (2013b).

A prerequisite for developing robust and meaningful indicators of performance are clear statements of objectives and the outcomes that the regulator is expected to achieve. In many cases regulators do not appear to have such clarity and this makes the development of measures, targets or benchmarks that reflect effective performance or successful achievement of objectives, challenging.

When implementing performance monitoring and reporting systems, regulators should be seeking to achieve consistency with other regulators wherever possible (particularly those regulators operating in the same broad area of regulation, both within their own jurisdiction or in other jurisdictions). In practice, this means only developing a tailored indicator where there is a sound rationale for not adopting an alternative indicator already widely used, for example if doing so would significantly detract from the usefulness of the indicators.

The incentive for regulators to address gaps or weaknesses in performance, for instance to find ways to lower business compliance costs, will be stronger where monitoring is combined with transparent public reporting. However, it is important that performance monitoring is not seen by regulators merely as a mechanism for complying with external reporting requirements. Regulators that are committed to

continuous improvement will carefully design indicators and refine them over time so as to maximise their usefulness.

Some individual regulatory agencies are required under specific legislation to publicly report on their regulatory activities, for example, the Victorian Department of Human Services, under the *Food Act 1984*. In most cases the focus of such reporting is on outputs, rather than the broader outcomes regulation seeks to achieve (VCEC 2011b, p. 119).

At the Commonwealth level, ASIC is required under its Act to report in some detail on its performance in its Annual Report. This includes reporting on the progress ASIC has made in achieving its goals and a range of specific performance indicators, including in relation to business compliance cost reduction, the use of risk based surveillance, timeliness and provision of guidance.

The Commission notes that in the United Kingdom, under the statutory Regulators' Compliance Code (see below), regulators are required to measure (and to report publicly on) their performance. This includes the costs they impose on regulated entities. Compliance is not mandatory but any departure from the Code must be properly reasoned and based on material evidence.

What type of performance indicators?

There needs to be a strong focus in regulator performance monitoring and reporting on measures of outcomes (that is success in achieving regulatory objectives, for example in terms of environmental or safety outcomes), as well as narrower measures of success such as rates of compliance and quality measures (such as timeliness or level of satisfaction/complaints).

Simple measures of inputs, such as number of approvals, successful prosecutions, or inspections undertaken, can provide some useful information on regulator performance, but typically they will not be good proxies for the regulator's effectiveness in meeting objectives. Similarly, measuring the level of compliance only assesses regulated entities' behaviour towards the law and does not assess the ultimate outcome from those behaviours.

In this regard, the Chairman of the ACCC has cautioned against focusing too much on simple measures of the success rate in enforcement litigation. In a recent speech he noted that losing cases in the courts is not necessarily inconsistent with meeting broader regulatory objectives:

> As I have said publically many times, all does not turn on whether we win or lose in court. While I do understand the media's desire to report in a 'winner takes all' way, this is not how we see it.
>
> … When taking a case, or even if we lose a case, often messages are sent and behaviour can change.
>
> … Further, and as I have said often, we are being too conservative if we always win enforcement litigation. (Sims 2013, p. 4)

The ANAO stated recently, in relation to the Australian Government, 'a more comprehensive model for performance measurement and reporting … would include consideration of the development and implementation of "efficiency indicators" to complement the "effectiveness" indicator focus … ' (ANAO 2013b, p. 20). This requires consideration of the administration and compliance costs of regulator activities not just the benefits. Currently, less than 15 per cent of regulators monitor the costs on business imposed by their engagement practices (PC regulator survey 2013).

Table 6.1 lists some specific performance indicators that could be considered for regulators to monitor and regularly report against. Where applicable, regulators should report their performance against indicators or objectives set out in their statements of expectations.

The Commission recognises, however, the complexity of measuring some aspects of performance. The measurement of the impact of different communication, compliance and enforcement strategies on outcomes is particularly challenging, but must be a priority. There can also be a significant cost in terms of information gathering, data management, and analysis and in some cases regulators may have to make an investment in upgrading information technology systems to achieve leading practice reporting.

Cross regulator benchmarking

Comparisons of regulator performance are limited by the lack of consistent benchmarks or standards applied across regulators or regulatory activities. There may be benefits therefore in developing and publicly reporting on some common performance measures across regulators.

A set of higher level indicators could be devised within a common framework that would allow some meaningful comparisons to be made of aspects of regulator performance. However, given that regulators differ in many significant respects any such comparisons have their limitations. Indeed, it could be appropriate to use such

a standardised framework to focus as much on comparisons of individual regulator performance over time as on comparisons across regulators.

Table 6.1 **Possible indicators of regulator performance**

Achieving objectives	– compliance rates – number of businesses in different risk categories and changes over time – changes in outcomes regulation is seeking to achieve
Costs	– overall cost of regulator's administration and enforcement activities – overall compliance costs imposed on business and reductions achieved
Use of different strategies	– nature and frequency of use of different communication, compliance monitoring and enforcement measures (e.g. type and number of inspections) – cooperative arrangements with other regulators/agencies

Cost effectiveness of different strategies	– relative cost effectiveness of different measures in terms of:
	  – influence on compliance
	  – impact on outcomes
	  – impact on compliance costs, including for small business

Timeliness	– the timeliness of key regulatory processes
Communication/education	– use of regulator website/information sources – attendance at seminars/workshops
Consultation and stakeholder feedback	– days allocated to consultation/number of stakeholders consulted – number of complaints/stakeholder views about the regulator's performance
Staff capacities and performance	– training — number of staff participating/training expenditure per employee – performance — number of decisions changed on review
Continuous improvement	– evaluations/reviews conducted
Dispute resolution	– number of appeals to external body and proportion of decisions upheld

The development of common indicators would in particular facilitate comparisons with other similar regulatory bodies in the same jurisdiction (or perhaps the same type of regulator in different jurisdictions). Performance reporting based on generalised performance metrics would provide government and the community more broadly with a clearer picture of regulators' relative performance, and where effort is needed to improve their performance. Such an approach could perhaps also introduce a degree of 'competition' among regulators with different approaches and methods of regulating, leading to more rapid convergence towards leading practice.

COSBOA (sub. 15) suggested that all regulators should publish outcomes and activities in the same format and that there should be one publication in each jurisdiction that lists all regulators that deal with small business. COSBOA

proposed this should include aggregated information on compliance (such as the number of prosecutions/fines/actions that have been undertaken), regulator activity and interaction with small business.

While further work would be needed to develop the indicators (especially outcome focused indicators) that would be most suitable for comparing the relative performance of equivalent regulators, some of the indicators identified in table 6.1 could be a starting point. Governments would need to identify:

- what aspects of performance need to be measured, and how the information will be used
- relevant performance indicators and the data that will measure them
- how the data will be collected and collated
- how performance will be reported.

There may be some resistance from regulators to adopting generalised performance benchmarks if they are seen as a threat rather than an opportunity, or are perceived as a poor source of information on how to improve their approaches and decision making. It is therefore imperative that regulators are consulted during their development and have some ownership of the benchmarks. To prevent backsliding and ensure long term success there must also be an ongoing commitment from governments to regulator benchmarking.

The challenges of benchmarking performance have not deterred some governments from pursuing this reform. As part of the Victorian Government's response to the VCEC inquiry, *Strengthening foundations for the next decade: An Inquiry into Victoria's regulatory framework*, it committed to implementing a regulator performance reporting framework (VCEC 2011b). This framework is expected to allow regulators to benchmark their performance on key regulatory activities against other regulators in Victoria, supporting continuous improvement in compliance and administrative practices. Currently, five regulators are required to include in their annual reports progress toward achieving key performance targets for compliance and administrative activities. These targets are set out in 'reducing red tape' SOEs issued by responsible ministers. The Government's intention is to eventually extend the performance reporting requirements to all regulators. The VCEC will monitor reporting by regulators on their performance against the SOE performance targets (Victorian Department of Treasury and Finance 2013).

Government wide engagement principles and guidance

The Commission considers there are benefits in the development and implementation of a set of better practice principles or guidance for regulator engagement with business. While generally these would be relevant to engagement with all businesses, regardless of size, in a few instances they would reflect a different approach being warranted for small business — for example some tailoring of the regulator's communication of compliance requirements.

Such principles can complement regulators' knowledge based on experience, evaluations and shared learning. The principles could also provide a framework or set of high level standards on which to develop the performance indicators discussed above. Table 6.2 provides some examples of principles that all governments might consider.

Some jurisdictions in Australia have released 'best practice' (or 'better practice') guides for use by regulators (box 6.5). Recognising that ideal regulator practices vary from field to field and from regulator to regulator, guides typically focus on general tips, considerations and principles rather than providing detailed direction.

The OECD and individual member countries have also developed guidance to improve the quality of administration and enforcement of regulation. The OECD is currently developing best practice principles for improving regulatory enforcement and inspections (OECD 2013b) to complement the 2012 Recommendation of the Council on Regulatory Policy and Governance (OECD 2012b).

The United Kingdom Regulators' Compliance Code is an example of guidance that has received considerable attention. The Code is a statutory (but not mandatory) code of practice intended to encourage regulators to achieve their objectives in a way that minimises the burdens on business (box 6.6). A 'post implementation review' of the Code, however, found it has not been effectively applied by UK regulators. The Government is amending the Code and has proposed closer monitoring of its future application.

There can be difficulties in translating principles for regulator behaviour into practice. This is partly because some practices will rightly vary from situation to situation, as appropriate actions can be contingent on the nature of the risk being regulated and the institutional arrangements under which a regulator operates, as well as a range of firm and industry specific considerations. Thus, any general guidance material must avoid excessive prescription and where possible identify key considerations relevant to the application of a principle or practice. To help deal with such problems, some guides — such as the ANAO's and the Queensland Ombudsman's (box 6.5) — have used case studies to illustrate regulator practices

that reflect the principles. The United Kingdom's National Audit Office provided guidance for regulators to implement the Hampton Review principles, which included a set of high level criteria and positive 'symptoms' or indicators that assist the understanding of, and compliance with, the principles.

Box 6.5 Some good practice guides for regulators

The following are examples of 'good practice' guidance for regulators developed by Australian governments.

- The ANAO's (2007) *Administering Regulation: Better Practice Guide* emphasised: governance considerations (including managing risk); information management; relationship management (including facilitating communication and efficient consultation); resourcing issues; controlling entry to a market; monitoring compliance; addressing non-compliance; and responding to adverse events. The Guide also included case studies of better practice principles and approaches.
- The Queensland Ombudsman's (2009) *Tips and Traps for Regulators* (2nd edition) looks at the role of: knowledge, skills and values; discretion and the role of risk management; investigative practices; systems for effective regulation; regulators working together; communication with the public; regulatory independence; recordkeeping and electronic data capture; complaint management and audits of regulators. The report also contains a set of case studies that demonstrate aspects of good regulatory practice.
- The NSW Better Regulation Office's (2008) *Risk Based Compliance* sets out the steps in adopting a risk based compliance approach, including: identifying risks of non-compliance; analysing risks of non-compliance; prioritising risks of non-compliance; identifying and selecting compliance measures; planning for implementation; and reporting and reviewing.
- The Better Business Regulation framework developed by the Department of Justice in Victoria and Consumer Affairs Victoria (2008) provides a practical framework for regulators to ensure processes are streamlined, effective and in line with international best practice. It sets out good practices relating to various activities and tasks covering the full regulatory cycle, including: developing administrative processes to enable implementation; educating stakeholders about the government interventions; receiving and responding to enquiries and complaints; registering and licensing entities; managing ongoing registration/licensing processes; monitoring and enforcing compliance of regulated entities' practices, processes and performance; assessing the performance of the government intervention; and reviewing the objectives of the government intervention.

Sources: PC (2011a), ANAO (2007); Consumer Affairs Victoria (2008); NSW Better Regulation Office (2008); Queensland Ombudsman (2009); VCEC (2011b).

Box 6.6 **UK Regulators' Compliance Code**

The Regulators' Compliance Code has a statutory basis in the *Legislative and Regulatory Reform Act 2006* (UK). The Code was drafted in response to the Hampton Review Report on inspection and enforcement (UK Government 2005). Regulators are required to 'have regard to' the provisions of the Code when determining policies, setting standards or giving guidance. The purpose of the Code is to embed a risk based, proportionate, targeted and flexible approach to regulatory inspection and enforcement among the regulators to which it applies. It aims to ensure that risk assessment precedes and informs all aspects of their approaches to regulatory activity and that inspectors and enforcement officers are enabled to interpret and apply regulatory requirements and enforcement policies fairly and consistently. The Code emphasises the quality of communication about regulatory activities and legal requirements on regulated entities, and information requirements. Where two or more regulators require the same information from the same regulated entity they should share data where this is practicable, beneficial and cost effective.

The Code applies to named regulators only, including specified national regulators and local authorities. It does not apply at the level of individual cases or decisions. This means, for example, that while an inspector or investigator should operate in accordance with a regulator's general policy or guidance on inspections, investigations and enforcement activities, the Code does not apply directly to the work of that inspector or investigator in carrying out any of these activities in individual cases. Despite the duty on a regulator to 'have regard to' the Code, the regulator is not bound to follow a provision of the Code if they properly conclude that the provision is either not relevant or is outweighed by another relevant consideration. However, they should ensure that any decision to depart from any provision of the Code is properly reasoned and based on material evidence.

A post implementation review of the Code in 2012, found that the Code had not fulfilled its potential in holding regulators to account for their activities and that although regulators had broadly adopted the principles of the Code and reflected the Code in their policies, there was little evidence of use of the Code as a reference for continuous improvement (UK Department for Business Innovation and Skills 2013). The UK Government is amending the Code — including simplifying content and enhancing accountability mechanisms (UK Treasury 2012). Regulators will be required to publish their service standards and a statement of how the requirements of the Code are met on an annual basis; the requirements of the Code may be used as part of ongoing reviews of regulators to assess their effectiveness in delivering their enforcement responsibilities; and when challenged by businesses and the community, regulators will be required to have mechanisms in place to discuss the issue and reach agreement. The UK Government will monitor the published service standards of regulators subject to the Code, and will challenge regulators where there is evidence that service standards are lacking or inadequate (UK Department for Business Innovation and Skills 2013).

Sources: UK Government (2005); UK Treasury (2012); UK Department for Business Innovation and Skills (2013).

Table 6.2 **Government wide engagement principles**

1. Regulators' engagement practices should, where not constrained by legislation, be designed and implemented with the aim of **maximising community net benefits**.
2. Regulators should: use **risk based approaches** in the design and enforcement of regulatory compliance strategies; and employ a **graduated approach to enforcement**, applying a range of enforcement instruments to ensure that responses to different types of non–compliance are proportionate.
3. Maximise the potential for **voluntary compliance** by: clearly communicating requirements and ensuring that affected parties understand their rights and obligations; avoiding unnecessary complexity; providing rewards and incentives for voluntary action and high compliance outcomes; and nurturing compliance capacity (particularly in small businesses).
4. Provide businesses with **flexibility** as to how they meet compliance obligations, but ensure that those businesses that do not have the capacities to develop alternative solutions have the option of adopting clearly specified deemed to comply solutions.
5. Employ information technology, one-stop shops for licences and other requirements, and lead agency approaches to make **service delivery more streamlined and user-focused**.
6. Design information collection and management strategies to ensure that necessary information is available but businesses **do not have to give unnecessary information** nor the same information more than once.
7. Ensure **transparency of decision making processes**, and as far as possible the documenting of decisions (and reasons). Establish and **publish standard time periods** within which businesses can expect an administrative decision (such as, an approval or infringement process) to be made.
8. Establish **accountability** mechanisms that clearly define how regulators will discharge their responsibilities with the necessary expertise, integrity, honesty and objectivity. Establish appropriate mechanisms for the review of decisions and independent dispute resolution.
9. Ensure appropriate **consultation** with regulated businesses and establish mechanisms that enable business to provide feedback at low cost.
10. Employ mechanisms for **coordination and cooperation between regulators**, including in relation to inspections and sharing of information, experiences and capacities.
11. Establish **cooperative and collaborative arrangements with business/business groups** to build trust and improve efficiency, including: recognition of industry accreditation schemes; and the use of private third party inspectors — with appropriate checks and balances to ensure outcomes consistent with broader community interests.
12. Ensure **regulator staff** have the necessary skills and capacities and receive appropriate guidance and training — including in risk management and the appropriate use of discretion.
13. Adopt **transitional arrangements** and test approaches, where appropriate, to allow adjustment time before the full operation/enforcement of regulation. Evaluate whether different treatment of small business, in either the design or delivery of regulations, would increase net benefits to the community.
14. Monitor and publicly **report on performance** including indicators of effectiveness in achieving objectives and reducing compliance burdens imposed on business/small business.
15. Ensure **regular evaluation** of the effectiveness and costs (including those imposed on small business) of engagement strategies. In addition to regulator self-assessments, administration and enforcement practices should periodically be subjected to external independent review.

Sources: Developed by the Commission drawing on various sources, including: Hampton (2005); OECD (2012b, 2013a); Parker (2000).

There is a risk that regulators can treat guiding principles as a box ticking exercise, implementing practices that can be shown to be consistent with the principles, but without adequate consideration of what will be most effective in meeting outcome objectives. The NSW Business Chamber submitted:

> There is … a tendency for existing guidance on best practice regulation to provide a laundry list of actions without a more systematic underlying framework. This can encourage regulators to see best practice regulation as a box ticking exercise, which discourages continuous improvement and creative attempts to adapt the overarching principles to suit the circumstances of particular regulators. It also means the communication of best practice typically relies on detailed guides that few people will ever read. (sub. 25, p. 5)

The extent to which better practice principles are reflected in regulator practices will continue to depend at least in part on the incentives regulators face to adopt such practices. These incentives can be strengthened where there are requirements on regulators to publish indicators of performance. In addition, an appropriate body in each jurisdiction could be given responsibility for monitoring and reporting on regulators' progress in implementing engagement practices that are consistent with the agreed principles. Such reporting would also provide an opportunity to highlight innovative practices that could be adopted more widely.

DRAFT RECOMMENDATION 6.4

Governments and regulators must ensure mechanisms are in place to strengthen the incentives for continuous improvement and the wider adoption of leading practice engagement approaches. This includes:

- ***ongoing internal, and periodic independent, evaluation of the effectiveness and costs of regulator engagement strategies***
- ***facilitating the efficient sharing of information, experiences and lessons learnt, for example, through the use of forums of regulators or 'communities of practice'***
- ***requiring regulators, including regulatory functions embedded within departments, to monitor and regularly report on their performance — including measures of effectiveness in achieving outcomes and reducing the compliance burden imposed on business (and small business in particular)***
- ***a commitment to common, whole of government, performance measures that can be used to facilitate comparisons of regulator performance, both within and across jurisdictions***
- ***development of better practice regulator-business engagement principles that can be used as a guide for regulators, including to inform the development of performance indicators.***

An appropriate body in each jurisdiction should monitor and periodically report on regulators' progress in implementing engagement practices that are consistent with the agreed principles. Such reporting would also provide an opportunity to highlight innovative practices that could be adopted more widely.

6.5 Conclusion

The Commission has formed the view that what constitutes good engagement, both in principle and practice, is generally well understood. The challenge for governments appears to be ensuring that the right institutional, governance, transparency and accountability mechanisms are in place to encourage the wider adoption of good engagement practices.

This includes ensuring the removal of unnecessary legislative or other constraints on the capacity of regulators to implement flexible and responsive approaches. It also includes implementing systems that work to create strong incentives for cultural change and continuous improvement. More specifically, the Commission has identified a number of strategies or approaches that governments, or regulators where they have the necessary control, can adopt to drive better performance.

Getting up front institutional and regulatory design right — This includes ensuring the consistent application of ex ante processes designed to ensure rigorous analysis of the impacts of regulation (including on small business) and careful consideration of how regulations will be implemented and enforced. In designing regulation, policy makers must provide regulators with an appropriate range of enforcement tools and discretion to respond flexibly and proportionately to compliance breaches. Roles and responsibilities must also be clearly defined and potential overlap or duplication carefully considered when new regulatory functions are being established.

Clear communication of objectives and expectations — Governments must clearly communicate their regulatory objectives and their expectations of regulators, through legislation and SOEs. It is important that governments provide guidance to regulators on how risks are to be managed and any particular enforcement priorities they may have. At the same time SOEs should explicitly acknowledge the Government's acceptance that some level of risk is unavoidable and that the regulator should be able to operate independently, without undue interference. This can reduce the risk of 'knee jerk' over reactions to particular incidents or events that are not consistent with the regulator's systematic assessment of risks.

Regulators have adequate resourcing and strong and effective leaders — Budget allocations must provide regulators with sufficient resources so as to be able to administer and enforce regulations in a manner that ensures regulatory outcomes are achieved and unnecessary business compliance and other costs are avoided. Leaders of regulatory agencies or those with chief responsibility for oversighting regulatory functions must have the capacities, drive and commitment to foster an organisational culture that appropriately balances risk mitigation and, by minimising unnecessary compliance burdens, facilitates business activity and economic growth.

Skills and capacities — Regulators must individually have the necessary systems in place to ensure the recruitment of staff with the right mix of relevant experience and skills and appropriate ongoing training and guidance for staff. There must be a particular focus on ensuring staff understand the underlying rationale for risk based enforcement and when and how to use discretion. It is also critical that a culture of continual improvement is established within regulatory agencies and an emphasis on regular evaluation of the effectiveness and the costs of their engagement approaches.

Systematic performance monitoring and review — Regulators should be required to monitor and regularly report against key indicators of their performance. Emphasis should be on measuring their effectiveness in achieving outcomes while minimising compliance costs. The information generated will be of value to regulators in identifying areas for improvement. The transparency that comes from public reporting of such measures ensures accountability and a stronger incentive to implement reforms that are in the broader community's interests.

Whole of government performance indicators — A common whole of government framework for reporting of a narrower range of performance indicators could facilitate comparisons of performance across regulators. This would further strengthen the incentives on regulators to improve their performance and to adopt leading practices. However, as has been noted frequently in this report, there are important differences between regulators (even those operating broadly in the same area of regulation), for example, in terms of institutional and governance arrangements, resourcing and the degree of discretion and flexibility they have to determine how they administer and enforce regulation. The Commission therefore recognises the limitations of cross regulator comparisons and the need for caution in drawing conclusions based on differences in reported performance.

Better practice engagement principles — The drawing together of whole of government better practice regulator engagement principles (including in relation to the use of discretion) can also provide valuable guidance to regulators. There must

also be appropriate mechanisms, such as regulator forums, for facilitating coordination between regulators and the sharing of experiences and lessons learned (both within and across portfolio areas and jurisdictions).

Independent oversight — An appropriate body in each jurisdiction should monitor and periodically report on regulators' progress in implementing, where relevant, engagement practices that are consistent with the agreed principles. Such reporting would also provide an opportunity to highlight innovative practices that could be adopted more widely.

APPENDIXES AND REFERENCES

A Study participants

This appendix lists the organisations and individuals that have participated in the study to date. Following receipt of the terms of reference on 7 December 2012, an initial circular advertising the study was distributed to several hundred government representatives, industry organisations and individuals and the study was advertised in national and metropolitan newspapers and in all state and territory regional newswire services.

The Commission released an Issues Paper on 25 January 2013 to assist interested parties in preparing their submissions. There were 31 submissions received by the Commission prior to the release of this draft and they are listed in table A1.

In addition, the Commission met with a number of stakeholders, including business groups, academics and government agencies. A list of those meetings is in table A2.

A survey was undertaken of approximately 400 national and state government regulators. The methodology used for the survey and broad information on respondents is discussed in appendix B. The names and responses of individual regulator respondents are treated as confidential.

The Commission partnered with the Council of Small Business of Australia (COSBOA) to canvas views of small businesses on regulator engagement practices. To facilitate this, COSBOA developed a number of targeted questions for their website to which they invited small business responses. An aggregation of these responses was then provided to the Commission as part of COSBOA's submission to this study.

Participants are invited to send any additional survey responses or submissions in response to this draft to the Commission by **14 August 2013**. The Commission will send the final report to the Australian Government by end September 2013.

The Commission would like to thank all who have contributed to the study so far.

A.1 Public submissions received

Participant	*Submission Number*
Australasian Association of Convenience Stores Limited	21
Australian Businesswomen's Network	4
Australian Chamber of Commerce and Industry (ACCI)	5
Australian Competition and Consumer Commission (ACCC)	26
Australian Hotels Association	17
Australian Motor Industry Federation	23
Australian Transaction Reports and Analysis Centre (AUSTRAC)	30
Business SA	3
Chamber of Commerce & Industry Queensland	16
Chamber of Commerce and Industry WA	7
Commercial Asset Finance Brokers Association of Australia Limited	6
Council of Small Business of Australia (COSBOA)	15,31
Department of Industry, Innovation, Science, Research and Tertiary Education	18
Energy Safe Victoria	2
Fast Access Finance Pty Ltd	20
Hills Orchard Improvement Group Inc	9
Housing Industry Association	24
Institute of Public Accountants	29
Local Government Association of Queensland	27
Master Electricians Australia	8
Migration Institute of Australia (MIA)	14
National Transport Commission	1
NSW Business Chamber	25
NSW Food Authority	28
Office of the Australian Small Business Commissioner	10
Office of the NSW Small Business Commissioner	12
Small Business Development Corporation (WA)	22
Strong Strategies Pty Ltd	19
Tasmanian Small Business Council	13
The Tax Institute	11
Number from businesses or business association	20
Number from government regulators	7
Number from other groups or individuals	4

A.2 Consultations

Commonwealth and national bodies

Australasian Association of Convenience Stores
Australian Competition and Consumer Commission (ACCC)
Australian Government Department of Finance and Deregulation
Australian Government Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education
Australian Government Treasury
Australian Industry Group
Australian National Audit Office (ANAO)
Australian Securities and Investments Commission (ASIC)
Australian Small Business Commissioner
Australian Taxation Office (ATO)
Australian Tourism Export Council
Australian Transaction Reports and Analysis Centre (AUSTRAC)
Council of Small Business of Australia (COSBOA)
Independent Contractors Australia
Institute of Chartered Accountants Australia
National Heavy Vehicle Regulator
National Transport Commission
SME Association of Australia

New South Wales

Better Regulation Office
Independent Pricing and Regulatory Tribunal
NSW Business Chamber
NSW Fair Trading
NSW Food Authority
NSW Small Business Commissioner
Office of Liquor, Gaming and Racing
Office of State Revenue
Roads and Maritime Services

Victoria

Consumer Affairs Victoria
Dairy Food Safety Victoria
Department of Business & Innovation (Vic)
Energy Safe Victoria
Environment Protection Authority (Vic)
Local Government Victoria
Municipal Association of Victoria
Victorian Competition and Efficiency Commission
Victorian Employers' Chamber of Commerce and Industry
Victorian Small Business Commissioner
Victorian WorkCover Authority

Queensland

Brisbane City Council
Chamber of Commerce and Industry QLD
Department of Environment and Heritage Protection
Department of Premier and Cabinet
Department of Tourism, Major Events, Small Business and the Commonwealth Games
Department of Transport and Main Roads
Department of Treasury and Trade
Local Government Association of Queensland
Master Builders Queensland
Office of Fair and Safe Work Queensland
QLD Building Services Authority
Tourism industry Council QLD

Western Australia

Chamber of Commerce and Industry (WA)
Department of Fisheries (WA)
Department of Premier and Cabinet
Department of Racing Gaming and Liquor (WA)
Department of Treasury
Office of the Environmental Protection Authority (OEPA)
WA Fishing Industry Council (WAFIC)
WA Small Business Commissioner and Small Business Development Corporation (SBDC)
WA Tourism Industry Council (WATIC)

South Australia

Business SA
Consumer and Business Services (SA)
Department for Manufacturing, Innovation, Trade, Resources and Energy (DMITRE)
Department of Health
Department of Premier & Cabinet
Department of Primary Industries and Regions SA (PIRSA) - Aquaculture
Enterprise Adelaide – Adelaide City Council
Local Government Association of South Australia
Restaurant and Catering Association (SA)
Small Business Commissioner (SA)

Tasmania

Environment Protection Authority (TAS)
Local Government Association of Tasmania (LGAT)
Tasmanian Chamber of Commerce and Industry
Tasmanian Department of Economic Development, Tourism and Arts
Tasmanian Department of Justice
Tasmanian Seafood Industry Council
Tasmanian Small Business Council
Tourism Industry Council of Tasmania

Australian Capital Territory
Environment and Sustainable Development Directorate, Regulation and Services Division
Office of the Coordinator General
Northern Territory
Environment Protection Authority (NT)
NT Consumer Affairs
NT Department of Business, Licensing Services
United States
Small Business Administration Office of Advocacy
Former Chief Advocate, Small Business Administration Office of Advocacy
World Bank – Global Indicators and Analysis Unit
George Washington University – Regulatory Studies Centre
George Washington University – International Congress on Small Business
George Mason University – Mercatus Centre
National Federation of Independent Businesses
Europe
UK Better Regulation Delivery Office
UK Federation of Small Business
British Chambers of Commerce
London School of Economics and Political Science, Professor of Risk Regulation
European Commission – Directorate General Enterprise and Industry

B Survey of regulators

B.1 Survey design and distribution

The Commission collected information about national, state and territory government regulators through a survey. Local governments were excluded from this survey to reduce burden on them as they had been surveyed for a recent Commission study (PC 2012b). The survey was intended to elicit information on the operation of regulators, identify which practices they consider to be working well and their barriers to engaging effectively with business.

Survey forms were emailed to regulators in 'smart pdf' format. All respondents answered the survey electronically and submitted the completed survey via a return email. The surveys were sent out in March 2013 with responses received over the following two months.

The survey was piloted with a small number of regulators and other government agencies to ensure the questions were comprehensive, clear and unambiguous. The technical aspects of the survey were tested by Commission staff and a number of external parties unrelated to the study.

B.2 Survey responses

The survey was sent to all national, state and territory government agencies that the Commission was able to identify as having regulatory roles that have the potential to impact business of any size or type. These regulatory roles included granting approvals, compliance monitoring and enforcement and other complementary activities. Throughout the study process, the Commission's list of regulators (section B.3) has expanded as additional regulators have been identified. In total, 405 of the estimated 470 regulators were surveyed and the Commission received 187 responses — a response rate of 47 per cent (table B.1). *The Commission welcomes any additional survey responses from regulators up until 14 August 2013.*

The explanatory material provided with the survey advised that no survey response would be reported in a manner that could be attributable to a particular respondent. Consequently, the names of surveyed regulators are not attributed to results used in this report.

A copy of the survey form is reproduced below and aggregated responses can be found in tables B.2 to B.9.

The survey of regulators

Australian Government
Productivity Commission

Survey of Regulators
for Productivity Commission Small Business Engagement study

About the survey

The Productivity Commission has been requested by the Australian Government, with the agreement of COAG's Business Regulation and Competition Working Group, to undertake a study identifying leading practices in regulator engagement which reduce the compliance burden on small business, while sustaining good regulatory outcomes. A regulator is any agency that administers or enforces regulation. All regulators in the Commonwealth, states and territories and local governments which interact with small business are within the scope of this study. For further information about the study please visit the Commission's website http://www.pc.gov.au/projects/study/small-business

The information provided in response to this survey will assist the Commission in this study.

When completing the survey please consider your practices and experience in *recent* years. Also note that some questions relate to all business while others only relate to small business; this is specified where relevant.

Confidentiality of responses

Survey responses will not be reported in a manner that could, in any way, be attributable to a particular respondent. Agency and contact details are only collected in case survey responses need to be clarified.

How to save and submit the survey

If you would like to save your survey without submitting, select 'File => Save As' at the top of the screen.

To submit the form (which also saves a final copy) press the button at the end of the survey.

If you require assistance in completing the survey please contact sbe.survey@pc.gov.au

Section 1: About your agency

Q1. Please fill in the following information about your agency.
*required field

Agency name		Contact position	
Jurisdiction		Phone number	
Contact name		Email address	

Q2. Which regulatory area(s) does your agency oversee?

☐ Roads or transport	☐ Gaming & racing	☐ Occupational health & safety	☐ Food safety
☐ Environment protection	☐ Taxation	☐ Planning, heritage or land use	☐ Liquor
☐ Building & construction	☐ Public heath or safety	☐ Financial or other professional services	
☐ Industrial relations	☐ Superannuation	☐ Fair trading, tenancy or consumer protection	
☐ Other, please specify:			

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Q3. Which of the following functions does your agency perform?

Policy/regulation design functions	Regulatory functions
☐ Develop policy ☐ Write regulation	☐ Registration/licensing ☐ Inspections ☐ Audits
☐ Set standards ☐ Review regulation	☐ Collecting fees/charges ☐ Educating business
☐ Other, please specify:	☐ Investigations ☐ Complaints resolution
	☐ Other, please specify:

Q4.

(a) Your agency is a: ◯ Statutory authority ◯ Unit within a department/agency ◯ Other

(b) The head of your agency reports to:
☐ Board or other governing body ☐ Statutory office holder ☐ Minister ☐ Parliament ☐ Other

Q5. Apart from legislation, your agency's roles and responsibilities are set out in a:

☐ Code of conduct/charter ☐ Statement of intent ☐ Memorandum/memoranda of understanding
☐ Ministerial statement of expectation ☐ Other, please specify:

Section 2: Co-ordination with other regulators

Q6. Does your agency face any difficulties in carrying out its regulatory role due to overlap, or unclear delineation, of responsibilities with other regulators?

☐ No overlap/unclear delineation or where it exists it has been effectively managed
☐ Yes, with local council(s)
☐ Yes, with state/territory regulator(s)
☐ Yes, with national regulator(s)

Q7. Does your agency *routinely* cooperate with one or more other regulators in any of the following ways?

	Yes, with local council(s)	Yes, with state/ territory regulator(s) in the same jurisdiction	Yes, with state/ territory regulator(s) in a different jurisdiction	Yes, with national regulator(s)
Developing information for business	☐	☐	☐	☐
Providing education to business	☐	☐	☐	☐
Presenting information to business in a common format and/or location	☐	☐	☐	☐
Sharing compliance data	☐	☐	☐	☐
Coordinating information collection	☐	☐	☐	☐
Coordinating inspections	☐	☐	☐	☐
Common board members	☐	☐	☐	☐

Please outline any other ways in which your agency routinely cooperates with another regulator.

Section 3: Communication practices

Q8. Based on your agency's experience, rate the effectiveness* of each of the following practices for communicating and consulting with small business:	Never used	Very ineffective	Ineffective	Neutral	Effective	Very effective
Information on your website	○	○	○	○	○	○
Information provided to external 'one-stop shop' websites	○	○	○	○	○	○
Information disseminated through industry groups	○	○	○	○	○	○
Advice hotline/help desk	○	○	○	○	○	○
Education seminars or workshops	○	○	○	○	○	○
Business focus groups or consultative fora	○	○	○	○	○	○
On-site visits	○	○	○	○	○	○
Surveys	○	○	○	○	○	○
Placement of your staff in business	○	○	○	○	○	○
Business staff placements in your agency	○	○	○	○	○	○
Relationship managers for individual businesses or industry sectors	○	○	○	○	○	○
Social media (e.g. facebook/twitter)	○	○	○	○	○	○

Please outline any additional communication and consultation practices your agency has adopted or provide any further detail on the practices above.

*In assessing the 'effectiveness' of these practices you might consider, for example, the extent to which they improved business understanding of regulatory requirements or your agency's understanding of business operations and the impact of regulation on their activities.

Q9. Does your agency monitor business awareness and understanding of the regulations it administers?

○ Yes ○ No

If yes above, please describe how.

Q10. Feedback, complaint and appeal mechanisms.

(a) Does your agency have a complaints or feedback mechanism for business? ◯ Yes ◯ No
If so, can complaints be lodged online? ◯ Yes ◯ No

(b) When feedback is recieved, do concerns raised by small business differ significantly from those of other businesses?

◯ Yes ◯ No ◯ Do not know

If yes above, in what way does feedback from small business differ?

(c) Does your agency have a formal appeal mechanism for businesses dissatisfied with processes or decisions?

(i) Internal ◯ Yes ◯ No (ii) External ◯ Yes ◯ No

Section 4: Administration and enforcement practices

Q11. Risk management.

(a) Does your agency adopt a risk-based approach* in its compliance monitoring and enforcement?

◯ Yes ◯ No => If No, proceed to question 12

(b) Are the details of your agency's risk-based approach accessible to small business? ◯ Yes ◯ No

(c) If your agency classifies regulated businesses into risk categories, please outline them below. For each category include: (1) the name of the category; (2) a description of the types of businesses in the category (e.g. scale, characteristics or activities); and (3) an approximate percentage of the businesses your agency regulates in the category. Note, you could alternatively provide a weblink to this information.

(d) When dealing with an individual business, its risk category is used to determine:

☐ Guidance provided ☐ Inspection/audit frequency ☐ Amount of information reported
☐ Education efforts ☐ Nature of inspection/audit ☐ Type of information reported
☐ Fees and charges ☐ Reporting frequency ☐ Other, please specify:

(e) What evidence is collected to classify businesses into risk categories and how are changes in risk monitored over time?

*A 'risk-based approach' involves targetting enforcement efforts based on an explicit consideration of the likelihood and consequences of a breach in compliance as well as the scope of the regulator to influence outcomes.

Q12. Monitoring/reporting

(a) How does your agency collect compliance information about business?

☐ No compliance information is collected

OR

☐ Business submits documents (e.g spreadsheets)
☐ Business fills out a standard paper form
☐ Business fills out a standard electronic form
☐ Inspections/on-site visits by my agency's staff
☐ Inspections/on-site visits by another regulator on behalf of my agency
☐ Inspections/on-site visits by contractors engaged by my agency
☐ Complaints from consumers/ members of the community
☐ Other, please specify:

(b) Approximately, what percentage of inspections undertaken fall into each of the following categories?

☐ No inspections are undertaken OR

(i)	%
Following a complaint	
Targeted campaign based on risk assessment	
Other targeted campaign	
Random spot check	
Regular visits (e.g. inspect every 6 months)	
Other, please specify	
Total	*0%*

(ii)	%
Announced	
Unannounced	
Total	*0%*

(c) Does your agency monitor the costs imposed on business by its administration and enforcement practices? (including, for example, paperwork burden and cost of delays) ◯ Yes ◯ No

If yes above, please describe how such costs are monitored.

Q13. Does your agency apply any of the following measures to ensure decision making and the performance of key regulatory processes are timely:

☐ Time limits are mandated in legislation/regulation
☐ A public commitment to target timeframes
☐ Public reporting on performance against target timeframes
☐ Regulated businesses are provided with advance notice of expected timeframes
☐ Tracking progress of referrals to other agencies
☐ Other, please specify:

Q14. Enforcement tools

(a) How frequently are the following tools used in response to compliance breaches?

	Tool not available/ applicable	Tool available, and used:				
		Never	Rarely	Often	Usually	Always
Education on compliance	◯	◯	◯	◯	◯	◯
Warning notice	◯	◯	◯	◯	◯	◯
Improvement notice	◯	◯	◯	◯	◯	◯
Name and shame	◯	◯	◯	◯	◯	◯
Enforceable undertaking	◯	◯	◯	◯	◯	◯
Product seizure/recall	◯	◯	◯	◯	◯	◯
Suspending business operation	◯	◯	◯	◯	◯	◯
Registration/license suspension, restriction or cancellation	◯	◯	◯	◯	◯	◯
Pecuniary penalty (e.g. fine)	◯	◯	◯	◯	◯	◯
Civil court action	◯	◯	◯	◯	◯	◯
Criminal court action	◯	◯	◯	◯	◯	◯

Please outline any other enforcement tools your agency has used in recent years and indicate how frequently they are used or provide any further detail on the tools above.

(b) Does your agency have a sufficient range of enforcement tools? ◯ Yes ◯ No

If no above, which additional tool(s) would enable your agency to most effectively achieve its objectives?

(c) Following a compliance breach, enforcement officers have some discretion in choosing:

☐ Which tool is applied ☐ The level/severity of the sanction (e.g. value of fines) ☐ Do not have discretion

(d) Enforcement officers are provided with guidance on the use of discretion in determining responses to compliance breaches via:

☐ None provided ☐ Training ☐ Written guidelines ☐ Other, please specify:

Section 5: Engagement with small business

Q15. Definition of small business. *required field

(a) Does your agency have a working definition of small business?

◯ No ◯ ABS definition (a business employing less than 20 people) ◯ Other, please specify:

(b) Based on the **ABS definition** of small business above, roughly how many of each of the following does your agency regulate?

Total business		Small business	
	☐ Don't know		☐ Don't know

Q16. Different treatment for small business.

(a) Does your agency provide any special assistance or different treatment to small business?

- ☐ No special assistance or different treatment is provided
- ☐ Yes, this is *required* (for example in enabling legislation or a ministerial statement of expectations)

  Describe the different treatment required or provide a reference/link to the relevant document or section:

  [ ]
- ☐ Yes, although not explicitly required to do so the agency provides:
  - ☐ Leniency or reduced obligations (not set out in the legislation your agency administers)
  - ☐ Waiving or reducing some fees or charges
  - ☐ Simplified requirements
  - ☐ Temporal exemptions (e.g. annual instead of quarterly reporting/inspections)
  - ☐ Tailored forms or fact sheets
  - ☐ Tailored coaching, seminars or other training
  - ☐ Other, please specify: [ ]

(b) Please fill in ***either option (1) or (2)*** below.

Option (1): Different treatment for small business is provided by your agency or you believe that it should be. This is mainly because:

- ☐ Compliance costs are disproportionately higher for small businesses
- ☐ Small businesses need extra help in understanding their compliance obligations
- ☐ Assistance is required to ensure adequate compliance levels and meet objectives
- ☐ Small businesses are *more likely* to comply (and therefore require less attention)
- ☐ Small businesses are *less likely* to comply (and therefore require more attention)
- ☐ The consequences of non-compliance by small business are *less* significant
- ☐ The consequences of non-compliance by small business are *more* significant
- ☐ Other, please specify: [ ]

Option (2) Different treatment for small business is *not* provided by your agency or you believe that it *should not* be. This is mainly because:

- ☐ My agency's policies aim to facilitate compliance by all business regardless of size
- ☐ Needs of small businesses are not significantly different to those of other businesses
- ☐ Legislative requirments for small businesses are less onerous so no additional special treatment is required
- ☐ Very few regulated entities are small businesses
- ☐ Majority of regulated entities are small businesses
- ☐ Extra administration and other costs of providing different treatment outweigh any benefit
- ☐ Other, please specify: [ ]

Section 6: Barriers to engagement with business/small business

Q17. Which of the following are the most significant constraints on your agency's capacity to effectively engage with business (please select a maximum of five options).

☐ Regulation is unclear or unnecessarily complex	☐ Minister is too risk averse
☐ Range of enforcement tools is too narrow	☐ The influence on enforcement decisions of media or public reaction to compliance breaches
☐ Regulation provides insufficient discretion/flexibility	☐ The influence on enforcement decisions of government responses to compliance breaches
☐ Regulation provides insufficient capacity to respond to changes in the regulatory environment	☐ Budget/resource constraints
☐ Insufficient consideration of enforcement issues during the regulatory development process	☐ Inability to attract or retain appropriately skilled staff
☐ Regulatory arrangements are not adequately tested before implementation	☐ Poor demarcation of roles with other regulators
☐ Difficulties in understanding business needs	☐ Challenges in coordinating with other regulators
☐ Other, please specify:	

Q18. What are the main additional constraints or costs related to engagement with **small** business?

- ☐ No additional constraints
- ☐ Constraints on the time or availability of business owners or key staff
- ☐ Limited awareness of their obligations
- ☐ Their number and/or diversity
- ☐ High turnover of small business or of key staff in those businesses
- ☐ Administrative cost of tailoring engagement strategies for small business
- ☐ Other, please specify:

Section 7: Resourcing and staff competency

Q19. Please fill out the following resourcing information for your agency.

Total full time equivalent (FTE) staff at 30 June 2012	
Approximate FTE staff directly involved in regulation of business at 30 June 2012	
Total annual budget for your agency in financial year 2011-12	
Approximate percentage of total 2011-12 budget for functions related to regulation of business	

Q20. In financial year 2011-12, approximately what percentage of total funding was sourced from:

	%
Government funding	
Fees and charges levied on regulated entites	
Industry support	
Other, please specify:	
Total	*0%*

Q21. In financial year 2011-12, approximately what percentage of business fees and charges were sourced from the following activities:

	%
Registration/licensing	
Fines (or similar)	
Inspections	
Audits	
Education programs for business	
Other, please specify:	
Total	*0%*

Q22. Which of the following strategies are employed to ensure that staff engaged in administering and enforcing regulation have the appropriate skills:

- ☐ Formal staff training, including with respect to understanding business needs
- ☐ Ensuring full documentation of procedures and decisions
- ☐ Hiring staff that have worked in a business in the area which your agency regulates
- ☐ Hiring staff with skills or experience in education and training
- ☐ Hiring staff with skills or experience in law enforcement
- ☐ Incorporating complaints/feedback from business in staff training and operating procedures
- ☐ Reviews of staff performance
- ☐ Reviews of branch/region performance

Q23.

(a) What measures are in place to reduce the risk of capture, corruption or bias in decision making?

- ☐ Staff that engage with business must document reasons for their decisions
- ☐ Significant decisions are subject to review by supervisor, board or other authority
- ☐ Policies are in place to ensure conflicts of interest are reported
- ☐ Audits of decisions are periodically conducted by staff in a separate office of your agency
- ☐ Audits of decisions are periodically conducted by an independent agency
- ☐ Rotation of staff

(b) What other mechanisms are used to ensure appropriate oversight and that agency-wide policies are adhered to, in practice, by staff that engage with business?

Section 8: Review and evaluation

Q24.

(a) Is your agency's regulatory performance subjected to ongoing or periodic review via:

- ☐ Formalised internal assessment drawing on feedback from stakeholders
- ☐ Within portfolio review
- ☐ External independent review within the last five years
- ☐ Other, please specify:

(b) If yes above, did any of these reviews include an assessment of the effectiveness of your agency's engagement with: (i) Business: ◯ Yes ◯ No (ii) Small business: ◯ Yes ◯ No

(c) If applicable, how is the effectiveness of your agency's engagement practices monitored and evaluated?

Q25.

(a) In the last two years, has your agency sought systematic feedback from business or small business through:

	Business	Small business
Surveys	☐	☐
Consultative fora	☐	☐
Other, please specify:	☐	☐

(b) In the last five years, has your agency substantially reformed its approach to engagement with business? [this may include, but is not limited to, seeking to change: agency culture; levels of discretion given to enforcement officers; decision review processes; or recruitment practices]

◯ Yes ◯ No

If yes above, please provide further information, including on the motivations or aims for these reforms.

Once you have finished filling in the survey, please click the 'Save & Submit' button below. This will verify your answers and then guide you to manually save and send the survey.
Please note the survey will not be submitted until you click send on an email to the Productivity Commission. If you have any trouble during this process, save a copy and contact sbe.survey@pc.gov.au.

Save & Submit

Thank you for your participation.

Table B.1 **Survey responses by jurisdiction**

	Surveys sent	*Survey returns*	*Response rate (%)*
National/Commonwealth	71	39	55
New South Wales	70	26	37
Victoria	57	28	49
Queensland	30	13	43
Western Australia	57	23	40
South Australia	33	13	39
Tasmania	39	21	54
Australian Capital Territory	10	8	80
Northern Territory	38	16	42
Total	**405**	**187**	**46**

Table B.2 **Survey responses for 'Section 1: About your agency'**

Q2. Which regulatory area(s) does your agency oversee?			
Roads or transport	15	Building & construction	14
Gaming & racing	11	Public health or safety	33
Occupational health & safety	13	Financial or other professional services	24
Food Safety	11	Industrial relations	4
Environment protection	43	Superannuation	3
Taxation	6	Fair trading, tenancy or consumer protection	21
Planning, heritage or land use	16	Other	16
Liquor	10		
Q3. Which of the following functions does your agency perform?			
Develop policy	135	Audits	121
Write regulation	105	Collecting fees/charges	134
Set standards	105	Educating business	121
Review regulation	126	Investigations	160
Other (policy/regulation design)	13	Complaints resolution	119
Registration/licensing	145	Other (regulatory)	41
Inspections	125		
Q4(a) Your agency is a:			
Statutory authority	79	Unit with a department/agency	97
Other	11		
Q4(b)The head of your agency reports to:			
Board or other governing body	48	Parliament	15
Statutory office holder	18	Other	7
Minister	129		
Q5. Apart from legislation, your agency's roles and responsibilities are set out in:			
Code of conduct/charter	76	Ministerial statement of expectations	33
Statement of intent	17	Memorandum/memoranda of understanding	44
Other (varied)	14	Other (internal plan/statement/document)	39

Table B.3 **Survey responses for 'Section 2: Coordination with other regulators'**

Q6. Does your agency face any difficulties in carrying out its regulatory role due to overlap, or unclear delineation, of responsibilities with other regulators?

No overlap/unclear delineation or where it exists it has been effectively managed	122	Yes, with local council(s)	17
		Yes, with state/territory regulator(s)	46
		Yes, with national regulator(s)	34

Q7. Does your agency routinely cooperate with one or more other regulators in any of the following ways?

	Yes, with local council(s)	Yes, with state/territory regulator(s) in the same jurisdiction	Yes, with state/territory regulator(s) in a different jurisdiction	Yes, with national regulator(s)
Developing information for business	31	84	79	72
Providing education to business	26	69	65	41
Presenting information to business in a common format and/or location	20	58	49	38
Sharing compliance data	18	87	87	74
Coordinating information collection	20	61	63	60
Coordinating inspections	19	66	39	33
Common board members	2	13	9	8

Please outline any other ways in which your agency routinely cooperates with another regulator.

Number of responses: 71

Table B.4 **Survey responses for 'Section 3: Communication practices'**

Q8. Based on your agency's experience, rate the effectiveness of each of the following practices for communicating and consulting with small business:

	Never used	Very ineffective	Ineffective	Neutral	Effective	Very effective
Information on your website	5	0	2	21	124	32
Information provided to external 'one-stop shop' websites	59	2	9	59	44	3
Information disseminated through industry groups	8	0	2	26	123	26
Advice hotline/help desk	31	1	2	24	84	40
Education seminars or workshops	19	1	2	22	96	42
Business focus groups or consultative for a	38	2	4	30	84	21
On-site visits	14	0	0	14	89	64
Surveys	49	3	4	54	61	7
Placement of your staff in business	152	0	2	11	7	4
Business staff placements in your agency	154	0	2	11	6	2
Relationship managers for individual business or industry sectors	86	1	2	21	54	13
Social media (e.g. facebook/twitter)	109	2	3	32	26	6

Please outline any additional communication and consultation practices your agency has adopted or provide any further detail on the practices above.

Number of responses: 75

Q9. Does your agency monitor business awareness and understanding of the regulations it administers? If yes, please describe how.

Yes	126	No	59	Number of written responses	124

Q10(a) (i) Does your agency have a complaints or feedback mechanism for business? (ii) If so, can complaints be lodged online?

(i)	Yes	164	No	23	*(ii)*	Yes	111	No	53

Q10(b) When feedback is received, do concerns raised by small business differ significantly from those of other businesses? If yes, in what way does feedback from small business differ?

Yes	19	No	96	Do not know	64	Number of written responses	31

Q10(c) Does your agency have a formal appeal mechanism for business dissatisfied with processes or decisions?

Internal:	Yes	134	No	35	*External:*	Yes	156	No	21

Table B.5 **Survey responses for 'Section 4: Administration and enforcement practices'**

Q11(a) Does your agency adopt a risk-based approach in its compliance monitoring and enforcement?

Yes	130	No	57

Q11(b) Are the details of your agency's risk-based approach accessible to small business?

Yes	61	No	67

Q11(c) If your agency classifies regulated businesses into risk categories, please outline them below. For each category include: (1) the name of the category; (2) a description of the types of businesses in the category (e.g. scale, characteristics or activities); and (3) an approximate percentage of the businesses your agency regulates in the category. Note, you could alternatively provide a weblink to this information.

Number of responses: 68

Q11(d) When dealing with an individual business its risk category is used to determine:

Guidance provided	62	Reporting frequency	37
Education efforts	61	Amount of information reported	34
Fees and charges	18	Type of information reported	35
Inspection/audit frequency	96	Other	4
Nature of inspection/audit	79		

Q11(e) What evidence is collected to classify businesses into risk categories and how are changes in risk monitored over time?

Number of responses: 88

Q12(a) How does your agency collect compliance information about small business?:

No compliance information is collected	14	Inspections/on-site visits by another regulator on behalf of my agency	36
Business submits documents (e.g. spreadsheets)	92	Inspections/on-site visits by contractors engaged by my agency	33
Business fills out a standard paper form	68	Complaints from consumers/members of the community	136
Business fills out a standard electronic form	62	Other	27
Inspections/on-site visits by my agency	136		

Q12(b) Approximately, what percentage of inspections undertaken fall into each of the following categories

No inspections are undertaken	26	Number that filled out the table	144

Q12(c) Does your agency monitor the costs imposed on business by its administration and enforcement practices? (including, for example, paperwork burden and cost of delays) If yes, please describe how such costs are monitored.

Yes	27	No	152	Number of written responses	32

(Continued next page)

Table B.5 (continued)

Q13. Does your agency apply any of the following measures to ensure decision making and the performance of key regulatory processes are timely:

Time limits are mandated in legislation/regulation	129	Regulated businesses are provided with advance notice of expected timeframes	92
A public commitment to target timeframes	86	Tracking progress of referrals to other agencies	40
Public reporting on performance against target timeframes	89	Other	19

Q14(a) How frequently are the following tools used in response to compliance breaches?

	Tool not available/ applicable	**Tool available, and used:**				
		Never	Rarely	Often	Usually	Always
Education on compliance	6	3	10	45	52	63
Warning notice	28	7	40	63	25	18
Improvement notice	58	12	26	52	18	10
Name and shame	48	50	51	18	5	3
Enforceable undertaking	54	24	51	32	7	5
Product seizure/recall	105	19	36	9	3	0
Suspending business operation	58	26	82	10	0	0
Registration/licence suspension, restriction or cancellation	29	18	106	21	1	2
Pecuniary penalty (e.g. fine)	31	32	54	41	20	0
Civil court action	46	58	57	14	0	0
Criminal court action	31	41	75	27	3	0

Please outline any other enforcement tools your agency has used in recent years and indicate how frequently they are used or provide any further detail on the tools above.

Number of responses: 55

Q14(b) Does your agency have a sufficient range of enforcement tools? If no, which additional tool(s) would enable your agency to most effectively achieve its objectives?

Yes	128	No	55	Number of written responses	52

Q14(c) Following a compliance breach, enforcement officers have some discretion in choosing:

Which tool is applied	140	Do not have discretion	29
The level/severity of the sanction (e.g. value of fines)	72		

Q14(d) Enforcement officers are provided with guidance on the use of discretion in determining responses to compliance breaches via:

None provided	10	Written guidelines	115
Training	119	Other	33

Table B.6 **Survey responses for 'Section 5: Engagement with small business'**

Q15(a) Does your agency have a working definition of small business?					
No	130	ABS definition	34	Other	22

Q15(b) Based on the ABS definition of small business above, roughly how many of each of the following does your agency regulate?					
Total business:		Numerical responses	76	Don't know	98
Small business:		Numerical responses	52	Don't know	113

Q16(a) Does your agency provide any special assistance or different treatment to small business?	
No special assistance or different treatment is provided	112
Yes, this is required (for example in enabling legislation or a ministerial statement of expectations)	20
Describe the different treatment required or provide a reference/link to the relevant document or section (text answers given)	20
Yes, although not explicitly required to do so the agency provides:	66
Leniency or reduced obligations (not set out in the legislation your agency administers)	13
Waiving or reducing some fees or charges	19
Simplified requirements	26
Temporal exemptions (e.g. annual instead of quarterly reporting/inspections)	7
Tailored forms or fact sheets	27
Tailored coaching, seminars or other training	30
Other	32

Q16(b) Option 1: Different treatment for small business is provided by your agency or you believe that it should be. This is mainly because:	
Number ticking at least one box	58
Compliance costs are disproportionately higher for small businesses	18
Small businesses need extra help in understanding their compliance obligations	52
Assistance is required to ensure adequate compliance levels and meet objectives	34
Small businesses are *more likely* to comply (and therefore require less attention)	0
Small businesses are *less likely* to comply (and therefore require more attention)	17
The consequences of non-compliance by small business are *less* significant	8
The consequences of non-compliance by small business are *more* significant	5
Other	16

*Q16(b) Option 2: Different treatment for small business is **not** provided by your agency or you believe that it **should not** be. This is mainly because:*	
Number ticking at least one box	123
My agency's policies aim to facilitate compliance by all business regardless of size	89
Needs of small businesses are not significantly different to those of other businesses	38
Legislative requirements for small businesses are less onerous so no additional special treatment is required	4
Very few regulated entities are small businesses	15
Majority of regulated entities are small businesses	34
Extra administration and other costs of providing different treatment outweigh any benefit	12
Other	27

Table B.7 **Survey responses for 'Section 6: Barriers to engagement with small business'**

Q17. Which of the following are the most significant constraints on your agency's capacity to effectively engage with business (please select a maximum of five options).

Regulation is unclear or unnecessarily complex	29	Minister is too risk averse	4
Range of enforcement tools is too narrow	19	The influence on enforcement decisions of media or public reaction to compliance breaches	13
Regulation provides insufficient discretion/flexibility	19	The influence on enforcement decisions of government responses to compliance breaches	1
Regulation provides insufficient capacity to respond to changes in the regulatory environment	19	Budget/resource constraints	115
Insufficient consideration of enforcement issues during the regulatory development process	22	Inability to attract or retain appropriately skilled staff	27
Regulatory arrangements are not adequately tested before implementation	15	Poor demarcation of roles with other regulators	8
Difficulties in understanding business needs	16	Challenges in coordinating with other regulators	17
Other	18		

*Q18. What are the main additional constraints or costs related to engagement with **small** business?*

No additional constraints	57
Constraints on the time or availability of business owners or key staff	56
Limited awareness of their obligations	70
Their number and/or diversity	64
High turnover of small business or of key staff in those businesses	28
Administrative cost of tailoring engagement strategies for small business	45
Other	7

Table B.8 Survey responses for 'Section 7: Resourcing and staff competency'

Q19. Please fill out the following resourcing information for your agency. (no. of responses)

Total full time equivalent (FTE) staff at 30 June 2012	171
Approximate FTE staff directly involved in regulation of business at 30 June 2012	466
Total annual budget for your agency in financial year 2011-12	158
Approximate percentage of total 2011-12 budget for functions related to regulation of business	146

Q20. In financial year 2011-12, approximately what percentage of total funding was sourced from: (no. of responses)

Government funding	157
Fees and charges levied on regulated entities	107
Industry support	46
Other	67

Q21. In financial year 2011-12, approximately what percentage of business fees and charges were sourced from the following activities: (no. of responses)

Registration/licensing	123
Fines (or similar)	66
Inspections	48
Audits	50
Education programs for business	45
Other	56

Q22. Which of the following strategies are employed to ensure that staff engaged in administering and enforcing regulation have the appropriate skills:

Formal staff training, including with respect to understanding business needs	157
Ensuring full documentation of procedures and decisions	172
Hiring staff that have worked in a business in the area which your agency regulates	90
Hiring staff with skills or experience in education and training	79
Hiring staff with skills or experience in law enforcement	97
Incorporating complaints/feedback from business in staff training and operating procedures	105
Reviews of staff performance	172
Reviews of branch/region performance	104

Q23(a) What measures are in place to reduce the risk of capture, corruption or bias in decision making?

Staff that engage with business must document reasons for their decisions	162	Audits of decisions are periodically conducted by staff in a separate office of your agency	67
Significant decisions are subject to review by supervisor, board or other authority	173	Audits of decisions are periodically conducted by an independent agency	56
Policies are in place to ensure conflicts of interest are reported	165	Rotation of staff	49

Q23(b) What other mechanisms are used to ensure appropriate oversight and that agency-wide policies are adhered to, in practice, by staff that engage with business?

Number of responses: 66

Table B.9 **Survey responses for 'Section 8: Review and evaluation'**

Q24(a) Is your agency's regulatory performance subjected to ongoing or periodic review via:

Formalised internal assessment drawing on feedback from stakeholders	43
Within portfolio review	39
External independent review within the last five years	52
Other	31

Q24(b) If yes above, did any of these reviews include an assessment of the effectiveness of your agency's engagement with:

Total business:	Yes	74	No	75
Small business:	Yes	34	No	103

Q24(c) If applicable, how is the effectiveness of your agency's engagement practices monitored and evaluated?

Number of responses: 48

Q25(a) In the last two years, has your agency sought systematic feedback from business or small business through:

Surveys:	Business	72	Small business	57
Consultative for a:	Business	94	Small business	66
Other:	Business	17	Small business	14

Q25(b) In the last five years, has your agency substantially reformed its approach to engagement with business? [this may include, but is not limited to, seeking to change: agency culture; levels of discretion given to enforcement officers; decision review processes; or recruitment practices].
If yes, please provide further information, including on the motivations or aims for these reforms.

Yes	106	No	71	Number of written responses	100

B.3 Commonwealth, state and territory regulators

Table B.10 **Commonwealth regulators**

Aboriginal and Torres Strait Islander Health Practice Board of Australia
Aged Care Standards and Accreditation Agency Limited
Auditing and Assurance Standards Board
Australian Accounting Standards Board
Australian Bureau of Statistics
Australian Communications and Media Authority
Australian Community Pharmacy Authority
Australian Competition and Consumer Commission
Australian Customs and Border Protection Service
Australian Energy Regulator
Australian Federal Police
Australian Fisheries Management Authority
Australian Health Practitioner Regulation Agency
Australian Human Rights Commission
Australian Information Commissioner
Australian Maritime Safety Authority
Australian Pesticides and Veterinary Medicines Authority
Australian Prudential Regulation Authority
Australian Radiation Protection and Nuclear Safety Agency
Australian Securities and Investments Commission
Australian Skills Quality Authority
Australian Taxation Office
Australian Transaction Reports and Analysis Centre
Civil Aviation Safety Authority
Comcare
Fair Work Building and Construction
Fair Work Commission
Fair Work Ombudsman
Food Standards Australia New Zealand
Great Barrier Reef Marine Park Authority
IP Australia
Migration Agents Registration Authority
Murray Darling Basin Authority
National Heavy Vehicle Regulator
National Offshore Petroleum Safety and Environmental Management Authority
National Rail Safety Regulator
Private Health Insurance Administration Council
Reserve Bank of Australia
Payments System Board
Safety, Rehabilitation and Compensation Commission
Seafarers' Safety, Rehabilitation and Compensation Commission
Sydney Harbour Federation Trust
Tax Practitioners Board
Tertiary Education Quality and Standards Agency
Treasury: Foreign Investment and Trade Policy Division

Tuition Protection Service
Wine Australia Corporation
Workplace Gender Equality Agency

Department of Agriculture, Fisheries and Forestry:
- Business Support Operations Branch (DAFF levies)
- Biosecurity
- Export Services and Control
- Illegal Logging
- Import Services and Controls
- Meat, Wool and Dairy Section
- Northern Territory Fisheries Joint Authority
- Queensland Fisheries Joint Authority
- Quota Administration Unit
- Torres Strait Protected Zone Joint Authority
- Western Australia Fisheries Joint Authority
- Wood Exports

Department of Attorney General:
- Classification Board
- Insolvency and Trustee Service Australia
- Marriage Celebrant Section
- National Security Law and Policy Division

Department of Climate Change and Energy Efficiency:
- Clean Energy regulator

Department of Defence:
- Defence Export Control Office
- US Trade Treaty
- Woomera Prohibited Area Coordination Office

Department of Education, Employment and Workplace Relations:
- Office of Early Childhood Education and Child Care
- Office of the Federal Safety Commissioner

Department of Families, Housing, Community Services and Indigenous Affairs:
- Additional Classification Restrictions in the Northern Territory
- Anindilyakwa Land Council
- Central Land Council
- Community Store Licensing Scheme
- Executive Director of Township Leasing
- National Gambling Regulator
- Northern Land Council
- Office of the Registrar of Indigenous Corporations
- Tiwi Land Council
- Torres Strait Regional Authority

Department of Foreign Affairs and Trade:
- Sanctions and Transnational Crime Section
- Australian Safeguards and Non-Proliferation Office

Department of Health and Ageing:
- Embryo Research Licensing Committee of the NHMRC
- Gene Technology Regulator

National Industrial Chemicals Notification and Assessment Scheme
Office of Aged Care and Quality Compliance
Office of Chemical Safety - Medicines & Poisons Scheduling Secretariat
Office of Chemical Safety - Drug Import/Export Licensing and Compliance
Population Health Division - Tobacco Control Taskforce
Therapeutic Goods Administration

Department of Industry, Innovation, Science, Research and Tertiary Education:
National Measurement Institute
Professional Standards Board for Patent and Trade Marks Attorneys

Department of Infrastructure and Transport:
Airports Branch
Aviation Branches
Office of Transport Security
Registrar of Liner Shipping
Surface Transport/Maritime Policy Reform Branch
Surface Transport/Vehicle Safety Standards

Department of Regional Australia, Regional Development and Local Government:
National Capital Authority

Department of Resources, Energy and Tourism
Australian Greenhouse and Energy Minimum Standards Regulator
Clean Energy and Energy Efficiency Division
Commercial Building Disclosure Program Regulator
Energy Efficiency Opportunities Program Regulator
Uranium Mining Regulator
Uranium Exports Regulator

Table B.11 **New South Wales regulators**

Anti-Discrimination Board
Architects Registration Board
Attorney General's Department
Board of Studies NSW
Board of Surveying and Spatial Information
Border Rivers-Gwydir Catchment Management Authority
Central West Catchment Management Authority

Department of Education & Communities:
Office of Communities
Commission for Children & Young People

Department of Family & Community Services:
Ageing, Disability & Home Care

Department of Finance and Services:
NSW Fair Trading
NSW Products Safety Committee

Department of Health:
Clinical Excellence Commission

Department of Planning and Infrastructure:
Building Professionals Board

Department of Premier and Cabinet:
- Division of Local Government

Environment Protection Authority
Firearms Registry
Greyhound Racing NSW
Harness Racing NSW
Hawkesbury-Nepean Catchment Management Authority
Independent Pricing and Regulatory Tribunal
Independent Transport Safety and Reliability Regulator
Information and Privacy Commission
Institute of Teachers
Lower Murray Darling Catchment Management Authority
Motor Accidents Authority
Murrumbidgee CMA
Namoi Catchment Management Authority
National Parks and Wildlife Service
Northern Rivers Catchment Management Authority
NSW Fire and Rescue
NSW Health: Private Health Care Branch
NSW Police Force: Security Licensing and Enforcement Directorate
NSW Rural Fire Service

NSW Trade and Investment:
- Industry, Innovation, Resources, Energy, Hospitality and the Arts
  - Office of Liquor, Gaming & Racing
  - Independent Liquor and Gaming Authority
- Department of Primary Industries
  - Agriculture NSW
  - Biosecurity
  - Fisheries NSW
  - Marine Parks Authority NSW
  - NSW Food Authority
  - Forests NSW
  - NSW Office of Water
  - Office of Agricultural Sustainability & Food Security
  - Animal Welfare Section
  - Plantation Assessment Unit
  - Division of Resources and Energy
    - Mine Safety
- Small Business Commissioner

Office of Biofuels
Office for Children: Children's Guardian
Office of Communities, Sport and Recreation
Office of Industrial Relations
Pharmaceutical Services
Psychology Council of New South Wales
Racing NSW
Roads and Maritime Services

Southern Rivers Catchment Management Authority
Transport for NSW
Treasury:
- NSW Industrial Relations
- Office of State Revenue

Veterinary Practitioners Board
Western Catchment Management Authority
WorkCover NSW

Table B.12 **Victorian regulators**

Automotive Alternative Fuels Registration Board
Building Commission
Bureau of Animal Welfare
Children's Services
Chinese Medicine Registration Board of Victoria
Council of Legal Education
Country Fire Authority
Department of Health
- Cooling Towers and Warm Water Systems
- Communicable Disease Prevention and Control Unit
- Drugs and Poisons Regulation Group
- Food Safety and Regulation Unit
- Pest Control Licensing
- Private hospitals and Non-Emergency Patient Transport
- Public Swimming Pools
- Radiation Safety
- Safe Drinking Water
- Supported Residential Services
- Policy Instruments and Compliance
- Cemeteries & Crematoria Regulation Unit

Department of Justice
- Business Licensing Authority
- Consumer Affairs Victoria
- Office of Liquor, Gaming and Racing
  - Victorian Commission for Gambling and Liquor Regulation
  - Harness Racing Victoria
  - Greyhound Racing Victoria
- Victorian Police: Licensing and Regulation Division
- Working with Children Check Unit

Department of Primary Industries
- Dairy Food Safety Victoria
- Regulation and Compliance Group
  - Earth Resources Regulation Branch
- Agriculture Productivity and Industry Development
  - Fisheries Victoria

Department of Planning and Community Development
- Aboriginal Affairs Victoria

Architects Registration Board of Victoria
Department of Sustainability and Environment
Department of Transport
VicRoads
Victorian Taxi Directorate
Energy Safe Victoria
Environmental Health Unit
Environmental Protection Authority
Essential Services Commission
Health Services Commissioner
Heritage Council of Victoria
Housing Registrar
Industrial Relations
Land Victoria
Legal Services Board
Legal Services Commissioner
Metropolitan Fire and Emergency Services Board
Parks Victoria
Plant Standards Branch
Plumbing Industry Commission
Primesafe
Private Hospital Unit
Professional Boxing and Combat Sports Board of Victoria
Small Business Commissioner
Sustainability Victoria
State Revenue Office
Surveyors Registration Board of Victoria
Transport Safety Victoria
Veterinary Practitioners Registration Board of Victoria
Victorian Assisted Reproductive Treatment Authority
Victorian Equal Opportunity and Human Rights Commission
Victorian Institute of Teaching
Victorian Pharmacy Authority
Victorian Registration and Qualifications Authority
Victorian Skills Commission

Table B.13 **Queensland regulators**

Department of Agriculture, Fisheries and Forestry
Agriculture and Forestry
Biosecurity Queensland
Fisheries Queensland
Department of Energy and Water Supply
Department of Environment and Heritage Protection
Department of Housing and Public Works
Board of Architects of Queensland
Board of Professional Engineers of Queensland
Plumbing Industry Council

Pool Safety Council
Queensland Building Services Authority
Department of Justice and Attorney-General
Council of Legal Education/Board of Examiners
Liquor, Gaming and Fair Trading
Office of Electrical Safety
Office of Fair Trading
Office of Fair and Safe Work Queensland
Department of Local Government, Community Recovery and Resilience
Queensland Police Service
Department of National Parks, Recreation, Sport and Racing
Department of Natural Resources and Mines
Surveyors Board of Queensland
Valuers Registration Board of Queensland
Department of State Development, Infrastructure and Planning
Department of Transport and Main Roads
Department of Treasury and Trade
Office of State Revenue
Queensland Competition Authority
Legal Services Commission
Workers' Compensation Regulatory Authority (Q-COMP) Board

Table B.14 **Western Australian regulators**

Albany Port Authority
Botanic Gardens and Parks Authority
Broome Port Authority
Dampier Port Authority
Department of Agriculture and Food
Department of the Attorney General:
Fines Enforcement Registry
Department of Commerce:
Building Commission
Consumer Protection
Energy Safety
Labour Relations Division
WorkSafe
Department of Environment and Conservation:
Keep Australia Beautiful WA
Waste Authority
Department of Finance:
Shared Services
Public Utilities Office
State Revenue
Department of Fire and Emergency Services

Department of Fisheries
Department of Health: Drug and Alcohol Office Office of Safety and Quality in Healthcare Office of the Chief Psychiatrist
Department of Housing
Department of Local Government
Department of Mines and Petroleum: Mineral Titles Division Petroleum Resources Safety Environment Royalties
Department of Planning
Department of Racing, Gaming and Liquor
Department of Regional Development and Lands
Department of Transport
Department of Water
Economic Regulation Authority
Environmental Protection Authority
Esperance Port Authority
Fremantle Ports
Geraldton Port Authority
Independent Market Operator
Legal Practice Board of Western Australia
Office of Road Safety
Training Accreditation Council
Perth Market Authority
Plumbers Licensing Board
Port Hedland Port Authority
Potato Marketing Corporation of Western Australia
Racing and Wagering Western Australia
Small Business Development Corporation
Western Australian Fisheries Joint Authority
Western Australian Industrial Relations Commission
Western Australian Meat Industry Authority
Western Australia Police
WorkCover WA

Table B.15 **South Australian regulators**

Attorney-General's Department: Consumer and Business Services
Dairy Authority of South Australia
Department of Environment, Water and Natural Resources

Department of Health

Department for Manufacturing, Innovation, Trade, Resources and Energy:
- Manufacturing Consultative Council
- Small Business Commissioner

Department of Planning, Transport and Infrastructure

Department of Primary Industries and Regions SA:
- Agriculture, Food, Wine and Forestry
- Biosecurity SA
- Fisheries and Aquaculture

Department of Treasury and Finance:
- Revenue SA

Development Assessment Commission
Environment Protection Authority South Australia
Essential Services Commission of South Australia
Independent Gambling Authority
Legal Practitioners Conduct Board
Mining and Quarry Occupational Health and Safety Committee
Motor Accident Commission
Natural resources - Adelaide and Mt Lofty Ranges
Natural resources - South East
Pharmacy Regulation of South Australia
SA Lotteries
SafeWork SA
South Australia Police
Teachers Registration Board of South Australia
The Architectural Practice Board of South Australia
Veterinary Surgeons Board of South Australia
WorkCover South Australia
Workers Rehabilitation and Compensation Advisory Committee

Table B.16 **Tasmanian regulators**

Department of Education:
- Skills Tasmania
- Teachers Registration Board

Department of Health and Human Services:
- Ambulance Tasmania
- Public and Environmental Health
- Radiation Protection Unit

Department of Infrastructure, Energy and Resources:
- Mineral Resources Tasmania
- Office of Energy
- Racing Services
- Transport

Department of Justice:
- Anti-Discrimination Commissioner
- Consumer Affairs and Fair Trading

Legal Profession Board
Monetary Penalties Enforcement Service
Poppy Advisory and Control Board
WorkCover Tasmania
Workplace Standards
Department of Police & Emergency Management:
Tasmania Police
Tasmanian Fire Service
Department of Premier and Cabinet
Local Government Division
Department of Primary Industries, Parks, Water and Environment:
Biosecurity
Environment Protection Authority Tasmania
Inland Fisheries Service
Land Titles Office
Quarantine Tasmania
Resources Management Division
Tasmanian Heritage Council
Sea Fishing & Aquaculture
Veterinary Board of Tasmania
Water
Department of Treasury and Finance:
Licensing Board
Liquor and Gaming Branch
Office of the Tasmanian Economic Regulator
State Revenue Office
Forest Practices Authority
Marine and Safety Tasmania

Table B.17 **Australian Capital Territory regulators**

ACT Revenue Office (Commerce and Works Directorate)
Community Services Directorate:
Children's Policy and Regulation Unit
Education and Training Directorate
Environment and Sustainable Development Directorate:
ACT Architects Board
Health Directorate:
Health Protection Service
Veterinary Surgeons
Indpendent Competition and Regulatory Commission
Justice and Community Safety Directorate

Table B.18 **Northern Territory regulators**

Aboriginal areas protection authority
Darwin Harbourmaster

Darwin Port Corporation
Darwin Waterfront Corporation

Department of Attorney-General and Justice:
- NT Anti-Discrimination Commission
- NT Consumer Affairs

Department of Business:
- NT Licensing Commission
- NT Worksafe
- Gambling & Licensing Services

Department of Health

Department of Land Resource Management

Department of Lands, Planning and the Environment:
- Architects Board
- Building Appeals Board
- Building Practitioners Board
- Building Advisory Committee
- Electrical Workers and Contractors Licensing Board
- Plumbers and Drainers Licensing Board

Department of Local Government:
- Animal Welfare Branch

Department of Mines and Energy

Department of Primary Industries and Fisheries:
- Agvet chemical regulation
- Animal Biosecurity
- Fisheries
- Plant Biosecurity
- Primary Industry

Department of Transport:
- Planning, Policy & Reform
- Public Transport
- Transport Safety

Department of Treasury and Finance:
- Territory Revenue Office
- Utilities Commission
- Work Health and Safety Advisory Council
- Workers Rehabilitation and Compensation Advisory Council

Environment Protection Authority
Health and Community Services Complaints Commission
Northern Territory Police
Teacher Registration Board NT

C Definitions of small business

C.1 Definitions of small business in Australia

While it is possible to broadly define small businesses by their characteristics, such a multi-layer definition of small business can be difficult, if not impossible, to use to collect statistics, to define in regulation or to determine eligibility for any government assistance (see chapter 1). Consequently, a definition based on a simple metric that proxies the characteristic based definition may be desirable. However, there is no such single universally accepted proxy definition of a small business. Government organisations have chosen to define small business using definitive metrics such as the number employed, turnover, assets, loan size, wages and even the number of gaming machines (table C.1).

One of the most used definitions of small business is the Australian Bureau of Statistics (ABS) definition. The ABS defines small businesses as those employing fewer than 20 people. There are also sub categories of small business such as micro businesses, which have fewer than five employees, as well as employing and non-employing small business. This current definition is based on a review undertaken in 1999 (box C.1).

Another well known definition is that of the Australian Tax Office (ATO), which defines a small business as an individual, partnership, trust or company with an aggregate annual turnover of less than $2 million — although it uses additional criteria to satisfy different regulatory objectives (for example, fringe benefit tax concession for car parking). The ATO uses this based definition to provide tax concessions as well as targeting advice and education programs to small business.

While the ABS and ATO definitions are general and are applied in other circumstances (such as the RBA business liaison and financial analysis), other definitions are based on metrics and thresholds that are more specific and targeted to the regulatory objective. For example, small hotels and clubs with less than 15 gaming machines are exempted from some of the requirements of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006.*

Table C.1 **Examples of small business definitions**

Metric	*Threshold*	*Institution/legislation*	*Purpose*
Employees	<15[a]	FWA	Unfair dismissal & redundancy
	<20	ABS	Statistical reporting
	<20	RBA	Business liaison
	<100	*Workplace Gender Equality Act 2012*	Equal opportunity laws
Turnover	<$2 million	ATO	Taxation
	<$3 million[b]	*Privacy Act 1988*	Privacy laws
Assets	<$50 million	APRA	Prudential supervision
Individual loan size	<$1 million	APRA	Prudential supervision
	<$2 million	RBA	Analysis of financing conditions
Legal structure	Unincorporated	RBA	Analysis of financing conditions
Value of transaction	<$3 million[c]	ACCC	Collective bargaining
Wages	Varies by state	payroll tax	Taxation
Gaming machines	<15	AUSTRAC	Anti-money laundering and counter-terrorism financing rules

[a] Calculated as a simple head count including casual employees who are employed on a regular and systematic basis [b] There are specified small businesses that are not exempt. [c] General threshold. There are industry specific thresholds for petrol retailing, new motor vehicle retailing, farm machinery retailing, primary production.

Sources: Australian Government (2011)*;* ABS (2013b)*;* RBA (2012); *Workplace Gender Equality Act 2012;* ATO (2012b)*; Privacy Act 1988;* ACCC (2011)*;* PC (2012a)*;* Austrac (2009).

Box C.1 **Businesses with fewer than 20 employees — ABS definition**

The ABS employee based definition of small business is the outcome of a review that compared a number of metrics — such as total employment, full-time equivalent, wages and salaries expenditure, annual income, assets and net profit — and various thresholds for each proxy measure. This investigation aimed to find an operational definition of small business that would simultaneously include the vast majority of small businesses (comprehensiveness) and exclude most businesses identified as not small (purity) for national statistical purposes.

The ABS concluded that employment based proxies performed well against these indicators and had a number of advantages over financial measures of size, including:

- being an easily understood and readily visualised concept
- it maintained the basis of measuring small business (previous definitions had been based on employment, albeit with a different threshold for manufacturing)
- financial measures would, over time, need to be adjusted for inflation.

While some sectors, such as Accommodation, cafes and restaurants, did not perform as well as others sectors on the indicators of comprehensiveness and purity, the implications were not considered sufficiently serious to warrant a separate definition for this sector. While a definition based on full-time equivalent would overcome this problem, such data is not always available from ABS data collections (for example monthly labour force survey).

Sources: ABS (2000); ABS (2002).

C.2 International definitions of small business

The definition of small business varies considerably across countries. While the European Union has a standard definition, this is not always adopted (for example Denmark does not use the financial component of the European Union definition). The definitions used for statistical data collection are presented in table C.3. Similar to Australia, some countries have a definition for data collection but use other definitions for taxation or research purposes.

In comparison to the Australian definitions of small business, the definitions used in other countries can to be more complex and vary by industry. For example, in Japan, Malaysia, Singapore and the USA the definition of small business varies by industry and in some instances is dependent on satisfying two metrics such as employment and turnover limits, such as China, European Union.

Table C.2 **Selected international definitions of small business**

Country	*Metric*	*Industry*	*Threshold*
Canada	employees	all	< 99
Chile	annual sales	all	< UF 25 000
China	employment or annual sales	varies	but general rule: <500 staff or annual sales of <30 m yuan
Denmark	employees	all	< 50
EU[a]	employee & turnover or balance sheet total	all	< 50 ≤ € 10 m ≤ € 10 m
Japan	investment or employees	manufacturing, construction, transportation	¥300 m or < 300
		wholesale	¥100 m or < 100
		service	¥50 m or < 100
		retail trade	¥50 m or < 50
Hong Kong	employees	manufacturing other sectors	< 100 < 50
Malaysia	turnover	manufacturing other sectors	< RM 10 m < RM 1 m
	employment	manufacturing other sectors	< 50 < 20
New Zealand	full-time employees	all	< 20
Singapore	net fixed assets employees	manufacturing other sectors	< S$15 m < 200 employees
Switzerland	employees	all	< 50
Thailand	employees & fixed capital	all	< 50 < 200 m THB
UK	employees	all	< 50
USA	employees	manufacturing	< 500 employees (up to 1 500) depending on the type of product manufactured
	employees	wholesaling	< 100 employees (up to 500) depending on the particular product being provided
	annual receipts	services	< US$2.5 m to US$21.5 m depending on the particular service being provided
	annual receipts	retail trade	< US$5.0 m to US$21.0 m, depending on the particular product being provided
	annual receipts	general & heavy construction	< US$13.5 m to US$17 m, depending on the type of construction
	annual receipts	special trade construction	< US$7 m
	annual receipts	agriculture	< US$0.5 to US$9.0 m, depending on the agricultural product.
Vietnam	employees & capital	all except services	< 200 < VND 200 b

a Finland, France, Hungary, Italy, The Netherlands, Portugal, Slovak Republic, Slovenia and Sweden.

Sources: Industry Canada (2012); New Zealand Ministry of Business, Innovation and Employment (2012);OECD (2004); OECD (2012a); Schaper et al. (2010); Socialist Republic of Vietnam (2009); US Small Business Administration (2013).

C.3 Considerations in defining small business

An operational definition or proxy measure of small business needs to be relatively simple, easily understood, practical to implement and capture those businesses that are considered 'small'. This requires the relevant agency to assess the reason why they need to define small business (such as to collect statistics to count the number of small business) to ensure there is a clear understanding of the target population in order to develop an accurate proxy. The target population may vary depending on the objective.

Even simple measures are subject to interpretation and may require more complex or sub-definitions to ensure clarity. For example, defining small business by the number of employees raises the issue of whether casual and part–time employees should be counted in the same manner as full-time employees. The Fair Dismissal Code applies to small business employers with fewer than 15 employees calculated on a simple headcount of all employees including casual employees who are employed on a regular and systematic basis.

The aim of having a simple proxy also needs to be balanced against accuracy: having a definition that captures a high proportion of those business that are genuinely 'small' while at the same minimising the number of businesses captured that are obviously not small (box C.1). Participants to this study highlighted this difficulty, noting that some businesses will be classified as small by certain definitions but not by other definitions. The Australian Chamber of Commerce and Industry provided one such hypothetical example:

> Business XYZ which employs 19 workers is classified as small business under the definition of the Australian Bureau of Statistics; however with $2.5 million annual revenue it is not eligible to access the small business tax concession, as it exceeds the annual turnover threshold of $2 million. The Small Business Fair Dismissal Code also does not apply to Business XYZ as it employs 15 or more employees. (sub. 5, p. 6)

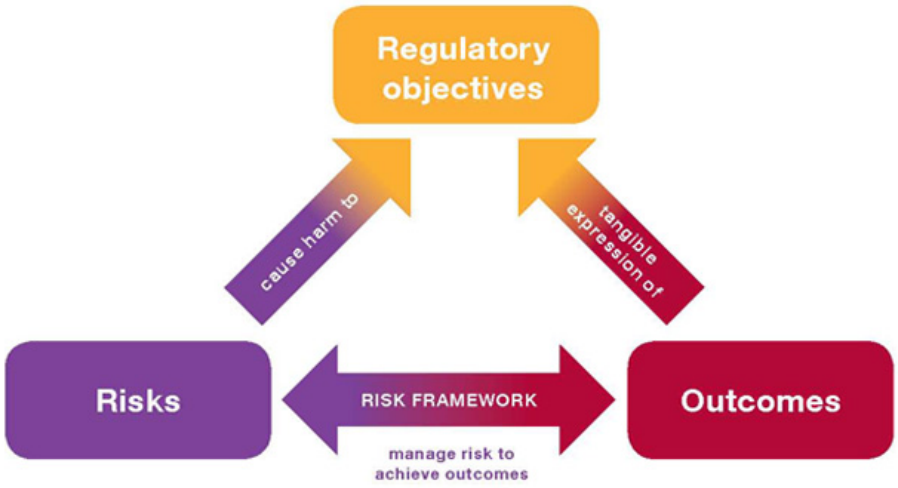
The purpose of the definition also has substantial impacts on the way small businesses are defined. A definition for national statistics is unlikely to prompt a change in behaviour from an individual small business to influence the way the ABS classifies them (that is, small, medium or large). Consequently, the definition of small business can be relatively simple. In circumstances where businesses are likely to benefit from being classified as a small business (such as exemption from paying tax or reporting requirements), definitions tend to be more complex and specific to the regulatory objective to prevent 'gaming'.

D Risk based delivery of regulation

D.1 What is a risk based approach?

A risk based approach to delivering regulation provides a framework to optimally reduce the risks to regulatory outcomes posed by different businesses (figure D.1). It facilitates a tolerance of risk in meeting regulatory objectives by prompting regulators to recognise that elimination of all risk is likely to be an uneconomical aspiration, in terms of both administrative costs and the efficiency loss for society — additional regulatory constraints to further mitigate risk may reduce consumer and producer choices, lead to higher business costs and consequently, higher prices.

Figure D.1 **The basis of a risk based framework**[a]



[a] The bottom left component of this chart is not formally incorporated without a risk based approach. In contrast, under a non–risk based approach, regulatory objectives would simply specify the conditions for compliance and the ways in which compliance can be satisfied in order to achieve specified outcomes — while not explicitly accounting for risks to achieving these outcomes.

Source: Solicitors Regulation Authority (2012).

When a regulator employs a risk based approach, they are recognising that different business characteristics such as size or ownership structure present different *levels* of risk to meeting intended regulatory objectives. Likewise, regulators can also accommodate the different *nature* of risk — some regulations seek to prevent

catastrophic outcomes, such as the loss of lives, while others aim to reduce less significant adverse events such as the evasion of tax payments by small businesses.

Armed with knowledge about such differences in risk, a regulator can then tailor the delivery of regulation so that the compliance costs for businesses are proportionate to the benefits of addressing the risks they pose to regulatory outcomes. Accordingly, when applied well, a risk based approach will generally maintain regulatory outcomes, but also potentially:

- reduce the compliance costs for low risk businesses and sometimes make it easier to comply, thereby increasing overall compliance
- lower administrative costs for regulators in achieving regulatory objectives.

Although a risk based approach may increase compliance costs for some higher risk businesses, such costs should be more than offset by improved outcomes for the community.

Use of a risk based approach requires regulators to develop the information and capacity to systematically target their effort to regulatory areas and businesses presenting the greatest risks. This contrasts with a more traditional approach to delivering regulation, which would tend to involve regulators pursuing rule enforcement as universally as possible across businesses, within the limits of their regulatory resources.

What is risk and how it is measured?

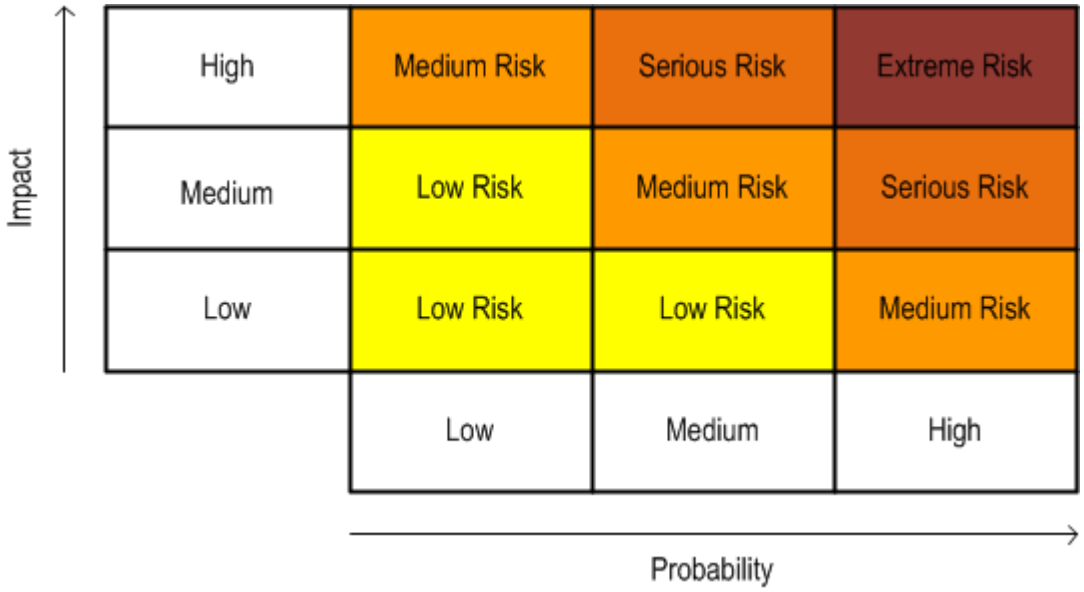
Risk can be defined as the probability of an unfavourable event multiplied by the severity of harm if the event occurs (figure D.2). Accordingly, probability and the magnitude of harm (impact) are the key concepts in a risk based approach — both of which should be given proper consideration in prioritising risk based compliance and enforcement.

Uncertainty is a reality when dealing with risk, and any attempt to measure risk will necessarily be imperfect. However, this does not mean that regulators cannot make reasonable estimates of relative risk of particular activities — they can do so as long as they adopt an approach that consistently and robustly relies on as much available evidence as possible (ideally with some quantitative evidence) and is consistent. This has been identified as a considerable challenge for regulators by the OECD:

> the difficulty in dealing with … uncertainty often leads to a proliferation of … *ad hoc* methods [for measuring risk] … which reveal a lack of understanding of the logic of decision making under uncertainty. (2010, p. 99)

This suggests that some regulators may need guidance on how to measure and classify risks in a formalised manner, since without an evidence based approach, it is possible that the use of 'ad hoc' methods could result in regulators adopting a risk averse regulatory posture — directing too many resources towards lower risk businesses in order to counteract the lack of information on risks (chapter 2).

Figure D.2 **Defining risk**[a]



[a] It should be noted that the nature of risks and correspondingly, the measurement and classification of risk, will naturally vary between regulatory areas. Consequently, this figure is meant only as a demonstration of one perspective a regulator may take when defining risk.

The varied nature of risk means regulators using a risk based approach will use different (qualitative and quantitative) evidence to measure risk according to their regulatory area (box D.1). Although this evidence base can sometimes be thin, as long as regulators recognise this potential limitation and use caution in their interpretation, this evidence base can still form the foundation for a sound risk based approach.

Once they have established an evidence base that can be used to estimate risk, regulators should continually review these estimates and improve the quality of information to ensure their approach remains relevant. Secondary to this is also ensuring the estimation of risk follows a consistent method (this commonly means using a matrix such as that shown in figure D.2) that allows decisions to be reviewed in a logically consistent way.

Box D.1 **Evidence used to measure risk**

- The ATO uses individual business activity as an indicator of risk, including when tax performance varies substantially from business performance and that of similar businesses; or there are spikes in refunds or unexplained losses.
  - The ATO also uses the industry a business belongs to as a risk indicator — for example, industries heavily involved in the cash economy (such as cafés) are likely to have a higher probability of non–compliance.
- The Victorian Environmental Protection Authority (EPA 2013) uses six criteria to measure risk, three each for impact and probability.
  - *Impact*: site activity (complexity of activities, types of processes and chemicals used), proximity to receptors (the environment around the site) and emissions and waste.
  - *Probability*: site management, compliance rating (number and severity of non–compliances) and community engagement (including whether the site communicates with the community and the number of reports made to the EPA's hotline about a site).
- In food safety regulation (case study, section D.3), regulators in different states have taken different approaches:
  - The Victorian Department of Health (2011) places food businesses into pre–determined categories based on the *type* of food they produce.
  - The Brisbane City Council (BCC 2010), in contrast, uses mostly information from past audits as an indicator of the probability of non–compliance.
- The Great Barrier Reef Marine Park Authority (GBRMPA 2012, p. 17) focuses on activities which are more likely to cause environmental damage, particularly activities such as illegal fishing, illegal access to preservation zones and the safety of protected species.
- Wine Australia's (2011) quality compliance strategy of label integrity and chemical residue audits maintains a focus on the reputation of Australian wine as a whole. This implies a trade–off between probability and impact when measuring risk that recognises one business can pose a risk to the entire industry. While the largest producers may have better quality control in place (reducing the probability of an adverse event), their size also means they have the potential to have the largest impact on the reputation of Australian wine.
  - In addition to producers, half of all label integrity inspections in 2011-12 were of exporters trading wine made by entities other than themselves (Wine Australia 2012, p. 20). Such exporters potentially present risks to multiple brands.
- The Queensland Building Services Authority (BSA 2012) uses (among other factors) a firm's compliance with financial requirements as an indicator of other risks (such as safety risks).

Sources: ATO website; BCC (2010); Queensland BSA (2012); Victorian EPA (2013); GBRMPA (2012); Victorian Department of Health (2011); Wine Australia (2011, 2012).

It is important for regulators to recognise that some risks may disappear over time, new risks may emerge in line with changing business and economic conditions, and many risks may be interconnected. For example, the Commission is aware that:

- The ATO adapts their risk based approach by changing the specific risks they focus on each year. New risks are continually identified and current risks reviewed in line with economic and business conditions and new legislation. This review process forms part of a framework that assesses tax risk and determines the likelihood, formality and intensity of review in a consistent manner.
- Prior to implementing its enabling Act, the Australian Transactions Reports and Analysis Centre (AUSTRAC) sought advice from regulated industries to determine the risks likely to be present in regulated businesses and the costs associated with addressing these risks.

Compared to alternative regulatory approaches, a risk based approach may involve higher costs — particularly in its early implementation — and require more information in order to make decisions. Correctly identifying and measuring risks may require regulators to invest in additional training and guidance material to overcome knowledge gaps and other limitations. Regulators may also need to draw on cross disciplinary expertise to spot emerging problems (Sparrow 2000) and integrate workgroups that previously saw themselves as specialised or discrete units (Black 2010).

The costs associated with risk measurement may also be incurred by regulated businesses. For instance, one dilemma a regulator can face is that good information is integral to assessing risk accurately, but if collected from business this data requirement imposes a burden on these businesses — if this problem occurs in an area of risk the regulator wishes to control and the burden is excessive, they may need to try and reduce their reliance on data requested from businesses whilst making more effective use of existing and other sources of information.

However, these higher costs may also achieve better decisions by providing regulators with all the important elements of the risk problem. By giving regulators the information necessary to more accurately evaluate the costs and benefits of alternative regulatory approaches, a risk based approach provides them with the basis for a consistent decision making rule (the economic efficiency framework, section D.2). In contrast, decisions that fails to consider all the elements of risk tends to distort regulatory priorities and compromise the consistency of regulatory policies (OECD 2010, p. 95).

The elements of a risk based approach

Although no two risk based regulatory approaches are exactly alike, a *well designed and implemented* risk based approach can generally be broken down to six common core elements. These elements are discussed in further detail below and adapted from the work of Black and Baldwin (2010) and the NSW Better Regulation Office (2008). These elements appear to be present, with varying levels and styles of implementation, in most structured Australian risk based regulatory approaches:

1. Defining outcomes and identifying risks — the regulator must determine its objectives from the enabling legislation and identify the risks it is required to control. Clearly, the less prescriptive the legislation, the more discretion is afforded to the regulator in its interpretation of regulatory outcomes and resulting objectives (box D.2, p. 8).
2. Determining the risk appetite — The regulator must determine the risks it is prepared to tolerate and at what level, consistent with the legislation set down by parliament and other guidance given by government, and its operating resources. This can be challenging — particularly if the regulator is given poor statutory or administrative guidance, and therefore itself needs to consider community views and determine what weight to place on quantitative risk assessment.
3. Risk assessment — having determined the risk appetite, the regulator can then formally assess the likelihood and potential impact of an adverse event, the expected value of that impact, and the costs and benefits of any regulatory action or inaction. This can incorporate various forms of qualitative and/or quantitative analysis and should also consider which businesses (or types of businesses) present high risks, and whether any of these businesses can self–manage those risks.
4. Prioritising risks — to assist in the implementation of compliance monitoring and enforcement, the information generated by risk assessments should be used to prioritise risks, ideally by assigning scores or ranks to those being regulated. Scoring and ranking systems may vary widely, based on the characteristics of the regulated industry and firms, scale of activities and history of compliance. These systems may or may not explicitly account for business size.
5. Implementation and the allocation of resources — the regulator will choose appropriate compliance and enforcement measures and how to allocate its resources to address risks, based on risk assessments and the prioritisation of different businesses being regulated. This has been most commonly applied in informing decisions on how to allocate supervisory, inspection and enforcement resources (Black 2010).
6. Reviewing outcomes — an effective risk based approach requires regulators to continually review their effectiveness at reducing the risks to their objectives, and the objectives themselves. This is essential to improving a regulator's understanding of risk, ensuring that risks are being managed and resources allocated in the most effective manner, and enabling proactive responses to emerging and changing risks.

A key challenge for regulators in reviewing outcomes is determining what would have happened if they had (or had not) intervened (Peterson and Fensling 2011). Regulators may find the concept of measuring regulatory effectiveness challenging if they have been more used to measuring success in terms of enforcement activities (such as inspections undertaken or prosecutions brought) or in financial terms.

Box D.2 **The effects of legislation in liquor regulation**

Liquor regulation is one area where legislation has been traditionally prescriptive, hindering the ability of regulators to adopt a risk based approach to some extent. However, many states are moving away from previously restrictive liquor licensing laws to risk based approaches, backed by legislative changes. Liquor licensing changes in many states are by no means 'best practice', but the changes represent a significant shift away from highly prescriptive approaches and towards better risk based practices. These changes (as well as some associated prescriptive legislation) are discussed below.

- In Victoria, legislated liquor licensing fees are lower for licensees assessed as having a low risk of alcohol–related violence such as restaurants and cafes; based on operating hours, compliance history and venue capacity (Victorian Commission for Gambling and Liquor Regulation 2012). The Commission understands that WA, QLD, NSW, SA and the ACT operate, or are beginning to operate, similar licensing schemes to varying extents.
- The Queensland Government has recently begun moving away from restrictive liquor licensing by introducing separate 'small bar' and 'café' licences. These licences reduce licence fees and other requirements, making it possible to open low risk small businesses where it may have previously been infeasible to do so (Jabour 2013; Office for Liquor and Gambling Regulation 2013).
  - For instance, the café licence means licensees are no longer required to meet the requirement to build a kitchen at the venue, which can impose confusing regulatory requirements surrounding food preparation. The Brisbane Times (Jabour 2013) identified one case where a licensee struggled to meet arbitrary, non–risk based regulations surrounding what constituted a meal before the introduction of the café licence — in one instance the licensee was told that two poached eggs with prosciutto on toast was not classified as a meal, but two poached eggs with bacon on toast was.
  - Similar small bar licences exist in Sydney, Melbourne, Adelaide and WA.
- The Queensland Government (2013, pp. 25–9) identified potential issues in its 'glassing' regulations in a recent discussion paper. It considers that:
  - The official 'high risk' glassing classification may have unreasonable commercial consequences for licensees, including implications for business reputation and insurance costs; and the ability to classify a business as 'high risk' based on one incident is potentially unfair.
  - It may be better to consider a more flexible approach that would complement licensees that voluntarily remove glass, particularly in late trading venues where the risk of violence is higher.

Sources: Jabour (2013); OLGR (2013); Queensland Government (2013); VCGLR (2012).

D.2 Implementing a risk based approach

Regulators should commit to a structured approach

A structured risk based approach would include the six elements discussed above as part of an explicit framework. Conversely, an unstructured approach is unlikely to reliably address risks in the most efficient manner, and may consequently reduce the net benefits possible from the adopting of a risk based approach. In fact, the OECD (2010, p. 96) identified that

> One of the most important issues facing legislators and risk regulators today is the move away from the *ad hoc* rules of the past, towards more inclusive and logically defensible principles.

In particular, a more formal approach to the elements 1–4 discussed above (identifying and prioritising risk) is essential to the implementation of a risk based approach and an effective allocation of resources. Otherwise — in addition to reducing net benefits — a non–structured approach means that a regulator may not collect information to assign risk based scores or ranks, enforce compliance or otherwise behave in a way that is consistent and defensible, which can result in criticism of the regulator (such as was the case with the APVMA, box D.4).

Evidence from the 2013 PC regulator survey suggests that many regulators are adopting a risk based approach that is not highly structured or formalised. Although 70 per cent of regulators said they had adopted a risk based approach, of these:

- over half did not make the details of this approach available to business
- 85 per cent did not monitor the costs imposed on businesses — an important aspect of ensuring compliance costs are proportionate to the risks a business poses
- 55 per cent did not give enforcement officers discretion in choosing the severity of sanctions used following a compliance breach.

From these responses, it appears that there is considerable scope for many regulators to implement more effective risk based approaches, including more explicit consideration of the compliance costs imposed on businesses and opportunities to reduce those costs.

Box D.3 **Australian Pesticides and Veterinary Medicines Authority**

A submission from the Hills Orchard Improvement Group (sub. 9) criticised the APVMA's approach, which they considered to be inconsistent, indefensible and non–consultative.

The Department of Agriculture, Fisheries and Forestry's (DAFF 2011a, 2011b) review of the APVMA also found numerous problems and criticised the agency's regulatory approach. The problems identified by DAFF appear to be due to both the enabling legislation and the conduct of the regulator. DAFF found that:

- The existing basis for the APVMA's decisions is not sufficiently clear and the current approach lacks flexibility. A 'one size fits all' approach appears to be used for all applications and there is a limited ability in the APVMA's existing framework to match regulatory effort to risk.
- Applications must be assessed against all parts of subsection 14(3) of the Agvet code, which describes what the APVMA must consider in deciding whether to grant or refuse an application; regardless of the risk the product poses. This can impose unnecessary data requirements on applicants.

DAFF also found that the lack of clear process means applications must be made without a complete understanding of the APVMA's approach to assessing risk. This makes it difficult to address application requirements and can result in lengthy delays and additional costs. These delays affect the ability of businesses to plan production and marketing and limit opportunities for innovation.

- The lack of a consistent transparent risk based approach acts as a disincentive for investment and has been identified as a possible reason why important 'agvet' chemicals registered overseas have not been registered in Australia.

Sources: DAFF (2011a, 2011b).

A risk based approach as part of an net benefit framework

A well designed risk based approach should be used within an explicit net benefit framework. When applied in this way, a risk based approach is not just a simple guide to deployment of regulatory resources, but rather determines the optimal regulatory strategy that maximises net benefits to the community. Such an approach seeks to align the allocation of regulatory resources and the consequent compliance costs for businesses to the risks presented by the actions of businesses and the benefits of reducing these risks (box D.4). Regulatory activities involve an 'opportunity cost', so economic efficiency requires that resources be allocated to alleviating risks where there is the greatest net benefit to society.

For instance, while reducing a risk may yield large *gross* benefits, the costs of intervention may also be large — including the cost and resources involved in

identifying and measuring risks and classifying businesses, whether borne by the regulator or the businesses they administer. Accounting for such costs in a net benefits framework should mitigate the potential tendency of regulators — caused, in large part, by their traditional role as purely enforcers of legal compliance — to adopt an overly 'safe' approach and attempt to reduce a particular risk beyond the point where the benefits of doing so outweigh the costs.

Box D.4 **Considerations in a net benefit framework**

- The benefits from avoiding or reducing risks
- The compliance costs for business stemming from provision of information and from enforcement activities — particularly those associated with inspections and reporting requirements, which may disproportionately affect small business
- The costs (benefits) associated with any decrease (increase) in competition from regulation
- The administration costs for regulators in identifying and mitigating risks
- The 'opportunity cost' of expending resources to address a particular risk over another

Failure to account for the cost imposed on businesses can result in unnecessary cost for businesses that are not commensurate with the benefits of regulations, for example:

- The NSW Small Business Commissioner (sub. 12) advised of one case where, after a random inspection discovered an inadvertent breach, a small business was to be closed for up to six weeks while the regulator granted a missing regulatory requirement. However, after the Commissioner contacted the regulator, the licence was able to be granted within 24 hours. Without such assistance from the Commissioner, the actions of the regulator could have had an unnecessarily detrimental impact on the small business concerned.

Both Australian and international regulatory oversight bodies and regulators have recognised the need to account for regulatory burdens in their approach to regulation:

- The Australian National Audit Office's (2007, p. 56) *Better Practice Guide* to administering regulation states that 'A regulator should also consider the cost burden the monitoring strategy is likely to place on regulated entities. Where possible, the strategy's design should aim to minimise these costs, without undermining the regulator's capacity to effectively monitor compliance'.
- The UK Government's (2005) Hampton Review argued that 'a proper analysis of risk should … enable them [regulators] to reduce the administrative burden of

regulation, while maintaining or even improving regulatory outcomes' (p. 1) and that 'regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress.' (p. 7)

Benefits of using a net benefit framework

A key benefit of using net benefits as the basis for decision making is that it encourages consistency in decision making (OECD 2010, p. 103). In addition to creating better decisions, consistency facilitates communication with business, among experts and regulators, and between experts, regulators and policy makers. It can also facilitate accountability and enable businesses and society to accept the best rational trade offs by providing a clear presentation of both sides of the cost benefit equation.

Using a net–benefit framework to choose between alternative regulatory approaches can also give regulators considerable flexibility in how to prioritise regulatory objectives and resources, based on an assessment of risk to achieving regulatory outcomes. This flexibility means regulators are able to pursue any policy that allows them to address risks to their objectives.

For instance, when considering the net benefits of a regulatory action, a regulator may decide not to intervene at all due to the limited benefits of doing so (potentially the case where businesses present low risks) or the high costs imposed, or to consider reducing the costs for business in other ways (examples in box D.5) where such actions would not be detrimental to regulatory objectives.

Furthermore, using an objective driven, flexible approach does not mean regulators are precluded from using blanket, purely prescriptive techniques such as random inspections and minimum standards — it simply means that any regulatory tool used is deployed with an objective in mind, rather than because a rule specifies its use. A regulator may choose to employ a purely 'outcomes based' system; a traditional prescriptive style system with a heavy focus on inspections and standards; or a mixture of both systems — what is important is that the tools used optimally address the risks posed by regulated businesses, based on an analysis of their costs and benefits.

Box D.5 **Reducing costs imposed on regulated entities**

- The UK's Office of Fair Trading (OFT) accepted an upfront cost to regulated entities in an attempt to reduce compliance costs in the future. The OFT requires licence applicants to give a significant amount of information, on the basis this will give it the data it needs in order to refine its risk based approach in the future (OECD 2010).
- The Department of Agriculture, Fisheries and Forestry (DAFF) bases its audit frequency for fish exporters on an establishment's compliance history and the level of risks with the products produced, using the frequency matrix below. Audit frequency in this matrix is measured in months (Australian Quarantine and Inspection Service 2009).

		Establishment rating			
		A	B	C	D
Risk category	Low	12	6	4	2
	Medium	9	5	3	1.5
	High	6	4	2	1

- The Commission understands that the Queensland Building Services Authority uses a firm's compliance with financial requirements as an indicator of overall regulatory compliance (BSA 2012). This potentially allows the BSA to use financial non–compliance as a basis to better target its technical site audits and reduce costs for compliant firms. For example, a firm may be found to be financially non–compliant or have a record of not paying subcontractors — the Authority could then target this firm for a technical audit, since a firm with poor financial and business practices is more likely to be technically non–compliant too.
- AUSTRAC exempts small businesses with less than five employees from paying AUSTRAC's supervisory levy. Even if a small business undertakes an activity where it is required to lodge a transaction report, they are not billed if the resultant levy is less than $100.

Sources: OECD (2010); Australian Quarantine and Inspection Service (2009); BSA (2012); AUSTRAC website.

Varied risks will mean varied implementation

Regulators in different industries face different types of risks and priorities when balancing these risks, so require different approaches. Regulators adopting a risk based approach could be expected to use an escalation model of enforcement (chapter 4), meaning the severity of an enforcement approach would correspond to the severity of risks presented by an identified breach (box D.7).

Box D.6 **Escalating enforcement in a risk based approach**

- AUSTRAC takes a conciliatory approach to innocent breaches of compliance and may first encourage businesses to rectify identified faults (under the threat of penalty).
- The ATO's involvement with low risk businesses is generally focused on targeted communication, providing education materials and sending compliance notification letters. The ATO has a preference for assisting businesses to 'nurture willing participation' and only uses harsh measures when non–compliance is systemic or deliberate
  - For example, during one audit, a taxpayer made a voluntary disclosure at the commencement of the interview that they had incorrectly claimed $500 000 as repairs and maintenance. The disclosure led to an 80 per cent remission in penalties (Hayes 2012)
- The ACCC determines enforcement actions on a case by case basis that takes into consideration the alleged contravention, the business involved and the impact of the breach.
  (a) Where breaches are **low risk**, particularly where they are inadvertent, the ACCC may accept an administrative resolution where the business agrees to conditions to rectify the situation.
  (b) **Infringement notices** are issued where more formal sanctions are needed, but where the matter can be resolved quickly without legal proceedings that can be costly to small business — generally speaking, an infringement notice will not be considered unless the breach is serious enough that the ACCC would be likely to seek a court–based resolution should the recipient choose not to pay.
  (c) A **court enforceable undertaking** requires a business to go on the public record and agree to remedy harm they have caused, accept responsibility and review their compliance programs. Businesses are ***allowed to tailor some elements of their undertaking to reflect their size and available resources*** (particularly compliance program design). Small business programs are less onerous and able to be undertaken without necessarily seeking external advice from compliance professionals.
  (d) **Court action** is only taken when conduct is particularly egregious.

Sources: ACCC (sub. 26); ATO website; Hayes (2012).

Even within similar regulatory areas, regulators might need to base their enforcement approach on firm/industry specific factors such as size, a business' compliance history, the ease of detecting breaches, the probability and detriment caused by breaches and the resources available to the regulator. Consequently, one could expect that no two regulators would be using precisely the same approach.

For example, an aviation regulator works within a relatively narrow and specific area with potentially catastrophic risks, whereas an environmental regulator may

work with thousands of businesses, many of whom may, individually, pose negligible risks. A low risk area may only require a focus on low impact information gathering tools, education, warnings and small civil penalties and have little need for large pecuniary or criminal penalties. In contrast, a high risk area may have intensive information gathering tools with a heavy reliance on inspections under the threat of substantial penalties.

Varied implementation, the evolving nature of risk and the difficulty in measuring the effectiveness of a risk based approach means assessing what constitutes 'best' practice, even within a particular industry (such as food safety, section D.3), can be a significant challenge. In particular, good practice should not be seen as a 'box ticking' exercise — such an approach discourages continuous improvement and is likely to be disconnected from regulatory outcomes on the ground. Rather, good practice requires a systematic underlying framework that attempts to adapt regulatory behaviour to suit the circumstances of particular regulators.

Given this challenge of identifying best practice, the examples in this appendix should only be considered as being indicative of the broad principles of a good risk based approach, and not as the 'best' practice in Australia or their respective regulatory areas.

When is a risk based approach most beneficial?

It is clear that a risk based approach can result in substantial societal gains in a regulatory area where the risks presented by different businesses are diverse (for example, in taxation, environmental regulation and consumer law). Although the gains of such an approach may seem less apparent where risks are more homogeneous, a risk based approach is still the appropriate method to guide the compliance and enforcement practices of regulators in areas where businesses are primarily only high or low risk.

Low risk businesses

Where a regulator is primarily dealing with low risk businesses, it is still important to consider the costs imposed on regulated entities and ensure these costs are proportionate to the low risks businesses present:

- For example, the National Measurement Institute (NMI) adopts a risk based approach even when enforcing compliance with trade measurement standards among businesses (a very low risk area). NMI engages in field visits to business premises to inform them of their obligations and adopts a conciliatory approach

to non–compliance, using an educative approach to ensure future compliance (DIISRTE, sub. 18).

In contrast, if a regulator does not realise the limited benefits and potentially high costs of reducing low risks, they may impose unnecessary costs on regulated businesses themselves — resulting in an efficiency loss (a net loss or reduced net gain) to society (box D.7).

There may, however, in regulatory areas presenting comparatively low risks overall, be some net benefit from more efficient targeting of risks through further subdividing of risk categories. This is apparent in the area of food safety (section D.3), where regulators have broken down comparatively low risk businesses into further risk categories, including on the basis of the type of food prepared, intended use (such as in hospitals), compliance history and more complicated systems involving a combination these factors.

Box D.7 **Primesafe Victoria and the yabby industry**

An inquiry by the Victorian Parliament (2013) found that Primesafe took a non–risk based and 'adversarial approach' to licensing in the yabby industry. It found:

The testing requirements for yabbies were in excess of those required for higher risk foods such as oysters and muscles.

- These requirements were not based on risk or scientific evidence and were not required by any other state or the Commonwealth.

This approach was taken even though yabbies are considered by Food Standards Australia New Zealand as a low risk food.

- The inquiry concluded that this approach went 'against a High Order Principle of the Legislative and Government Forum on Food Regulation, namely that the Primary Production and Processing Standards should ' … provide a regulatory framework that applies only to the extent justified by market failure'. (p. 111)

Evidence suggests that the cost of these requirements made Victoria's yabby industry 'uncompetitive compared with the rest of Australia'. (p. 108).

- The Victorian yabby industry went from 60 producers licensed for human consumption down to zero in a few years.

Source: Parliament of Victoria (2013, pp. 107–11).

High risk businesses

Where a regulator is primarily dealing with businesses whose activities present potentially catastrophic risks, a risk based approach can certainly help ensure a

thorough understanding of these risks and their consequences. A risk based approach can also be used to determine whether it is appropriate to treat all businesses with the same level of caution, or whether even primarily high risk businesses can be appropriately broken down into additional risk categories.

Adopting a risk based approach when dealing with high risk businesses can thereby give rise to the same kind of benefits as adopting this approach with low risk businesses: ensuring costs are proportionate to the potentially varied risks presented by businesses and avoiding imposing unnecessary costs by facilitating more efficient targeting of resources. The Civil Aviation Safety Authority (CASA) is a regulator that deals with such primarily higher risks, and has still adopted a risk based approach (box D.8).

Exceptions

One potential exception, where a risk based approach would not result in substantial societal gains, might be areas where any consideration of risks will not need to be as extensive as described above. This exception might apply to regulators that oversee fairly homogeneous businesses, such as accreditation bodies for specific professions. However, even this type of regulatory body should account for the costs it imposes on regulated entities (given that the benefits of this kind of regulation are likely to be limited). This type of regulatory area would likely be better suited to the use of minimum standards or 'deemed to comply' checklists (chapter 3), rather than a particularly complicated framework.

The challenge of a risk based approach for low risk small businesses

A good risk based approach need not necessarily explicitly account for business size, since business size may be a less reliable indicator of risk, such as in the previously mentioned area of food safety. In fact, the nature of a risk based approach that considers costs imposed on both regulators and businesses means it should be unnecessary for government to require or legislate towards a differential approach or special consideration for small business.

Box D.8 **CASA's risk based approach**

CASA has a formal risk based framework that broadly resembles the elements of a risk based approach discussed above. These steps include, in order:

1. Establish the context for the risk assessment. The process of identification of risk and the criteria against which risk will be evaluated should be defined at this stage. The overall objective for the assessment needs to be established.
2. Identify the aviation safety risks that need to be addressed.
3. Assess and evaluate the safety risks for sources of likelihood and consequences and determine the level of risks using the Risk Analysis Table (below) as a guide.
4. Determine what kind and what level of risk mitigation is required. Non–regulatory approaches (e.g. education, advisory material) may be sufficient to address the issue without regulatory intervention.

Later steps also include:

- explicitly considering the 'costs and benefits of each regulatory option'
- establishing 'which regulatory solution has the greatest net benefit and results in the most efficient use of industry and CASA resources'
- identifying 'any residual risks and issues that may require further analysis'.

Risk Analysis Table

Consequences						
LIKELIHOOD		1. Insignificant	2. Minor	3. Moderate	4. Major	5. Catastrophic
	A. Almost certain	High	High	Extreme	Extreme	Extreme
	B. Likely	Moderate	High	High	Extreme	Extreme
	C. Moderate	Low	Moderate	High	Extreme	Extreme
	D. Unlikely	Low	Low	Moderate	High	Extreme
	E. Rare	Low	Low	Low	High	High
EXAMPLES OF SCALE		Not much ←				→ a lot
Most common choice		Minor injury/ damage	Hospitalisation major damage	Fatality GA/ 1-5/ hull loss	Fatality LCAT/ 6-14/ hull loss	Fatality HCAT/ >14 / hull loss
Possible Recreational		Minor injury/ damage	Hospitalisation major damage	Single fatality/ hull loss	Double Fatality / hull loss	Fatality >2 / hull loss
Possible High capacity Air Transport		Minor injury/ damage	Hospitalisation major damage	Fatality <14/ hull loss	Fatality 14-30 / hull loss	Fatality >30 / hull loss
Other possibilities		Lack of safety - related data; few operators and non passengers	Breach of practice – no immediate threat to aircraft, lack of safety data	Breach of practice, loss of non critical system or element, reportable incident, no immediate threat to aircraft; applies to most operators and sectors, especially passenger-carrying.	Loss of significant system, failsafe or redundancy, aircraft safety incident/direct threat, unsafe practice; all/most sectors.	Loss of critical system, immediate threat to aircraft, aircraft accident, loss of aircraft, applies to all sectors, especially passenger transport.

Source: CASA (2011).

However, a key challenge that remains in implementing a good risk based approach is accounting for the specific challenges associated with some low risk small businesses. In particular, a good risk based approach should not only eliminate unnecessary burdens on small businesses, but also ensure this does not mean low risk small businesses actually find it harder to comply as a result of receiving less attention from regulators.

- One instance where this appears to have happened is among Canberra dry–cleaning businesses, regulated by Worksafe ACT. Evidence suggests that compliance standards dropped in the dry–cleaning industry after it was ignored by the regulator for many years, presumably because drycleaners were either classified as low risk or because WorkSafe ACT did not use a risk based approach. Previous audits (in 2005) uncovered 17 issues in 25 businesses, whereas 2013 audits uncovered 60 issues in the first 6 audits (Knaus 2013a, 2013b).

Regulators must also consider how a risk based approach may place unforseen burdens on small business — such as the need to hire external consultants to replace close contract with regulators — and how these burdens might conflict with regulatory objectives. Addressing this concern could involve the use of new education programs or prescriptive 'deemed–to–comply' checklists. These kinds of strategies (which should also be sufficiently low cost) can help ensure both that contact with small businesses is maintained and unnecessary compliance burdens are optimally reduced (box D.9).

Box D.9 **Considering low risk small businesses**

- The ATO recognises most small businesses are classified as low risk, and ensures these businesses are not ignored by providing extensive online tools and free tailored assistance visits on request, including targeting assistance campaigns to areas of perceived low compliance.
- AUSTRAC requires businesses to self–assess risk with reference to the services they provide. They provide a prescriptive checklist for small businesses to help ensure compliance requirements are made clear.
  - AUSTRAC also engages with businesses on an individual level to assist with particular difficulties.
- The ACCC provides a popular free printed and online publication, *Small business and the CCA: Your rights and responsibilities*, that outlines key provisions of the Competition and Consumer Act that small business operators need to be aware of.
  - The ACCC also recently developed an online education program to further explain small businesses' rights and obligations under the CCA

Sources: ATO website; AUSTRAC website; ACCC (sub. 26)

D.3 Case study: Food safety and varied implementation

Food safety is an area of regulation that demonstrates substantial variation in its implementation across different states. The variations in risk based approaches in this area provide a useful example of how the *principles* of good practice can be met by different means; whereas which approach, if any, is 'best' practice can remain unclear. Food safety policies in New South Wales, Victoria and Brisbane are examined below.

First, it is necessary to note that Food Standards Australia New Zealand (FSANZ 2001) has developed a risk based 'priority classification system for food businesses' (box D.10).[1] This system is intended as a reference for enforcement agencies to allow them to explain the risk factors used to classify businesses. However, each state regulatory agency is free to modify this system or institute their own, while enforcement is generally under the purview of local councils. This results in the varied implementation of food safety regulation seen in Australia, although all these systems contain the elements of a good risk based approach.

Box D.10 **Food Standards Australia New Zealand classification system**

- FSANZ provides a classification system for food businesses that is based upon a scoring system it developed. Trials of this system indicated that its use produced consistent classification of food businesses.
- Businesses are classified as high, medium or low risk depending on their score.
  - Their score is determined by factors such as food type and intended use (ready–to–eat or not), activities of the food business (food handling, whether the business is a catering business and risk level of the food), method of processing and whether the business is a small business.
- FSANZ considers this system may be used to individually classify businesses if appropriate and is meant to inform food safety program implementation requirements and initial audit frequency.
  - Audit frequency can then be adjusted according to performance in later audits (within a range set by the risk classification of the business).
- While this classification system could be considered good practice in terms of its use of a risk based approach, some states have heavily modified the FSANZ system or implemented their own risk based approaches, all of which reflect the broad principles of good regulatory practice to ranging extents.

Source: FSANZ (2001).

[1] FSANZ is an independent statutory agency that develops and administers the Australia New Zealand Food Standards Code. In Australia, FSANZ has broader coverage and also prepares standards across the food supply chain — although it does not have an enforcement role.

New South Wales

The NSW Food Authority's (NSWFA) risk based approach is prescribed in its enabling legislation. The *Food Act 2003* (s93) requires that the NSWFA (2010b) determine '*the priority classification of individual food businesses*' for purposes '*relating to food safety programs and the frequency of auditing'*. This legislation affords considerable discretion to the NSWFA in its interpretation of regulatory outcomes and resulting policies.

The NSWFA (2011) uses the FSANZ scoring system as one element within its own risk based approach (figure D.3). Food businesses are first classified into four risk prioritisation categories, using the national food safety risk profiling framework available from the Department of Health and Ageing (2007).

- Priority 1–2 businesses are required to undergo audits and implement food safety programs, while priority 3–4 businesses are exempt.
- Audits then use the same scoring system the FSANZ developed for risk prioritisation to rate businesses as acceptable (A, B), marginal (C) or unacceptable (D, E).

The priority classification and the rating from the most recent audit are combined to inform the frequency of audits, shown in figure D.3 below.

Figure D.3 **NSWFA audit frequency matrix**

Food business rating	Priority 1	Priority 2
A	12 months	24 months
B	6 months	12 months
C	3 months	6 months

Rating	Follow up audit	Unacceptable follow up audit	Acceptable follow up audit
D or E	1 month	Remain on 1 monthly audits and additional enforcement action (see below)	Return to original audit schedule (prior to initial D or E rated audit)

Source: NSWFA (2011).

After classification, the NSWFA (2010a) uses a graduated approach to enforcement and has a wide array of enforcement tools. These tools are designed to be used in a manner that is proportionate to the identified non–compliance and range from warning letters and improvement notices to licence suspension and prosecution.

It should be noted that all NSW councils have been formally appointed as enforcement agencies under the *Food Act 2003*, and the adoption of this escalating enforcement policy by these councils is not mandatory (NSWFA, sub. 28). The success of this approach is thus dependent on the quality of training council officers receive and their enforcement culture. There is therefore potentially room for improvement in regulatory practice, since individual council officers may not always apply this policy.

Victoria

After extensive amendments to the Victorian *Food Act (1984)* in 2010, the Victorian Department of Health (2011) now uses a risk based approach that does not incorporate any specific elements of the FSANZ system. Foregoing a scoring system, Victorian food businesses are classified into one of four *predetermined* risk based tiers based almost entirely on the type of food they prepare (with some consideration of whether they serve high risk groups, such as in hospitals). As in NSW, the lower two tiers are exempted from undergoing audits and implementing a food safety program (FSP).

- Class 1 businesses undergo an annual audit of their FSP by an approved auditor, who informs the relevant local council of any deficiencies. These businesses also undergo separate annual assessment from their local council for compliance with both FSP requirements and food safety standards.
- Class 2 businesses may either develop their own independent FSP and be audited annually in the same way as Class 1 businesses; or use a Department of Health registered standard FSP and only undergo the latter annual assessment from their local council.

By using predetermined risk based categories, the Victorian system appears simpler, and therefore less costly than the more complicated NSW or FSANZ systems. However, there does not appear to be any formal allowance to adjust this system, such as linking the frequency of audits to a business' compliance history. This is arguably a weakness of the enabling Victorian legislation. However, it is unclear whether this considerably alters the system's effectiveness, and Victoria's risk based categories and FSP and audit processes remain indicative of good practice.

Brisbane City Council

While the Queensland Department of Health (2006) specifies when a business does not require a licence, most other regulatory practices are the responsibility of local councils.

The Brisbane City Council (BCC 2010, 2012, p. 49) gives businesses a star rating (0, 2, 3, 4 or 5 stars).

- Four and five star businesses can undertake self–audits, reducing costs.
- Businesses with three stars or higher can choose to publicly display their star rating and be promoted on a BCC website.
- Licensing fees are substantially reduced for businesses with higher star ratings.

These star ratings are based on a combination of compliance practice (based on 44 criteria), rated A–E, and good management practice (based on 13 criteria), rated A–D. These scores are combined in a matrix to determine a star rating (figure D.4).

Figure D.4 **Brisbane City Council star rating matrix**

		SECTION A RESULT				
SECTION B RESULT	RATING	A	B	C	D	E
	A	5	4	4	2	0
	B	4	4	3	2	0
	C	4	3	3	2	0
	D	3	3	3	2	0

Source: BCC (2010).

E Enforcement tools

There is a range of enforcement tools potentially available to regulators when a regulatory breach is discovered. These tools can be classified into a number of categories:

- Warnings
- Public notifications
- Enforceable undertakings
- Trading restrictions
- Pecuniary penalties
- Court action.

Some of these categories are relatively broad and encompass a spectrum of tools, while others include just one tool that has some more specific characteristics. Further, while warnings are typically the lowest level of enforcement tool, and prosecution through the courts is typically the most severe, the categories cannot be easily ranked in terms of severity, as the magnitude of the impacts of different enforcement tools will vary on a case-by-case basis.

This appendix examines some of the key features of various enforcement tools, the extent of their use by Australian regulators, and some of the issues identified with their implementation.

E.1 Warnings

Warnings are typically the lowest level of enforcement where there is a breach of regulations. However, there is also variation in the nature of warnings. Warnings may be of a relatively informal, or educative, nature, aimed at providing information and advice to businesses to enable them to meet their compliance requirements and that failure to comply may result in further action. In this respect, there may be considerable overlap with regulators' more general education programs (see chapter 5).

Warnings may also be of a more formal nature, such as a written warning or improvement notice that requires a business to comply with a regulatory requirement within a specified period of time to avoid further action.

Application by regulators

As a group, warnings are the most commonly used enforcement tool. In the 2013 PC regulator survey, the most cited enforcement tool used in response to compliance breaches was education on compliance, which was used either often, usually or always by the bulk of responding regulatory agencies (table E.1). While education is typically used to increase compliance and prevent breaches (chapter 5), remedial education, perhaps in the form of informal verbal warnings, would also appear to be a commonly used response to some identified compliance breaches by most regulators. Warning or improvement notices are also commonly used by many regulators, although there is a reasonable share of regulators for whom these, particularly improvement notices, were either not available or applicable.

Table E.1 **Regulator use of enforcement tools — warnings[a]**
Per cent of regulators using this enforcement tool

	Education on compliance	*Warning notice*	*Improvement notice*
Not available/applicable	3	15	33
Never	2	4	7
Rarely	6	22	15
Often	25	35	30
Usually	29	14	10
Always	35	10	6

a PC regulator survey question 14. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

While warnings are used by agencies across the range of regulatory areas, respondents indicating that they used warnings, often, usually or always were more commonly those administering regulations in the areas of environment protection, public health or safety, and financial or other professional services.

Issues surrounding implementation

Warnings can be cost effective and timely to administer, and provide an option for businesses to remedy compliance breaches, without the added sanction (such as a fine, or cessation of trade) of other enforcement options.

While warnings may be ineffective in some situations, and in and of themselves do not impose a sanction for non-compliance, they typically form the basis of an escalating enforcement model where low level compliance breaches can be addressed with a proportionate response. An example of the greater use of warnings relative to more severe enforcement actions is demonstrated by the enforcement activities of councils against food businesses in New South Wales, where warning letters and improvement notices account for over 80 per cent of enforcement action (table E.2). The relatively small number of stronger enforcement actions suggests that in most cases a warning is sufficient to remedy compliance breaches.

Table E.2 **Enforcement action against food businesses in NSW**
1 July 2011 to 30 June 2012

Enforcement action	*Number*
Warning letters	7 108
Improvement notices	1 246
Penalty notices	1 714
Seizures	31
Prohibition orders	82
Penalty notices — court elected	14
Prosecutions	14

Source: NSW Food Authority (2013c).

One weakness of warnings is that they may be ineffective. This is a particular risk of verbal warnings. For instance, the NSW Food Authority notes that:

> Verbal warnings, as they are not accompanied by formal notification, are prone to improper documentation by the regulator and the business, or misinterpretation or being completely forgotten. Due to the informal nature of verbal warnings, it is suggested that they are only used for issues of a minor technical nature. (NSWFA 2013a, p. 11)

E.2 Public notifications

Public notification, or the 'name and shame' approach is a relatively specific method of enforcement where regulatory breaches are dealt with by publishing the identity of offenders. While the use of some other tools may result in the identity of offenders being publicly discoverable, in some cases, the public naming and shaming of offenders is an explicit objective.

Application by regulators

Public notification approaches do not appear to be commonly used by Australian regulators. In the PC regulator survey, the majority of respondents indicated that the tool was not available to them or was never used. A further 30 per cent reported that it was rarely used (table E.3).

Table E.3 **Regulator use of enforcement tools — public notifications[a]**
Per cent of regulators using this enforcement tool

	Name and shame
Not available/applicable	27
Never	29
Rarely	29
Often	10
Usually	3
Always	2

a PC regulator survey question 14. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

Of those agencies reporting that they often, usually or always used the name and shame approach, most administered regulation in the areas of environment protection, fair trading, tenancy or consumer protection, public health or safety, gaming and racing, and liquor. While name and shame is an enforcement tool that is also used by some food safety regulators — including in NSW (NSW Food Authority, sub. 28) and the ACT (as noted by COSBOA, sub. 15 — see below) — its use in this area is not common in Australia.

Issues surrounding implementation

Public notification approaches are typically used where it is perceived to be in the public interest to be aware of regulatory breaches. For instance, the NSW Food Authority uses a name and shame approach in conjunction with penalty notices and prosecution, publishing the names of those who are fined or successfully prosecuted. The stated aim of the public register is to 'make information on alleged breaches of food safety law available to consumers' (NSWFA 2013b).

In addition to public interest, there may be an additional deterrent effect of this enforcement tool, improving regulatory compliance, with the NSW Food Authority also submitting that:

> Additional leverage is provided by the Authority's public penalty notice register which publishes penalty notices issued by the Authority and councils in relation to food safety breaches. The register is supported by a documented publication protocol and decision

matrix to ensure that in all cases publication is permitted and meets the aims of the register. (NSW Food Authority, sub. 28, p. 12)

However, there are concerns that there may be unintended adverse impacts from this approach. For example, COSBOA submits:

> Certainly the lowest form of regulation is naming and shaming individuals. Perhaps this has a place but it should be rarely used. If a business person is publicly humiliated it will affect their general health and the health of their employees and their families. (COSBOA, sub. 15, p. 4)

COSBOA were particularly critical of the use of this enforcement option by the ACT Health Protection Service:

> The ACT Health Protection Service has embraced a name and shame culture in dealings with restaurants and cafes. They frequently close restaurants and cafes and go out of their way to make sure the owners are publicly humiliated … The agency seems to have the approach to regulation that the more closures and public humiliations that occur the more likely there will be compliance. Their approach has obviously failed yet they continue to use a process that is flawed.
>
> This is a regulator who notches closures onto its corporate belt and takes pride in their actions. It is obvious to anyone in business that this agency has no idea about communications, process, education or due diligence. (sub. 15, p. 8)

Further, the impacts of name and shame actions may be highly variable and difficult to predict — the publication may have no discernible effect on the business, or it could precipitate business closure. Also, if the name and shame approach is applied in error, it may be very difficult to remedy the situation as the reputational damage will have been done.

E.3 Enforceable undertakings

Another relatively specific tool is an enforceable undertaking. Where a regulatory breach has been discovered, a regulator may accept an undertaking from the party to remedy the breach. Failure to perform the agreed actions can result in escalated enforcement action, including court action.

As an example, the ACCC often resolves breaches through enforceable undertakings where the company or individual agrees to:

- remedy the harm caused by the conduct
- accept responsibility for their actions
- establish or review and improve their trade practices compliance programs (sub. 26, p. 5).

Application by regulators

While enforceable undertakings do not appear to be very widely used, one quarter of respondents to the PC regulator survey indicated that they use this enforcement approach often, usually or always (table E.4).

Table E.4 **Regulator use of enforcement tools — enforceable undertakings[a]**

Per cent of regulators using this enforcement tool

	Enforceable undertakings
Not available/applicable	31
Never	14
Rarely	29
Often	18
Usually	4
Always	3

a PC regulator survey question 14. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

Respondents who indicated that they use enforceable undertakings often, usually or always covered a range of regulatory areas, with environment protection the most common.

Issues surrounding implementation

Enforceable undertakings allow regulators to tailor action to reflect the type or size of the business. For example, the ACCC submitted that it:

> … allows businesses to tailor some elements of their undertaking to reflect their size and available resources. For example, the ACCC would expect a large business to maintain a strong trade practices compliance program that includes a complaints handling system that complies with the relevant Australian Standard. On the other hand, it would be acceptable for a small business to maintain a more basic compliance program with a simpler complaints handling system that is nonetheless effective. (sub. 26, p. 5)

Similarly, the National Measurement Institute notes that enforceable undertakings can provide a broader compliance outcome compared to prosecution:

> Enforceable undertakings allow more flexibility and broader outcomes than those available through prosecutions. Successful prosecutions lead to convictions where the outcome is limited to a criminal record and/or a fine. On the other hand, enforceable undertakings can provide a range of solutions tailored to particular circumstances of non-compliance within a single remedy. (National Measurement Institute 2011, p. 7)

There have been some concerns expressed about the procedural fairness of enforceable undertakings, where the procedures followed by regulators in accepting undertakings have not been properly specified. Also, enforceable undertakings are a form of negotiated settlement between the parties, but there may be considerable inequality in bargaining power between a business and the regulator (Nehme 2010).

E.4 Trading restrictions

There are a range of enforcement tools available to regulators that involve restrictions on a business's activity. Most commonly, this may involve the suspension or cancelling of any licences or permits required to undertake activities if the conditions of the licence or permit are breached. An alternative form is negative licensing, where a licence or permit is not required to undertake a given activity, but compliance breaches can result in a business being excluded from a market or subject to restrictions in undertaking the activity in the future. Product recalls and seizures are another form of trading restriction that may be imposed on businesses where products do not meet regulatory requirements.

Application by regulators

Results from the PC regulator survey indicate that trading restrictions of one form or another are used by a relatively large proportion of regulators, but fairly infrequently (table E.5). Product seizure/recall tools are not applicable to most regulators and are used only rarely by those regulators that do use them. While the suspension or cancellation of licences or registration is a tool available to most regulators who responded to the survey, the majority report that it is used only rarely.

Table E.5 **Regulator use of enforcement tools — trading restrictions[a]**
Per cent of regulators using this enforcement tool

	Product seizure/recall	*Suspending business operation*	*Registration/licence suspension, restriction or cancellation*
Not available/applicable	61	33	16
Never	11	15	10
Rarely	21	47	60
Often	5	6	12
Usually	2	0	1
Always	0	0	1

a PC regulator survey question 14. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

Those regulators who responded that they used these types of tools often, usually or always were most commonly overseeing regulation in the areas of gaming and racing, financial or other professional services, and fair trading, tenancy or consumer protection.

Issues surrounding implementation

Measures that restrict the operation of businesses, or the seizure/recall of goods are relatively severe forms of enforcement that are typically undertaken where lower level enforcement tools, such as warning or improvement notices have been ineffective, or there are substantial public risks. At their most severe, if a licence to operate is cancelled, it can result in the closure of a business. Breaches of trading restrictions can often lead to prosecution.

The imposition of trading restrictions will typically involve a follow up course of action by the business and the regulator, such as inspections to approve any remedial actions by the business prior to lifting restrictions. Regulations may impose conditions on the operation of regulators in conducting these inspections. For instance, in regard to prohibition orders on food businesses, the NSW Food Authority notes:

> A prohibition order will remain in place until a certificate of clearance is issued following a request for inspection from the business. An inspection is to take place within 48 hours of receiving a written request for inspection from the proprietor of a food business. Should an inspection not be undertaken within this timeframe, the Food Act 2003 requires that a certificate of clearance be automatically issued to a business under a prohibition order. (NSWFA 2013a, p. 13)

Similarly, Safe Work Australia noted that the revocation or suspension of someone's authorisation to undertake specified work can have serious consequences and the decision to use this tool needs to be considered carefully:

> Regulators may decide to revoke, suspend or cancel a person's authorisation given in order to deal with inappropriate conduct or practices identified during inspection work or as a result of information received. Such action is a protective measure and may be undertaken even where steps have been taken to remedy a contravention or where an offender has otherwise been punished (ie. fined).
>
> The regulators recognise that the revocation, suspension or cancellation of authorisations may have serious consequences for a person. When making decisions about authorisations, the regulators balance these considerations with the paramount need to protect the health and safety of workers and other persons. In making a decision whether or not to issue or renew an authorisation, the regulators will consider the person's history of compliance. (Safe Work Australia 2011, p. 11)

Seizure of goods is a particular form of trading restriction. Goods may be seized because they are noncompliant with regulations, or as evidence of an offence. While the seizure of goods may not be the intended penalty in and of itself, this can be the effect, as the NSW Food Authority has noted:

> While seizures are undertaken to collect evidence or prevent further offences being committed they effectively impose a penalty upon the person from whom the food, vehicle, equipment and labelling or advertising material has been seized. (NSWFA 2013a, p. 13)

E.5 Pecuniary penalties

A common enforcement tool is the issuing of fines. When a breach is detected an infringement notice is issued, which the offender may elect to pay, or contest in court.

Application by regulators

The use of pecuniary penalties, that is fines, is fairly mixed. In the PC regulator survey, an overall a majority of regulators reported using fines, although a considerable proportion of respondents said fines were not available or never used. While many reported using fines often or usually, no regulator reported that they were always used (table E.6).

Table E.6 **Regulator use of enforcement tools — pecuniary penalties[a]**
Per cent of regulators using this enforcement tool

	Pecuniary penalty
Not available/applicable	17
Never	18
Rarely	30
Often	23
Usually	11
Always	0

a PC regulator survey question 14. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

Pecuniary penalties were most commonly reported to be frequently used by regulators in the area of environment protection.

Issues surrounding implementation

Infringement notices can be useful as a formal, yet administratively efficient and timely enforcement tool. For instance, the ACCC submitted that it:

> … may issue an infringement notice where it believes there has been a contravention of the CCA [*Competiton and Consumer Act 2010*] that requires a more formal sanction than an administrative resolution but where the ACCC considers that the matter can be resolved quickly without legal proceedings (which can be extremely costly for small businesses). (sub. 26, p. 4)

They are often used as a lower level alternative to court action (although the recipient of an infringement notice may elect to have the matter dealt with by a court):

> Generally speaking, the ACCC will only consider issuing an infringement notice where it is likely to seek a court-based resolution should the recipient of the notice choose not to pay. (ACCC, sub. 26, p. 4)

Similarly, the NSW Food Authority states:

> Penalty notices provide an efficient method of dealing with breaches of food legislation that may otherwise require presentation to a court. (NSWFA 2013a, p. 14)

One consideration with fines is getting the value of the fine high enough for it to act as a deterrent. In this respect, fines can be regressive, and their deterrence effect can depend on the different financial circumstances of businesses. Fines also need to be in proportion to the offence and are not likely to be an appropriate tool where the penalty amounts are not commensurate with the scale of the breach. For example, the NSW Food Authority states:

> Penalty notices may not be used where the penalty imposed is significantly out of proportion to the profit gained by the business through the noncompliance or where the penalty is not likely to have an impact on the proprietor of a very large food business. In this instance, another enforcement tool may be more appropriate, eg prosecution or the imposition of specific licence conditions upon a business. (NSWFA 2013a, p. 14)

And the ACCC submits that it:

> … may issue multiple infringement notices where it considers it appropriate to do so, taking into account all of the circumstances. …
>
> On over 15 occasions, multiple infringement notices have been paid in relation to the same matter. These have usually related to large businesses … (sub. 26, pp. 4–5)

E.6 Court action

Where lower level tools have been ineffective, or have been judged to be inappropriate, prosecution through the courts may be used to enforce regulation. Court action includes both civil and criminal proceedings and can be used to seek a broad range of remedies, such as injunctions, fines or imprisonment. Regulation might also create rights for a person or business to seek compensation through civil proceedings for a regulatory breach (BRO 2008).

As an example of the range of outcomes that may result from court action, the ACCC states that under the *Competition and Consumer Act 2010*, legal proceedings may lead to the court:

- making declarations that a company or individual has contravened the Act
- making injunctions restraining current or future conduct, or requiring respondents to take certain action
- requiring respondents to publish notices about their conduct and corrective advertising, and to disclose relevant information to others (for example, to their customers)
- making findings of fact that show contraventions of the Act so that damages may be recovered by consumers and businesses affected by the conduct
- making orders to achieve financial redress for consumers or businesses harmed by the conduct
- making various non-punitive orders, including community service or probation orders (which may include orders for implementing a compliance or an education and training program)
- imposing significant pecuniary penalties for breaches of the consumer protection or restrictive trade practices provisions (the ACCC is more likely to seek pecuniary penalties in matters which result in significant consumer detriment, involve blatant conduct or where the traders or individuals concerned have a history of past conduct)
- convicting persons found to have contravened various offence provisions in the Act, and/or
- imposing prison sentences for serious cartel conduct. (ACCC 2013a)

Application by regulators

Enforcing regulation through the courts would appear to be used relatively infrequently, compared to the other enforcement tools available to regulators. In the PC regulator survey, many regulators indicated that court action was either not available/applicable or was never used. Of those that do resort to court action, most

regulators report they do so rarely, with a smaller proportion doing so often. Only a few regulators reported that they usually resort to criminal court action (table E.7).

Table E.7 **Regulator use of enforcement tools — trading restrictions[a]**
Per cent of regulators using this enforcement tool

	Civil court action	*Criminal court action*
Not available/applicable	26	17
Never	33	24
Rarely	33	42
Often	8	15
Usually	0	2
Always	0	0

a PC regulator survey question 14. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

Court action was most commonly used by regulators in the areas of environment protection, along with gaming and racing, liquor, building and construction, and financial or other professional services.

Issues surrounding implementation

Court action is time consuming and costly, for both regulators and business. It is typically only resorted to where other enforcement options have been ineffective, or for egregious breaches where other tools are considered inadequate. For instance, the ACCC submitted:

> Legal proceedings are only taken where, having regard to all the circumstances, the ACCC considers litigation is the most appropriate way to achieve its enforcement and compliance objectives. The ACCC is more likely to proceed to litigation in circumstances where the conduct is particularly egregious (having regard to the factors set out in its *Compliance and Enforcement Policy*), where there is reason to be concerned about future behaviour, or where the party involved is unwilling to provide a satisfactory alternate resolution to the matter. (sub. 26, p. 6)

Court action is also a very public process and can be damaging to the reputation and credibility of the regulator and/or the business involved. As such, there are often strong incentives for businesses to avoid the need for court action or for regulators to avoid using court action as an enforcement tool.

F Communication modes

Regulators employ a range of different modes of communication with small business. These include:

- websites and other electronic forms of communication
- direct communication (including on-site visits and relationship managers)
- communication via industry groups
- seminars and workshops
- advice hotlines and help desks

This appendix examines some of the key features of these modes, the extent of their use by Australian regulators, regulators' assessments of their effectiveness and some of the issues identified with their implementation.

F.1 Websites and other electronic modes of communication

The use of web based and other electronic modes of communication to provide advice and assistance to business is an important part of most regulators' communications strategies. Websites — whether it be the regulator's own website or an external 'one-stop-shop' website to which different regulators supply information — allow business to access regulatory information at a time and place of their choosing.

A newer form of electronic communication being employed by regulators is social media such as Facebook and twitter, which can provide a more succinct and targeted means of communicating advice and information to business.

Other modes of electronic communication include:

- *e-newsletters, e-lerts and email* — nominated by many regulators as an effective means by which they communicated with business
- *webinars* (web-based seminars) — an increasingly common means of providing help and advice to business

- *technology tools,* such as smartphone applications — these have potential to improve communication, particularly given the high rates of use of mobile electronic devices/smartphones among some groups of small business.

Application by regulators

Websites were the most commonly reported mode of communication in the 2013 PC regulator survey, with 84 per cent nominating information provided on their website as either effective or a very effective means of communicating with business (table F.1). Information provided to external one-stop-shop websites was used by around two thirds of regulators. This mode was not rated as effective as the regulator's own website, with most regulators who used this mode giving a neutral response. This is perhaps unsurprising, and likely reflects the lack of data regulators would have on the use and effectiveness of external websites compared to their own websites.

Social media was used by around 40 per cent of regulators. As with one-stop-shop websites, many regulators were reluctant to make judgements as to the effectiveness of this mode. Some regulators noted that this was because the use of social media was too recent for them to assess their effectiveness.

Table F.1 **Regulator assessment of the effectiveness of communication modes — websites and social media[a]**

Per cent of regulators using this communication mode

	Regulator's website	*One stop shop websites*	*Social media*
Never used	3	34	61
Very ineffective	0	1	1
Ineffective	1	5	2
Neutral	11	34	18
Effective	67	25	15
Very effective	17	2	3

a PC regulator survey question 8. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

Issues surrounding implementation

Key features that make websites useful include: information that is well set out, comprehensive and easy to understand, collated by business type and topic; and the links are useful (NAO 2008).

Evidence of small business views on regulator communication provided by COSBOA (sub. 31) indicates some discrepancy between regulator and business perceptions of the usefulness of various communication approaches. In particular, small businesses reported regulator websites to be less useful than advice from third parties (such as accountants and solicitors) or from other business owners. That said, third parties often rely on the information provided via regulator websites, which they then draw on for disseminating information on regulatory requirements to small business.

The Commission heard that many small businesses feel that there is scope for improvement in the use of government websites and other electronic modes of communication. The SBDC (WA) (sub. 22), for example, noted that regulator websites varied significantly in their layout, ease of finding relevant policies and procedures, and provision of contact details. In some cases there was so much information that it was difficult for small business to find relevant documents. In other cases, websites had so little information (for example, local government websites) that business had to either go into the office to obtain documents or request that they be posted or emailed.

COAG's Business Regulation and Competition Working Group warned in its recently endorsed guide for government best practice consultation with small business, that: '[s]imply uploading a 25 page document outlining your proposed policy to your agency website will have limited reach within the small business community (2012b, p. 4)'.

One respondent to the PC regulator survey noted that in their experience, small business operators were more likely than larger firms to find navigation of regulator websites confusing and to have greater difficulty understanding procedures — problems that were exacerbated for regional based businesses, that often had slow internet connections and slower mail turnaround.

As the introduction or upgrading of electronic modes of communication can be very costly, regulators, before proceeding, need to undertake appropriate analysis and pilot testing to assess whether the benefits are likely to exceed the costs. Moreover, as some small businesses do not operate online, regulators need to ensure that other means of communication are also available.

F.2 On-site visits, relationship managers and staff placements

Direct or personalised communication such as face-to-face meetings can sometimes be the most effective means of communication between regulators and business.

- *On-site visits* by regulators provide an opportunity for small businesses to obtain relevant and timely advice and guidance on meeting their regulatory obligations.
- The use of *relationship managers* can help build mutual respect and trust, provide effective guidance and foster associations between key personnel in business and regulators (ANAO 2007).
- *Staff placements* (of regulator staff in business or industry associations, or business staff in regulators) can also help improve mutual understanding between business and regulators.

Application by regulators

On-site visits were used by almost all regulators to communicate with business. Almost all rated them as effective, with 35 per cent rating them as 'very effective' and no regulators found them to be ineffective (table F.2). Around half of regulators used relationship managers and these were generally rated as effective. Staff placements were not commonly used by regulators, and in cases where they were, regulators, as often as not, rated their effectiveness as 'neutral'.

Table F.2 **Regulator assessment of the effectiveness of communication modes — on-site visits, relationship managers and staff placements[a]**

Per cent of regulators using this communication mode

	On-site visits	*Relationship managers*	*Staff placements*	
			Regulator staff in business	*Business staff in regulator*
Never used	8	49	86	88
Very ineffective	0	1	0	0
Ineffective	0	1	1	1
Neutral	8	12	6	6
Effective	49	31	4	3
Very effective	35	7	2	1

a PC regulator survey question 8. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

Issues surrounding implementation

Although resource intensive, direct communication with business has the advantage of allowing tailoring of information to meet the needs of individual businesses. This can be valuable in instances where, for example, small businesses have limited experience or knowledge of regulatory requirements.

COSBOA noted that placing regulator staff, particularly field officers, for three month periods into industry associations:

> … would provide that person with a better understanding of issues for small business and better ways to communicate and also develop improved processes. It also would inform the members and staff of the associations about the way government agencies work and better ways of influencing process and policy (sub. 15, p. 10).

Clearly, in cases where regulator resources are limited, the placement of staff in business or industry associations would need to be undertaken with care to ensure that it did not result in a reduction in the quality of the services provided by the regulator.

With regard to relationship managers, the Commission heard that they should be used selectively. One respondent to the PC regulator survey noted that while they may be seen as effective from the perspective of small business, downsides included the risk, or perceived risk, of regulatory capture, limited effectiveness and that they diverted resources from core activities underpinning regulator service standards.

F.3 Industry groups

The ACCI (sub. 5) notes that, overall, less than half of small businesses receive information about regulatory changes directly from the regulator or government agency (whereas the majority of large businesses do). Industry groups and professional associations are a key source of information and advice for small business.

Application by regulators

Industry groups are widely used to communicate with business, with over 95 per cent of regulators using them, and only 1 per cent rating them ineffective (table F.3).

Table F.3 **Regulator assessment of the effectiveness of communication modes — industry groups[a]**

Per cent of regulators using this communication mode

	Industry groups
Never used	4
Very ineffective	0
Ineffective	1
Neutral	14
Effective	66
Very effective	14

a PC regulator survey question 8. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

As with regulators, small businesses generally considered information disseminated through industry groups to be one of the most useful forms of communication on regulatory requirements (COSBOA, sub. 31).

Issues surrounding implementation

Industry groups generally have well established membership groups and effective methods in place that are well suited to communicating messages on behalf of regulators. These can include industry newsletters and other publications; industry expos and training sessions operated in conjunction with the regulator.

F.4 Seminars, workshops and focus groups

Many regulators make use of seminars and workshops to provide advice and guidance to business on regulatory obligations and how to meet them; advance notice of impending changes; tailored advice and training on specific aspects of the regulatory requirements; and for specific sectors of regulated businesses that have been identified as requiring help.

Business focus groups are also used by regulators to gain an understanding of business knowledge and awareness of regulatory requirements.

Application by regulators

Seminars and workshops are widely used, with the majority of regulators rating them either effective or very effective (table F.4). Focus groups were also both widely used and generally rated as effective.

Table F.4 **Regulator assessment of the effectiveness of communication modes — seminars/workshops and business focus groups**[a]

Per cent of regulators using this communication mode

	Seminars/workshops	*Business focus groups*
Never used	10	21
Very ineffective	1	1
Ineffective	1	2
Neutral	12	17
Effective	53	47
Very effective	23	12

[a] PC regulator survey question 8. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

Issues surrounding implementation

The Commission has heard that small businesses can at times be more willing to participate in training sessions that are run by industry and professional associations (albeit often with behind-the-scenes support by the regulator) than training sessions run by the regulator alone.

F.5 Advice hotlines/help desks

Help desks can provide business with a simple and relatively easy way of accessing the regulator. The Commission heard that small businesses were more likely to use help desks and hotlines than large firms — the latter being more likely to contact agency relationship managers or write formally to the relevant general manager.

Application by regulators

More than 80 per cent of regulators provide hotlines and help desks, with the majority of regulators rating them as effective (table F.5).

Table F.5 **Regulator assessment of effectiveness of different communication modes — advice hotlines/help desks**[a]

Per cent of regulators using this communication mode

Never used	17
Very ineffective	1
Ineffective	1
Neutral	13
Effective	46
Very effective	22

[a] PC regulator survey question 8. Survey includes responses from 187 regulators.

Source: PC regulator survey 2013.

Issues surrounding implementation

The most common concern with regard to help desks is the amount of time small businesses sometimes spend waiting for operators to answer their phones, with waiting periods sometimes exceeding one hour (Office of the NSW Small Business Commissioner, sub. 12, Tasmanian Small Business Council, sub. 13). The point was made that owner operators of small businesses who need to talk to an agency ' … will not have the time to be on hold for long periods of time as they have customers to attend to' (SBDC (WA), sub. 22, pp. 7-8).

The Commission also heard that help lines for the ATO and Centrelink had improved markedly in recent years — moving from an adversarial attitude to a more educative and facilitative approach, reducing stress for small business. Strong Strategies noted in this regard:

> Whereas previously I worked with clients to try and fix problems without the stress of involving the regulator I now consider the help lines to be a good resource (as long as I pick the right time to ring!) (Strong Strategies, sub. 19, p. 7).

For a regulator, determining the optimal level of resources to devote to call centres requires assessing the benefits, including shorter waiting times and better quality advice for businesses that used these services, against the added cost of factors such as hiring and training additional operators, and expanding contact hours outside normal business trading times.

The Commission heard a number of examples of regulators reviewing the usefulness of their call centres, including monitoring waiting times, quality of advice, satisfaction levels within business and other relevant aspects bearing on their effectiveness. In 2011, the ATO, for example, commissioned ORC International to undertake research to track and monitor its call centre service on a monthly basis. Issues examined included customer satisfaction, how quickly queries

were resolved and the time taken for calls to be answered. The results of the survey were placed on the ATO's website.

Monitoring of call centre queries can also indicate specific gaps in industry understanding that may be leading to increased compliance costs for business or other adverse regulatory outcomes.

References

ABS (Australian Bureau of Statistics) 2000, *Small Business in Australia 1999*, Cat. no. 1321.0, Canberra.

—— 2002, *Characteristics of Small Business, Australia, 2001*, Cat. no. 8127.0, Canberra.

—— 2008, *Counts of Australian Business Operators, 2006 to 2007*, Cat. no. 8175, Canberra.

—— 2013a, *Australian Industry, 2011-2012*, Cat. no. 8155, Canberra.

—— 2013b, *Counts of Australian Business, Including Entries and Exits, June 2008 to June 2012*, Cat. no. 8165, Canberra.

—— 2013c, *Summary of IT Use and Innovation in Australian Business, 2011-12*, Canberra.

ACCC (Australian Competition & Consumer Commission) 2013a, *Compliance & enforcement policy*, Compliance & enforcement policy.

—— 2011, *Guide to Collective Bargaining Notifications*, Canberra.

—— 2013b, *Small Business Consultative Committee*, http://www.accc.gov.au/about-us/consultative-committees/small-business-consultative (accessed 20 June 2013).

ACCI (Australian Chamber of Commerce and Industry) 2012, *ACCI National Red Tape Survey*, October.

Adler, J. 2000, 'Shifting players', *Journal of Property Management*, vol. 65, no. 4, pp. 18–22.

AFMA (Australian Fisheries Management Authority) 2008, *Small Pelagic Fishery Harvest Strategy*, June, http://www.afma.gov.au/wp-content/uploads/2013/04/Small-Pelagic-Fishery-Harvest-Strategy.pdf (accessed 30 May 2013).

—— 2012a, *Letter to the Canberra Times which remains unpublished*, 3 September, http://www.afma.gov.au/2012/08/super-trawler-faqs-3/ (accessed 19 June 2013).

—— 2012b, *'Super trawler' fears unfounded*, May, http://www.afma.gov.au/2012/05/super-trawler-fears-unfounded/ (accessed 27 May 2013).

Almeida, R. and Carneiro, P. 2008, *Enforcement of labor regulation and firm size*, Social Protection Discussion Paper, 43675, The World Bank, http://ideas.repec.org/p/wbk/hdnspu/43675.html (accessed 6 May 2013).

ANAO (Australian National Audit Office) 2006a, *Export Certification: Australian Quarantine and Inspection Service*, September, Canberra.

—— 2006b, *Regulation of Pesticides and Veterinary Medicines*, December, Canberra.

—— 2007, *Administering Regulation: Better Practice Guide*, Canberra.

—— 2011a, *Development and Implementation of Key Performance Indicators to Support the Outcomes and Programs Framework*, November, Canberra.

—— 2011b, *Risk Management in the Processing of Sea and Air Cargo Imports*, November, Canberra.

—— 2011c, *The Management of Compliance in the Small to Medium Enterprises Market*, Canberra.

—— 2011d, *Therapeutic Goods Regulation: Complementary Medicines*, Canberra.

—— 2012, *Administration of the Northern Australia Quarantine Strategy*, June, Canberra.

—— 2013a, *Administration of the Domestic Fishing Compliance Program*, February, Canberra.

—— 2013b, *The Australian Government Performance Measurement and Reporting Framework*, Canberra.

Anginer, D., Narayanan, M.P., Schipani, C.A. and Seyhun, H.N. 2012, 'Should size matter when regulating firms? Implications from backdating of executive options', *Journal of Legislation and Public Policy*, vol. 15, no. 1, pp. 1–28.

ARC (Administrative Review Council) 2000, *Internal Review of Agency Decision Making*, Report to the Attorney-General, Canberra.

ASIC (Australian Securities and Investments Commission) 2012, *Regulation Impact Statement: ASIC Implementation of the National Credit Act: Training and Competence of Credit Licensees*, Melbourne.

ATAP Victoria (Australian Tourism Accreditation Program Victoria) 2010, *Information for Operators*, http://www.atapvic.net.au/informationforops.php (accessed 24 June 2013).

ATO (Australian Taxation Office) 1997, *A Report into the Taxpayer Costs of Compliance*, Canberra.

—— 2012a, *Electronic Commerce Interface (ECI) software*, http://www.ato.gov.au/onlineservices/content.aspx?doc=/content/50871.htm&mnu=42420&mfp=001/010 (accessed 20 June 2013).

—— 2012b, *Guide to Small Business Entity Concessions*, http://www.ato.gov.au/content/00231250.htm (accessed 19 December 2012).

—— 2013, *Small Business Partnership charter*, http://www.ato.gov.au/content/00212081.htm (accessed 20 June 2013).

ACT Auditor-General 2011, *Management of Food Safety in the Australian Capital Territory*, performance audit report, no. 6, Canberra.

AUSTRAC (Australian Transaction Reports and Analysis Centre) 2009, *Small Business Checklist: Are you Managing your AML/CFT Obligations?*

Australian Government 2011, *Small Business Fair Dismissal Code*, http://www.fairwork.gov.au/Templatesformschecklists/Small-Business-Fair-Dismissal-Code-2011.pdf (accessed 29 May 2013).

—— 2012, *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio: Report to the Australian Government*, Department of Finance and Deregulation, Canberra.

Australian Industry Group 2011, *National CEO Survey: Business Regulation*, September, Sydney.

Australian Public Service Commission 2005, *Working Together: Principles and Practices to Guide the Australian Public Service*, http://www.apsc.gov.au/publications-and-media/archive/publications-archive/working-together (accessed 7 May 2013).

Australian Quarantine and Inspection Service 2009, *Audit Regime for Fish Exports: A Guideline to Compliance with the Export Control (Fish & Fish Products) Orders 2005*, Canberra.

Australian Recreational Fishing Foundation 2013, *Anglers Unite to Oppose 'Super Freezer' Bid*, http://www.fishingworld.com.au/news/anglers-unite-to-oppose-super-freezer-bid (accessed 18 June 2013).

Australian Small Business Commissioner 2013, *Our Role*, http://www.asbc.gov.au/about/our-role (accessed 17 June 2013).

Ayres, I. and Braithwaite, J. 1992, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York.

Bartle, I. and Vass, P. 2005, *Self-Regulation and the Regulatory State: A Survey of Policy and Practice*, research report 17, School of Management, University of Bath.

BCC (Brisbane City Council) 2010, *Food Safety Checklist*, Brisbane, http://www.brisbane.qld.gov.au/2010%20Library/2009%20PDF%20and%20Docs/5.Community%20Support/Safety_Eat_Safe_Brisbane_Food_Safey_Checklist.pdf (accessed 29 April 2013).

—— 2012, *Annual Plan: Budget Full Fees and Charges*, Brisbane, http://www.brisbane.qld.gov.au/downloads/about_council/council_information_rates/news_publications/annual_plan_budget_full_fees_charges.pdf (accessed 29 April 2013).

Beale, H. and Lin, K. 1998, *Impacts of Federal Regulations, Paperwork and Tax Requirements on Small Business*, December, report to the Small Business Administration, Washington D.C.

Beddall, D. (House of Representatives Standing Committee on Industry, Science and Technology) 1990, *Small Business in Australia: Challenges, problems and opportunities*, Canberra.

Better Regulation Commission (UK) 2006, *Risk, Responsibility and Regulation - Whose Risk is it Anyway?*, London.

Bickerdyke, I. and Lattimore, R. 1997, *Reducing the Regulatory Burden: Does Firm Size Matter?*, Industry Commission staff research paper, December, AGPS, Canberra.

Black, J. 2010, 'Risk–based regulation: choices, practices and lessons being learnt', in OECD (ed), *Risk and Regulatory Policy: Improving the Governance of Risk*, Paris, pp. 181–228.

—— and Baldwin, R. 2010, 'Really responsive risk-based regulation', *Law and Policy*, vol. 32, no. 2, pp. 181–213.

Blair, A. 2005, 'Risk and the State', address to the Institute of Public Policy Reasearch.

Blanc, F. 2012, *Inspection Reforms; Why, How, and with what Results*, OECD, Paris.

Borthwick, D. 2012, *Review of Commonwealth Fisheries: Legislation, Policy and Management*, December.

—— and Milliner, R. 2012, *Independent Review of the Australian Government's Regulatory Impact Analysis Process*.

Bradbury, D. (Minister for Finance and Deregulation) 2013, *Driving Greater Awareness of Standard Business Reporting*, 18 March, no. 34, http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/034.htm&pageID=003&min=djba&Year=&DocType=0 (accessed 13 May 2013).

Bradford, C.S. 2004, 'Does size matter - An economic analysis of small business exemptions from regulation', *Journal of Small and Emerging Business Law*, vol. 8, pp. 1–37.

BRDO (Better Regulation Delivery Office) 2013, *Primary Authority*, http://www.bis.gov.uk/brdo/primary-authority (accessed 21 June 2013).

BRE (Better Regulation Executive) 2008, *Improving Outcomes from Health and Safety*, August, Department for Business Enterprise and Regulatory Reform, London.

BRO (Better Regulation Office, NSW) 2008, *Risk-Based Compliance*, Sydney.

BSA (Building Services Authority) 2012, *Strategic Plan 2012-2017*, Brisbane, http://www.bsa.qld.gov.au/SiteCollectionDocuments/Generic/Publications/BSA%20Strategic%20Plan%202012-2017.pdf (accessed 3 April 2013).

Business Advisory Forum Taskforce 2012, *Business Advisory Forum Taskforce Report on Progress, December 2012*, Department of Prime Minister & Cabinet, Canberra, http://www.dpmc.gov.au/publications/baf/docs/Business-Advisory-Forum-Progress-Report.pdf (accessed 7 May 2013).

Campbell Research & Consulting 2003, *General Practice Compliance Costs Case Study Project*, vol. 1, final report, report for the Productivity Commission, Clifton Hill, Victoria.

Carson, V. 2010, 'Dirty laundry', *Sydney Morning Herald*, 21 October, http://www.smh.com.au/national/dirty-laundry-20101020-16udi.html (accessed 30 April 2013).

CASA (Civil Aviation Safety Authority) 2011, *Standards Development Manual: Annex 8A, Safety Risk Assessment*, Canberra, http://www.casa.gov.au/wcmswr/_assets/main/manuals/regulate/rdm/260rx8a.pdf (accessed 26 April 2013).

Chant Link & Associates 2011, *A Research Report: GST and Simplified Accounting Methods*, project 3396, report prepared for the ATO, Camberwell South, Victoria.

Chittenden, F., Kauser, S. and Poutziouris, P. 2002, *Regulatory Burdens of Small Business: A Literature Review*, Manchester Business School, University of Manchester.

——, Poutziouris, P. and Michaeleas, N. 2000, *Small Business Taxation: an Agenda for Growth*, NatWest Bank Publications, https://www.escholar.manchester.ac.uk/uk-ac-man-scw:5b440 (accessed 1 May 2013).

COAG (Council of Australian Governments) 2007, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, Canberra.

—— 2012a, *COAG Meeting, 13 April 2012*, communiqué, Canberra.

—— 2012b, *Identifying Unnecessary and Ineffective Regulations*, final report, report from the Commonwealth Minister for Small Business, Canberra.

Commonwealth Office of Small Business 2000, *Giving Small Business a Voice - Developing Strategies for Informaing Small Business about Regulation*, Department of Employment, Workplace Relations and Small Business, Canberra.

Commonwealth Ombudsman 2009, *Better Practice Guide to Complaint Handling*, Canberra.

—— 2011, 'Promises, Prospects and Performance in Public Administration', address to the National Administrative Law Forum, Canberra.

Consumer Affairs Victoria 2008, *Better Business Regulation*, research paper, 14 May, Melbourne.

—— 2013, *Business Licensing Authority*, Melbourne, http://www.consumer.vic.gov.au/bla (accessed 29 May 2013).

DAFF (Department of Agriculture, Fisheries and Forestry) 2011a, *Better Regulation of Agricultural and Veterinary Chemicals: Regulatory Impact Statement*, Canberra.

—— 2011b, *Decision–Making Using a Risk Based Framework: Fact Sheet No. 1*, Better Regulation of Agricultural and Veterinary Chemicals, Canberra, http://www.daff.gov.au/agriculture-food/ag-vet-chemicals/better-regulation-of-ag-vet-chemicals/decision-making-using-risk-based-framework (accessed 21 March 2013).

—— 2013, *Better Regulation of Agricultural and Veterinary Chemicals*, http://www.daff.gov.au/agriculture-food/ag-vet-chemicals/better-regulation-of-ag-vet-chemicals (accessed 14 June 2013).

Department of Finance and Deregulation 2012, *Commonwealth Regulators Framework*, Canberra.

Department of Health and Ageing 2007, 'Food Safety Risk Priority Classification Framework', Canberra, http://www.health.gov.au/internet/main/publishing.nsf/Content/12F61D1DBAFBE5F0CA257A7F0008464A/$File/Risk%20Profiling.ppt (accessed 17 April 2013).

DIISRTE (Department of Industry, Innovation, Science, Research and Tertiary Education) 2012, *Australian Small Business Key Statistics and Analysis*, Canberra.

Dixon, P., Picton, M. and Rimmer, M. 2002, *Payroll taxes: Thresholds, Firm Sizes, Deadweight Loss and Commonwealth Grants Commission Funding*, December, Centre of Policy Studies, Monash University.

DoFA (Department of Finance and Administration) 2012, *Strategic review of small and medium agencies in the Attorney-General's Portfolio: Report to the Australian Government*, January, Canberra.

DSDIP (Department of State Development, Infrastructure and Planning) 2013, *Guidelines to State Development Area Fees*, January.

ENSR (European Network for SME Research) 1995, *The European Observatory for SMEs: Third Annual Report*.

EPA (Environment Protection Authority Victoria) 2011, *Compliance and Enforcement Policy*, June.

—— 2013, *Licensed Operator Risk Assessment*, http://www.epa.vic.gov.au/our-work/licences-and-approvals/lora (accessed 22 May 2013).

Europe Economics 2003, *Costs of Compliance*, June, London.

European Commission 2011, *Minimizing Regulatory Burdens for SMEs: Adapting EU Regulation to the Needs of Micro-Enterprises*, final report, report from the Commission to the Council and the European Parliament.

Fearon, P. (Director of Energy Safety) 2012, *Energy Safe Victoria Response - Statement of Expectation*, 13 February, Victorian Department of Primary Industries, Melbourne.

Forsaith, D. and Hall, J. 2001, 'Financial ratios and the size classification of small business: some Australian evidence', *Flinders University, School of Commerce, Research paper series.*

FPB (The Forum of Private Business) 2000, *58th Quarterly Survey of Private Business*, quarterly 2.

Freiberg, A. 2000, 'Effective Compliance and Enforcement Policies', presented at Smart Compliance for the New Millenium, Adelaide, 30 March.

FSANZ (Food Standards Australia New Zealand) 2001, *Food Safety: The Priority Classification System for Food Businesses*, Canberra.

Gago, G. (Minister for Agriculture, Food and Fisheries) 2012, *Aquaculture Changes to Benefit Business*, 26 October, http://www.premier.sa.gov.au/images/news_releases/12_10Oct/aqua_act.pdf (accessed 24 April 2013).

GBRMPA (Great Barrier Reef Marine Park Authority) 2010, *Tourism Operators Responding to Climate Change: Certification - Recognising Best Practice*, Townsville, Queensland.

—— 2012, *Recreation Management Strategy for the Great Barrier Reef Marine Park*, Townsville, Queensland.

Gilligan, G., Bird, H. and Ramsay, I. 1999, 'Civil penalties and the enforcement of directors' duties', *University of New South Wales Law Journal*, vol. 22, no. 2, www.austlii.edu.au/au/journals/UNSWLJ/1999/3.html (accessed 3 April 2013).

Gunningham, N. 1999, 'Integrating management systems and occupational health and safety regulation', *Journal of Law and Society*, vol. 26, no. 2, pp. 192–214.

——, Kagan, R. and Thorton, D. 2003, *Shades of Green: Business Regulation and Environment*, Stanford University Press, Palo Alto, California.

——, —— and —— 2005, 'Motivating management: corporate compliance in environmental protection', *Law and Policy*, vol. 27, no. 2, pp. 289–316.

—— and Sinclair, D. 2011, *Culture Eats Systems for Breakfast: On the Limitations of Management-Based Regulation*, November, working paper 83, National Research Centre for OHS Regulation, ANU, http://regnet.anu.edu.au/sites/default/files/WorkingPaper_83.pdf (accessed 27 May 2013).

Hayes, T. 2012, 'ATO audit risks for SMEs that mix private and business expenses', *SmartCompany*, 13 December, http://www.smartcompany.com.au/tax/053409-ato-audit-risks-for-smes-that-mix-private-and-business-expenses-2.html (accessed 2 April 2013).

Health and Safety Commission (UK) 1993, *Advisory Comittee on the Safety of Nuclear Installations (CSNI) Study Group on Human Factors Third Report: Organising for Safety*, Health and Safety Executive, London.

Henson, S. and Heasman, M. 1996, *The Cost of Compliance with Food Regulations in the U.K.*, Food Economics Group, Department of Agricultural Economics and Management, University of Reading.

Hopkins, T. 1995, *Profiles of Regulatory Costs*, report to the Small Business Administration, Office of Advocacy, Washington D.C.

—— 1996, *Cost of Regulation: Filling the Gaps*, report prepared for the Office of Management and Budget of the US Government, Washington D.C.

—— 1998, *A Survey of Regulatory Burdens*, report to the Small Business Administration, Office of Advocacy, Washington D.C.

HWSA (Heads of Workplace Safety Authorities) 2008, *National Occupational Health & Safety (OHS) Compliance and Enforcement Policy*, December.

IFF Research 2012, *Business Perceptions Survey 2012*, National Audit Office, London.

Indecon 2006, *Regulating the Small Business Sector*, report for the Small Business Forum.

Industry Canada 2012, *Key Small Business Statistics*.

Inland Revenue 1998, *The Tax Compliance Costs for Employers of PAYE and National Insurance in 1995-1996*, The Centre for Fiscal Studies, University of Bath.

Inspector-General of Taxation 2010, *Report into Delayed or Changed Australian Taxation Office Views on Significant Issues*, March, Canberra.

—— 2012, *Review into the Australian Taxation Office's use of Early and Alternative Dispute Resolution*, report to the Assistant Treasurer, Canberra.

Jabour, B. 2013, 'New liquor licence a boon for small bars', *Brisbane Times*, 14 February, http://www.brisbanetimes.com.au/queensland/new-liquor-licence-a-boon-for-small-bars-20130213-2ediz.html (accessed 14 February 2013).

Jennings, D. 2002, 'Strategic sourcing: benefits, problems and a contextual model', *Management Decision*, vol. 40, no. 1, pp. 26–34.

Jordan, C. 2013, 'Tax, the Way Ahead', address to the Tax Institute 28th Annual Convention, Perth.

King & Wood Mallesons 2012, *A Guide to Doing Business in Australia*.

Knaus, C. 2013a, 'Dry cleaners have their say', *Canberra Times*, 1 February, http://www.canberratimes.com.au/act-news/dry-cleaners-have-their-say-20130131-2dnvv.html (accessed 1 February 2013).

—— 2013b, 'Fears for safety at dry cleaners', *Canberra Times*, 28 January, http://www.canberratimes.com.au/act-news/fears-for-safety-at-dry-cleaners-20130127-2dfg4.html (accessed 1 February 2013).

KPMG Econtech 2010, *CGE Analysis of the Current Australian Tax System, Final Report*, March.

Kremic, T., Tukel, O.I. and Rom, W.O. 2006, 'Outsourcing decision support: a survey of benefits, risks, and decision factors', *Supply Chain Management: An International Journal*, vol. 11, no. 6, pp. 467–482.

Krpan, S. 2011, *Compliance and Enforcement Review: A Review of EPA Victoria's Approach*, February, Carlton, Victoria.

Lancaster, R., Talbot, P. and Brazier, A. 2003, *Cost of Compliance with Health and Safety Regulation in SMEs*, research report 174, prepared by Entec UK Limited for the Health and Safety Executive.

Lattimore, R., Martin, B., Madge, A. and Mills, J. 1998, *Design Principles for Small Business Programs and Regulations*, Productivity Commission Staff Research Paper, Canberra.

LBRO (Local Better Regulation Office) 2011, *Local Better Regulation Office Annual Report and Accounts 2010-2011*, London.

Macdonald, R. 2012, *Report of the Independent Farming Regulation Task Force: Follow up*, 13 June, HC 308, Environment, Food and Rural Affairs Committee, House of Commons, London.

McIntyre, K. and Moore, B. 2002, 'National road transport compliance and enforcement reforms: On the road to a new national culture of compliance', presented at Current Issues in Regulation: Enforcement and Compliance Conference, Melbourne, 2 September.

Mills, T. (Minister for Lands, Planning and the Environment) 2012, *Debates*, Northern Territory Assembly, 25 October, Parliamentary Record No. 1, http://notes.nt.gov.au/lant/hansard/hansard12.nsf/WebbySubject/0EE058009D3D9B5869257AF5007FCA12?opendocument (accessed 15 May 2013).

NAO (National Audit Office) 2008, *Regulatory Quality: How Regulators are Implementing the Hampton Vision*, London.

National Alternative Dispute Resolution Advisory Council 2012, *Your Guide to Dispute Resolution*, Attorney-General's Department, Canberra.

National Measurement Institute 2011, *Compliance and Enforcement Policy*.

Nehme, M. 2010, 'Enforceable Undertakings: Are They Procedurally Fair?', *Sydney Law Review*, vol. 32, p. 471.

Neist, L. 2012, 'Mind the organisational safety gap', *Safety Institute of Australia OHS Professional Magazine*, March.

New South Wales Auditor General 2011, *Performance Audit: Transport of Dangerous Goods*, Sydney.

New Zealand Ministry of Business, Innovation and Employment 2012, *Government Response to the Small Business Advisory Group Report*.

NSW Attorney General 2010a, *Caution Guidelines Under the Fines Act 1996*, Sydney, http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/caution_guidelines_under_the_fines_act_pdf.pdf (accessed 27 May 2013).

—— 2010b, *Internal Review Guidelines Under the Fines Act 1996*, Sydney, http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/internal_review_guidelines_under_the_fines_act.pdf (accessed 17 June 2013).

NSW Ombudsman 2002, *Enforcement Guidelines for Councils*, June, Sydney.

NSWFA (New South Wales Food Authority) 2008, *Microbial Quality of High Risk Bakery Products*, Sydney, http://www.foodauthority.nsw.gov.au/_Documents/corporate_pdf/bakery_survey_08_final_report.pdf (accessed 4 April 2013).

—— 2010a, *NSW Food Authority Compliance and Enforcement Strategy*, Sydney.

—— 2010b, *Priority Classification System*, Sydney.

—— 2011, *Audits of Licensed Businesses*, Sydney, http://www.foodauthority.nsw.gov.au/industry/audits-inspections-compliance/audits-of-licensed-businesses/#.UbkMKLX7CFc (accessed 4 April 2013).

—— 2013a, *NSW Food Authority Compliance and Enforcement Policy*, http://www.foodauthority.nsw.gov.au/_Documents/industry_pdf/compliance-enforcement-policy.pdf (accessed 6 May 2013).

—— 2013b, *Penalty notice publication protocol*, http://www.foodauthority.nsw.gov.au/news/offences/penalty-notice-publication-protocol/#.UUfoFBxmh8E (accessed 30 April 2013).

—— 2013c, *Summary report of NSW enforcement agencies' activities: Food retail and food service sector for 1 July 2011 to 30 June 2012*.

O'Brien, M. (Minister for Energy and Resources) 2011, *Energy Safe Victoria - Statement of Expectation*, 9 December, Victorian Department of Primary Industries, Melbourne.

OBPR (Office of Best Practice Regulation) 2012, *Prime Minister's Exemption — New Fishing Activities of Size and Scale Unprecedented in Commonwealth Marine Areas — Department of Sustainability, Environment, Water, Population and Communities*, September, http://ris.finance.gov.au/2012/09/14/prime-minister%e2%80%99s-exemption-%e2%80%93-new-fishing-activities-of-size-and-scale-unprecedented-in-commonwealth-marine-areas-%e2%80%93-department-of-sustainability-environment-water-population/ (accessed 27 May 2013).

OECD (Organisation for Economic Cooperation and Development) 2004, 'SME Statistics: Towards a more systematic statistical measurement of SME behaviour', presented at 2nd OECD Conference of Ministers responsible for small and medium-sized enterprises (SMEs): Promoting Entrepreneurship and Innovative SMEs in a Global Economy, Istanbul, 3 June.

—— 2010, *Risk and Regulatory Policy: Improving the Governance of Risk*, OECD Reviews of Regulatory Reform, Paris.

—— 2012a, *Financing SMEs and Entrepreneurs 2012: An OECD Scoreboard*.

—— 2012b, *Recommendation of the Council on Regulatory Policy and Governance*, Paris.

—— 2013a, *Draft OECD Best Practice Principles: Improving Regulatory Enforcement and Inspections*, April, Paris.

—— 2013b, *Draft OECD Best Practice Principles: The Governance of Regulators*, April, Paris.

Office of Regulation Review 1995, *Enforcing Australia's Food Laws: A Survey and Discussion of the Practices of Australian Food Regulation Enforcement Agencies*, Information Paper, November, Canberra.

OLGR (Office of Liquor and Gaming Regulation) 2013, *Guideline 52 – Bar Licences*, Brisbane, http://www.olgr.qld.gov.au/resources/liquorDocs/guideline52.shtml (accessed 3 April 2013).

Ombudsman Western Australia 2009, *Exercise of Discretion in Administrative Decision-Making*, October, Perth.

—— 2010, *2009-10 Survey of Complaint Handling Practices in the Western Australian*, Perth.

ORC International 2012, *ACCC Perceptions Research - Business*, Melbourne.

Parker, C. 2000, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, OECD, Paris.

Parliament of Victoria 2013, *Inquiry into the Impact of Food Safety Regulation on Farms and Other Businesses*, final report, Rural and Regional Committee, Government of Victoria, Melbourne.

PC (Productivity Commission) 2001, *Cost Recovery by Government Agencies*, report no. 15, Canberra.

—— 2004, *Reform of Building Regulation*, Research report, Canberra.

—— 2006, *Potential Benefits of the National Reform Agenda*, report to the Council of Australian Governments, Canberra.

—— 2008, *The Market for Retail Tenancy Leases in Australia*, Report no. 43, Canberra.

—— 2009a, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrstructure Services*, Research Report, Canberra.

—— 2009b, *Performance Benchmarking of Australian and New Zealand Business Regulation: Food Safety*, Research Report, Canberra.

—— 2010a, *Annual Review of Regulatory Burdens on Business: Business and Consumer Services*, Research Report, Canberra.

—— 2010b, *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety*, Research Report, Canberra.

—— 2011a, *Identifying and Evaluating Regulation Reforms*, Research Report, Canberra.

—— 2011b, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, Research Report, Canberra.

—— 2012a, *Impacts of COAG Reforms: Business Regulation and VET*, research paper, September, vol. 2, Canberra.

—— 2012b, *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator*, Research Report, Canberra.

—— 2012c, *Regulatory Impact Analysis: Benchmarking*, Research Report, Canberra.

Peterson, D. and Fensling, S. 2011, 'Risk–based regulation: good practice and lessons for the Victoria context', presented at Victorian Competition and Efficiency Commissions Regulatory Conference, Melbourne, 1 April.

Pierce, R. 1998, 'Small is not beautiful: the case against special regulatory treatment of small firms', *Administrative Law Review*, vol. 50, no. 3, pp. 537–578.

Planning NSW 2002, *Exercising Discretion*, April, Guiding Development - Practice Notes, Sydney.

Pope, J., Fayle, R. and Chen, D.. 1991, *The Compliance Costs of Public Companies' Income Taxation in Australia 1986/87*, Australian Tax Research Foundation, Sydney.

Queensland Department of Health 2006, *Local Government Assessment of Applications for a Licence Under the Food Act 2006*, Brisbane.

Queensland Government 2013, *Red Tape Reduction and other Reform Proposals for Regulation of Liquor and Gaming*, discussion paper, Department of Justice and Attorney General, Brisbane.

Queensland Ombudsman 2009, *Tips and Traps for Regulators*, October, second edition, Brisbane.

Quinn, J.B. 1999, 'Strategic outsourcing: leveraging knowledge capabilities', *Sloan Management Review*, vol. 40, no. 4, pp. 9–21.

RBA (Reserve Bank of Australia) 2012, *Small Business Finance Roundtable*, 22 May, http://www.rba.gov.au/publications/workshops/other/small-bus-fin-roundtable-2012/pdf/small-bus-fin-roundtable.pdf (accessed 27 November 2012).

Reason, J. 1997, *Managing the Risks of Organisation Accidents*, Ashgate Publishing Limited, Aldershot, England.

Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, report to the Prime Minister and the Treasurer, Canberra.

Safe Work Australia 2011, *National Compliance and Enforcement Policy*.

SBA (Small Business Administration) 1995, *The Changing Burden of Regulation, Paperwork and Tax Compliance on Small Business: A Report to Congress*, Office of Advocacy, Washington D.C.

SBRT (Small Business Research Trust) 1998, *Natwest Quarterly Survey of Small Businesses in Britain*, vol. 14, no. 1.

Schaper, M., Volery, T., Weber, C. and Lewis, K. 2010, *Entrepreneurship and Small Business*, 3rd Asia-Pacific edition, John Wiley & Sons, Milton, Qld.

Seafish Tasmania nd, *The Vessel*, http://seafishpelagic.com.au/the-vessel/ (accessed 28 May 2013).

Sims, R. 2013, 'Economic Philosophy & the ACCC (and we are all Economic Philosophers)', address to the National Press Club.

Sislian, E. and Satir, A. 2000, 'Strategic Sourcing: A Framework and a Case Study', *Journal of Supply Chain Management*, vol. 36, no. 3, pp. 4–11.

Small Business Deregulation Taskforce 1996, *Time for Business*, November, Australian Government, Canberra.

Socialist Republic of Vietnam 2009, *Decree no. 56/2009/ND-CP*, http://www.economica.vn/Portals/0/MauBieu/eedeb5241be5a5e74eb1bda4f7906563.pdf (accessed 29 May 2013).

Solicitors Regulation Authority (UK) 2012, *Strategy: Regulatory Risk Framework*, http://www.sra.org.uk/sra/strategy/risk-framework/regulatory-risk-framework.page (accessed 14 March 2013).

South Australian Tourism Industry Council 2013, *Australian Tourism Accreditation*, http://www.satic.com.au/index.php/programs/australian_tourism_accreditation (accessed 24 June 2013).

Southern Shark Industry Alliance 2012, *SSIA submission to the Review of Commonwealth Fisheries Management Legislation*, http://www.daff.gov.au/__data/assets/pdf_file/0006/2224419/Southern_Shark_Industry_Alliance.pdf (accessed 3 June 2013).

Sparrow, M. 2000, *The Regulatory Craft*, The Brookings Institution, Washington D.C.

SSA (State Services Authority) 2009, *Review of the Rationalisation and Governance of Regulators*, final report, Melbourne.

Tasmanian Audit Office 2012, *The Assessment of Land-Use Planning Applications*.

Uhrig, J. 2003, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, Australian Government, Canberra.

UK Department for Business Innovation and Skills 2013, *Consultation Paper, Amending the Regulators' Compliance Code*, March, Better Regulation Delivery Office, London.

UK Government (Hampton Review) 2005, *Reducing Administrative Burdens: Effective Inspection and Enforcement*, London.

UK Treasury 2012, *Autumn Statement 2012*, London.

US Small Business Administration 2013, *What is SBA's definition of a small business concern?*

Uttal, B. 1983, 'The Corporate Culture Vultures', *Fortune*, October, pp. 66–72.

VAGO (Victorian Auditor-General's Office) 2010a, *Control of Invasive Plants and Animals in Victoria's Parks*, Melbourne.

—— 2010b, *Hazardous Waste Management*, Melbourne.

—— 2011a, *Compliance with Building Permits*, Melbourne.

—— 2011b, *Managing Contaminated Sites*, Melbourne.

—— 2012, *Effectiveness of Compliance Activities: Departments of Primary Industries and Sustainability and Environment*, Melbourne.

—— 2013, *Management of Freshwater Fisheries*, Melbourne.

VCEC (Victorian Competition & Efficiency Commission) 2005, *Housing Regulation in Victoria: Building Better Outcomes*, Melbourne.

—— 2007, *Simplifying the Menu: Food Regulation in Victoria*, Melbourne.

—— 2009, *A Sustainable Future for Victoria: Getting Environmental Regulation Right*, Melbourne.

—— 2011a, *Business and for Profit Organisations' Perceptions of Victoria Regulations (Wallis Survey)*, Melbourne.

—— 2011b, *Strengthening Foundations for the Next Decade: An Inquiry into Victoria's Regulatory Framework*, final report, Melbourne.

VCGLR (Victorian Commission for Gambling and Liquor Regulation) 2012, *Liquor Licencing Fact Sheet: Liquor Licence Fees*, Richmond, Victoria.

Victorian Department of Health 2011, *Guide to the Food Act Changes, Effective 1 July 2010*, Melbourne, http://docs.health.vic.gov.au/docs/doc/07176C5D812B

E5D3CA25785C0001F89B/$FILE/guide-food-act-changes-201103.pdf (accessed 4 April 2013).

Victorian Department of Treasury and Finance 2013, *Guidelines for Preparing Reducing Red Tape Statements of Expectations for Regulators*, January, Melbourne.

Victorian Government 2012, *Victorian Government Response to the Victorian Competition and Efficiency Commission's Final Report - Strengthening Foundations for the Next Decade: An Inquiry into Victoria's Regulatory Framework*, March, Department of Treasury and Finance, Melbourne.

Victorian Parliament 2012, *Inquiry into the Impact of Food Safety Regulation on Farms and other Businesses*, 22 October, Rural and Regional Committee, Melbourne.

WA Department of Environment and Conservation 2012, *How to Apply - Accreditation*, http://www.dec.wa.gov.au/parks-and-recreation/for-industry/commercial-operations-licensing/how-to-apply.html?showall=&start=4 (accessed 24 June 2013).

WA Department of the Premier and Cabinet 2009, *Lead Agency Framework: A guidance note for implementation*.

Walpole, M., Evans, C., Ritchie, K. and Tran-Nam, B. 1999, 'Taxation compliance costs : some lessons from "Down-under"', *British Tax Review*, no. 4, pp. 244–271.

Western Australia Auditor General 2011, *Raising the bar: Implementing key provision of the Liquor Control Act in licensed premises*, March.

Wine Australia 2011, *Corporate Plan 2011-2014*, Adelaide.

—— 2012, *Annual Report 2011-2012*, Adelaide.

WorkCover NSW 1997, *Amenities for Construction Work*, Health and Safety Code of Practice 1997, Gosford, NSW.

WorkSafe Victoria 2012, *A guide for employers: Your workSafe Insurance*.