Australian Government
Department of Industry

Industry Officer's Guide to Regulation Reform

August 2014

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Purpose

The Government's deregulation agenda

The Australian Government is committed to a regulation reform agenda that increases the productivity and competitiveness of Australian industry through removing unnecessary government red tape. A key feature of the agenda includes reducing the regulatory burden for individuals, businesses and community organisations by at least $1 billion a year.

The role of the Industry Portfolio

One of our key roles is to build the competitiveness and productivity of Australian industry through the development of effective policy and programmes. Industry officers can achieve this by identifying unnecessary or inefficient regulation, considering options to streamline processes, better manage risks and implement regulation only if necessary.

Some practical examples which will help you include: using online 'smart form' application and registration forms, using the whole-of-government low risk grant agreement template, eliminating complexity in contracts and cutting down on reporting requirements. The savings we find for businesses through the deregulation agenda can be invested elsewhere, such as growing the business, investing in research and development or building internal skills.

How will this guide assist you?

This guide is relevant to Industry officers developing ***new*** policies and programmes, or ***reviewing*** existing regulations.

This guide will help you design objectives at least cost to businesses by thinking about practical ways of achieving good outcomes without necessarily resorting to regulation, through:

- consideration of alternatives to regulation when developing policy;
- providing best practice tools to regulation, review and consultation; and
- highlighting the new regulation impact statement (RIS) requirements.

Sections 1 and 2 apply if you are developing new policy, Section 4 applies if you are currently administering regulation and Sections 3 and 5 provides best practice regulation and consultation principles that apply throughout the policy cycle. This guide also includes quick checklists to assist you in applying these best practice principles.

Section 1: The Policy Design Process

Regulation should never be the default option. Whether or not regulation is necessary depends on the problem at hand and whether government intervention is necessary. Government should not act to address problems until a case for action has been clearly established.

What is regulation?

Regulation is any rule endorsed by government where there is an expectation of compliance. It includes legislation, regulations, quasi-regulations, and any other aspect of government or regulator behaviour that can influence or compel specific behaviour by business and the community. It also includes the red tape imposed by the Australian Government's procurement, grants and cost-recovery frameworks. Information sheets, questions and answers, explanatory manuals, guidelines or standards are ***not*** included.

The Australian Government Guide to Regulation sets out ten principles for Australian Government policy makers to consider before addressing a policy problem.

The ten principles are:

1. *regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option*
2. *regulation should be imposed only when it can be shown to offer an overall net benefit*
3. *the cost burden of new regulation must be fully offset by reductions in existing regulatory burden*
4. *every substantive regulatory policy change must be the subject of a Regulation Impact Statement*
5. *policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals*
6. *policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens*
7. *the information upon which policy makers base their decisions must be published at the earliest opportunity*
8. *regulators must implement regulation with common sense, empathy and respect*
9. *all regulation must be periodically reviewed to test its continuing relevance; and*
10. *policy makers must work closely with their portfolio Deregulation Units throughout the policy making process.*

When is a RIS required?

A RIS is mandatory for all Cabinet submissions and proposals that have more than a minor impact on business, community organisations or individuals.

The RIS process provides a framework for policy officers to consider non-regulatory alternatives to traditional regulation. Furthermore, it provides an opportunity for policy officers to objectively assess the costs versus the benefits of each policy option through the application of the net benefit test. All RISs are regularly uploaded on the OBPR website. Some exemptions to the RIS process apply in special cases.

There are three types of RISs: short, standard and long form. The table below summarises when each type of RIS is appropriate.

Type of RIS	What does it require?	Example
Short Form	■ *A summary of proposed policy options, overview of likely impacts and outline of regulatory costs and offsets.* ■ *This is only available for matters to be considered by cabinet.* ■ *There is a* Short Form RIS Template Guidance Note *available.*	■ Policy issues are simple, clear cut or policy alternatives are limited. ■ Regulatory impact of policy is of low priority. ■ RIS has recently been completed and only minor modifications have been made to original policy proposal. ■ Proposal is non-regulatory, minor or machinery in nature.
Standard Form	■ All seven RIS questions must be answered. ■ Evidence of appropriate public consultation. ■ A detailed presentation of regulatory costings and offsets.	■ Policy proposal has measurable but contained impact on the economy. ■ Proposed changes affect a relatively small number of stakeholders. ■ The administrative and compliance costs are measurable but not onerous. ■ There is unlikely to be vigorous opposition among stakeholders or the public. ■ The issue is uncontroversial and unlikely to attract media attention.
Long Form	■ All seven RIS questions must be answered. ■ Evidence of appropriate public consultation. ■ A detailed presentation of regulatory costings and offsets. ■ A formal cost-benefit analysis is required.	■ Policy proposal has substantial or widespread impact on the economy. ■ Proposed changes affect a large number of stakeholders. ■ The administrative and compliance costs are high or onerous. ■ There may be determined opposition among stakeholders or the public. ■ The issue is sensitive, contested and may attract media attention.

** **Please note** this table is only a guide to when a RIS is required. You should contact The Portfolio Regulation Reform Team for advice on when and what type of RIS is required.*

A RIS should shadow the policy development process and be considered at the earliest opportunity. This allows time to add further information, explore alternative options to regulation and consult stakeholders. This ensures that the final product is a well informed and high quality RIS.

There are two stages to the RIS assessment process: ***early*** and ***final***.

Early assessment

- OBPR can provide an early assessment once the first four RIS questions are completed.
- Line areas decide when and how often to submit RIS to OBPR.
- It is best practice to do so before each major policy decision.
- It is also best practice to have costs and offsets agreed with OBPR.
- The focus should be on consultation and compliance costs.

Final assessment

- Costs and offsets are required.
- Deputy Secretary certification is required.

What should you include in a RIS?

The seven RIS questions

There are seven questions that need to be considered when completing a RIS. They are:

1. *what is the problem you are trying to solve?*
2. *why is government action needed?*
3. *what policy options are you considering?*
4. *what is the likely net benefit of each option?*
5. *who will you consult about these options and how will you consult them?*
6. *what is the best option from those you have considered?*
7. *how will you implement and evaluate your chosen option?*

A RIS also needs to be accompanied by a Regulatory Burden and Cost Offset (RBCO) Estimate Table which quantifies any regulatory burden and identifies offsets. Further details on the RBCO can be found in the RBM Framework Guidance Note.

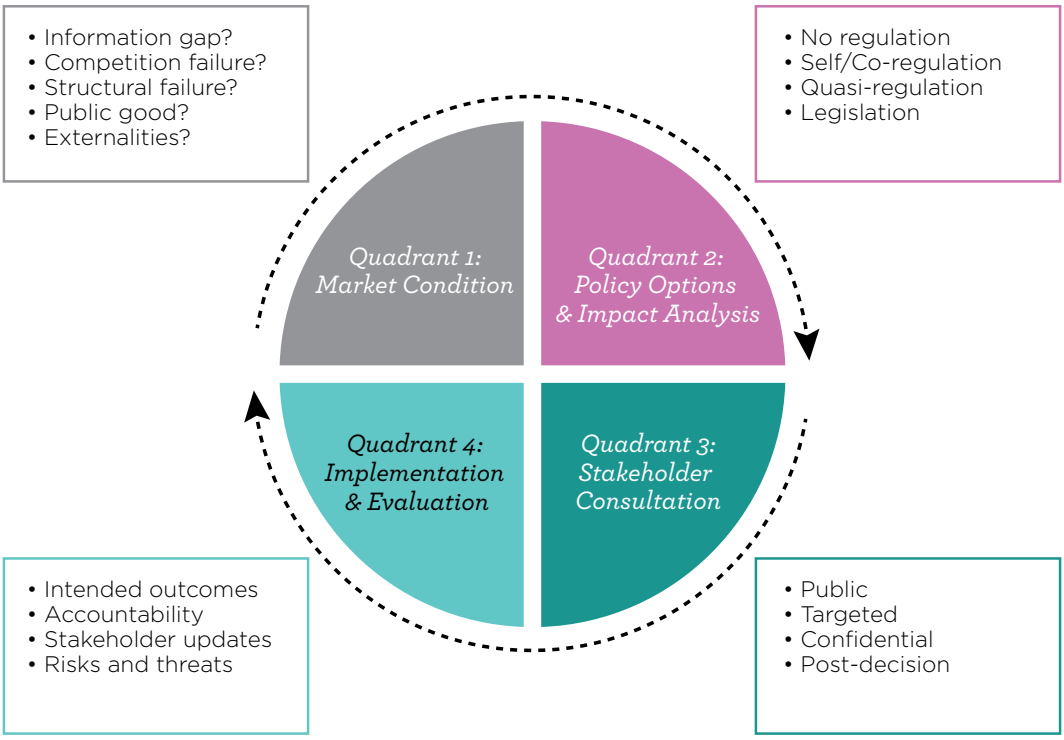
Portfolio Best Practice Regulation Coordinator

The portfolio Best Practice Regulation Coordinator acts as the single point of contact for the Industry portfolio on all general matters concerning regulatory changes. The objective of this role is to understand what regulation change activities are occurring across the portfolio. To do this, the portfolio Best Practice Regulation Coordinator is located in the Regulation Reform and Parliamentary Coordination Branch and maintains a central regulation reform register for the purpose of monitoring progress against the portfolio's deregulation target. Oversight of regulation change activities (including where RISs are required) provides an opportunity for the portfolio Best Practice Regulation Coordinator to ensure the quality of RISs being produced across the portfolio are consistent and meet best practice expectations. To assist with this and create consistency across the portfolio there will be a **Portfolio Best Practice RIS Template**.

Industry officers are required to contact the portfolio Best Practice Regulation Coordinator at PortfolioRegCoordinator@industry.gov.au. This should be done as soon as a regulatory change opportunity has been identified so that a Best Practice Regulation Identification can be issued and referenced in any internal briefing material. Additionally, the portfolio Best Practice Regulation Coordinator can assist line areas in navigating RIS requirements, regulation reform and cost calculation best practice guidelines and in liaising with OBPR.

The policy pie

The diagram below incorporates the seven RIS questions and takes you through the policy development process that should be undertaken when faced with a policy problem.



Quadrant 1: Is there a market failure? (RIS Qs 1 & 2)

The first quadrant deals with the first two RIS questions; what is the problem you are trying to solve and what government action is needed. In answering these questions, you should consider:

- how big is the problem?
- what is causing it?
- who is affected by it?
- what has government tried to date?

There is a stronger rationale for government intervention when a market failure exists. It is always best to identify the type of market failure being addressed. For example, a common market failure requiring consideration from the portfolio includes information asymmetry (or information gaps) facing many Australian small and medium enterprises (SMEs). These businesses often face difficulty in obtaining information as a result of them being small scale, time poor and locally based. Information gaps affect SMEs' level of understanding and reduce their capacity to capitalise on opportunities to compete globally. As a result of this market failure, the Australian Government may deliver a range of policies, programmes or information guides to assist SMEs increase their capability and competiveness as well as linking them to opportunities to facilitate growth and capability to compete at a global level. See the Policy Development Toolkit for further information.

Quadrant 2: Consider alternative instruments and net benefit (RIS Qs 3, 4 & 6)

The second quadrant takes into account RIS questions three, four and six, which look at the range of policy options, their net benefits and making a decision to choose the best option. Best practice should consider all genuine and viable alternative policy options. You must include in your RIS both 'no regulation' and 'status quo' options. Status quo is also about considering current resources and infrastructure and investigating new and innovative ways of maximising existing resources.

The alternatives and examples are explained in greater detail in section 2 and table 1 of this guide.

For each option the impact analysis should include a consideration of the following:

- who is affected?
- analysing costs and benefits (to whom do they accrue?):
  - *consumers:* prices, variety, availability, quality, convenience, safety and risk, access to information
  - *business:* compliance costs, uncertainty, complexity, market access, input prices, process modification, restrictions on competition
  - *government:* administration and enforcement costs
  - *community:*
    - public health and safety, environmental quality, economic growth, innovation, employment
    - need for societal costs and benefits
    - distributional/jurisdictional impacts
- quantify regulatory burden
- competition restrictions:
  - will the proposed regulation affect government business and private business in the same way?
  - governing the entry or exit of businesses into markets
  - controlling input or output prices
  - restricting the quality, quantity or location of goods and services
  - restricting advertising and promotional activities

The RIS must demonstrate that:

- restricting competition will result in a net benefit for the community; and
- the objective of the intervention cannot be achieved in any other way.

The depth of assessment should be proportionate to the impact of any proposed regulation, and far-reaching regulatory impacts warrant more stringent assessment.

The policy option chosen will need to demonstrate a net benefit, summarise the decision making process, and outline any caveats and reservations. For further information see the Cost-Benefit Analysis Guidance Note.

Quadrant 3: Stakeholder consultation (RIS Q 5)

Stakeholder consultation should be undertaken throughout the policy design process, but especially when identifying policy options and deciding on the policy response. Please see the **Best Practice Consultation Principles** on page 23 for further details on consultation.

Quadrant 4: Implementation and evaluation (RIS Q 7)

Lastly, irrespective of the type of policy, programme or regulation, the implementation and evaluation mechanisms should involve a continuous improvement approach by ensuring the policy response aligns with the intended policy, programme or regulation outcomes.

Evaluations provide an excellent opportunity to track particular responses against expected outcomes. It allows you to identify when a particular response is more effective than others. It is therefore essential to collect data to gather baseline and subsequent performance statistics to enable measurement of the impact of interventions. It is imperative that policy and programme officers, as well as regulators carefully consider the types of data necessary so as to not unnecessarily burden businesses but to adequately test impact at the earliest stage in the design and implementation of new measures.

For further information contact the Evaluation Unit at Evaluation.Unit@industry.gov.au.

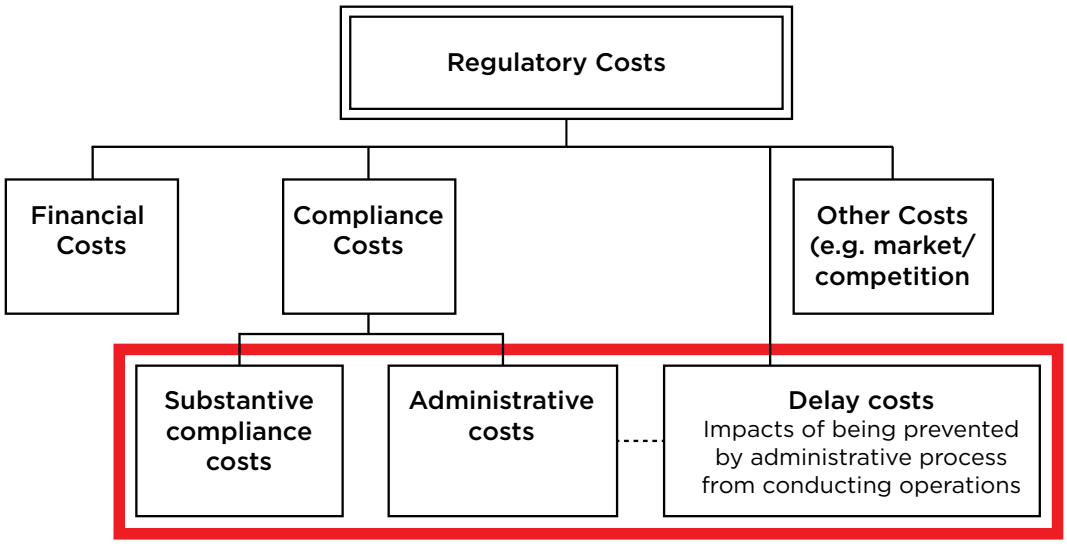
Offsets

For all new or amended regulation that increases compliance cost, an offset must be identified. You are responsible for identifying a regulatory saving within your division to offset increases in regulatory costs. Where possible, the offset should target the same group of stakeholders as well as the cost over the same time period.

If an ***offset cannot be identified or developed in time***, you may be able to draw from the portfolio's contribution to the target or from another area with agreement from the Regulation Reform and Parliamentary Coordination Branch. This offset may be provided on the condition that savings are achieved and will be returned to the portfolio's target within six months.

The Commonwealth Regulatory Burden Measurement (RBM) Framework

All new proposals require quantification of regulatory costs regardless of whether a RIS is required or not. Any proposal that increases regulatory burden must identify offsetting regulatory savings. You should use the RBM framework to quantify these regulatory costs and offsets.



Compliance costs

1. **Administrative costs:** *Costs incurred by regulated entities primarily to demonstrate compliance with the regulation.*
2. **Substantive compliance costs:** *Costs that directly lead to the regulated outcomes being sought.*
3. **Delay costs:** *Expenses and loss of income incurred by a regulated entity through an application delay and/or an approval delay.*

Exclusions from the RBM

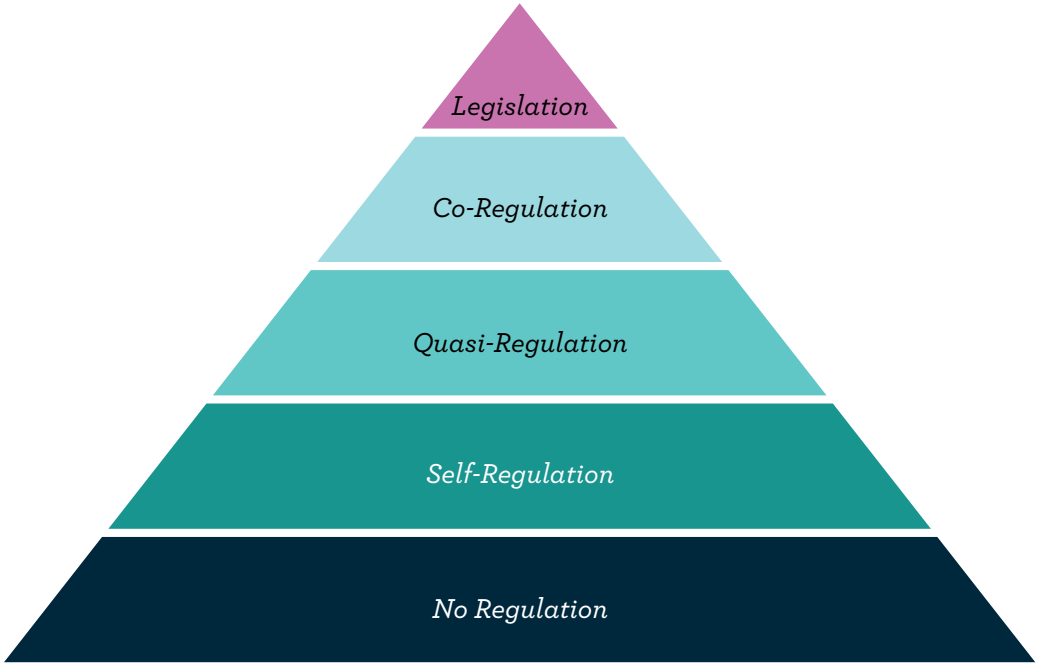
- Opportunity costs (unless they relate to a delay)
- Business-as-usual costs
- The costs of non-compliance
- Indirect costs
- Direct financial costs
- Internal Commonwealth Government red tape

Although the above six exclusions are not included in the RBM, you should still consider themwhen designing regulations. RISs need to accompany RBCO Estimate Table. All costs and cost-offsets should be quantified using the Regulatory Burden Measure. For further information see the RBM Framework Guidance Note.

Section 2: Alternatives to Regulation

So, you have identified a policy problem, you have started a RIS and now you need to consider a range of options. This section will assist you in identifying an appropriate policy response, noting that regulation should be considered an option of last resort. This section is also relevant to those reviewing existing regulations to assess whether a lighter touch option may be more appropriate, particularly if existing legislation may have resulted in sufficient behavioural change and there is evidence that industry has incorporated these practices into their operations.

Policy officers can choose from a range of options ranging from no regulation to traditional regulation (i.e., legislation). This pyramid includes a number of combinations of voluntary and mandatory components of alternatives to prescriptive regulation.



The regulatory pyramid identifies the main policy responses available to policy officers with a suggested order of priority. We should explore the non-regulatory options before moving up the pyramid, where legislation is a last resort. All of these categories, including examples of their application, are explained further below.

2.1 No regulation

There are many instances where it is appropriate for a policy solution to propose no regulation. This may include situations where the following options are less costly and a more appropriate mechanism for government to intervene to achieve the desired behavioural change.

No regulation includes a range of options such as:

- letting competitive market forces prevail;
- reducing information barriers through consultative mechanisms (whereby industry-government forums provide an avenue for government to work collaboratively with industry on a number of issues including harmonisation of industry regulations and standards); and
- providing education programmes and information.

2.1.1 Education programmes

Education programmes are used to raise the awareness of a particular problem or issue, or upgrade the knowledge or skill levels within industry or amongst key stakeholder groups.

When is it appropriate?

Education awareness programmes help ensure that the general public are aware of benefits or risks associated with products or services. They can also be used in conjunction with other regulatory options as well as on their own. Furthermore, these programmes play a key role in increasing the awareness of other non-regulatory approaches, such as third party certification and voluntary codes of conduct.

Case Study – Education campaign

Education campaigns can be a very effective alternative to regulation. A good example of an education campaign is that offered by the Griffith University *Asia Pacific Centre for Franchising Excellence* pre-entry franchise education initiative. This initiative includes five interactive modules aimed at educating prospective franchisees about what they should expect when entering into a franchise agreement. Through undertaking this interactive on-line course, franchisees (small businesses or individuals) become aware of their main rights and responsibilities under their agreements and the Franchising Code of Conduct – including for example, territory rights, dispute resolution procedures, and licensee fees etc. Through undertaking this due diligence up front, franchisees will be more likely to succeed and avoid disputes with franchisors and third parties.

This initiative was financially supported by both the Australian Competition and Consumer Commission (ACCC) and the Industry Department as a way of addressing the imbalance of power which can sometimes exist between franchisees and large franchisors.

This education also reduced pressure for regulatory changes to the Franchising Code of Conduct - a mandatory code under the *Competition and Consumer Act 2010* – changes that may have resulted in increased burdens to industry.

For more information, see http://www.franchise.edu.au/home/education/all-education-and-training/pre-entry-franchise-education.

2.2 Self-regulation

Self-regulation consists of industry-written rules and codes of conduct enforced by industry.

When is it appropriate?

Where industry participants understand and appreciate the need for self-regulation, this can be a good option. It is also a good option where the consequences of market failure are low and the market is likely to move towards an optimal outcome by itself.

Three underlying reasons why firms would participate in self-regulation:

1. *companies which take voluntary action to redress a policy concern may stave off more onerous government regulation;*
2. *firms may enhance their reputation and hence increase sales via participation in voluntary Associations; and*
3. *firms are often best placed to understand the problem that needs to be addressed and how to address it most efficiently. Firms are also best placed to propose innovative solutions. Such innovation may inform solutions to future problems whether they be in the same field or another.*

Self-regulation is not a viable option if an industry has no incentive to comply with its own rules. In some cases, self-regulation may create public concern, where, for example, perceived conflicts of interest could threaten safety, such as in food-handling, healthcare or aviation.

Case Study – Self regulated industry code of conduct

The Australian Window Association (AWA) established an industry code of conduct to impose minimum building standards on its members throughout Australia.

AWA members are required to:

- provide products and services that comply with or exceed the minimum performance requirements of all relevant Australian Standards and the National Construction Code (NCC);
- provide a minimum six year guarantee against faulty workmanship and materials;
- adhere to the AWA third party National Association of Testing Authorities (authority responsible for accreditation);
- submit to inspections by accredited auditors;
- provide access for customers to a complaints handling procedure;
- maintain a high standard of integrity; and
- commit to the AWA code of conduct.

These types of industry led examples demonstrate how industry associations can develop their own guidelines/code of conduct which allow greater flexibility for industry to develop their own standards/key performance indicators (KPIs) etc. While focusing on the standards of the goods or service, these codes may also be developed to encourage greater respect and confidence for particular organisations.

2.3 Quasi-regulations

Quasi-regulations cover a wide range of rules or arrangements that are not part of ***explicit*** government regulation, but nevertheless seek to influence the behaviour of businesses, community organisations and individuals. They may be designed to accompany existing regulations but are also increasingly used as stand-alone documents.

On a spectrum of regulation, quasi-regulation lies between self-regulation where industry, individuals, companies or groups formulate and enforce their own rules and formal legislation or 'black-letter law' where government formulates and enforces legislation.

Examples include: standards, codes of practice/conduct, administrative process and any ruling document, or other piece of advice with an expectation of compliance. It also includes compliance costs associated with: procurements, grants and cost recovery frameworks.

When is it appropriate?

Quasi-regulations are helpful where there are many acceptable solutions to a regulatory problem, because they do not limit the range of options for compliance. However, if they start to be treated as traditional regulation, they can often lose their flexibility.

Case Study – Quasi-regulations

The National Construction Code is an example of quasi-regulation because it is not a formal piece of legislation, however there is an expectation of compliance. The NCC is an initiative of the Council of Australian Governments (COAG) developed to incorporate all on-site construction requirements into a single code. It is referenced under state and territory legislation if they have decided to adopt the NCC as part of their legislation.

The NCC is a quasi-regulation that provides maximum flexibility. The code adopts a performance-based approach with two different options. Firstly, an "alternative solution" that allows businesses to meet the performance requirements of the code through varied means as long as it meets the performance criteria stated within the code. Secondly, there is also an option for businesses to simply follow the deemed-to-satisfy pathway (usually an accepted construction method or Australian standard).

Smaller businesses often have little internal capacity to develop plans or flexible processes to achieve outcomes. The variety of compliance methods provided caters for both large and small business needs.

2.4 Co-regulation

The regulatory role is shared between government and industry. It is usually affected through legislative reference or endorsement of a code of practice. Typically, the industry formulates a code of practice in consultation with government, with breaches of the code usually enforceable via sanctions imposed by industry or professional organisations rather than the government directly.

When is it appropriate?

This approach allows industry to take the lead in the regulation of its members by setting standards and encouraging greater responsibility for performance. It also exploits the expertise and knowledge held within the industry or professional association.

Co-regulation affords government the opportunity to involve industry and interested parties in the investigation and enforcement of the regulations. This can lead to significantly greater levels of compliance, as industries become co-monitors, while it also encourages participants to see good industry-wide performance as a common good, through its impact on public perceptions. From the government viewpoint, co-regulation can be highly cost effective, as industry experts will often participate on a voluntary basis, while the "arm's length" relationship with government can also mean lower overheads and greater responsiveness.

However, there is a risk attached to co-regulation arising from the possibility that it will become the vehicle for anti-competitive activities created by the industry regulators. Opportunities for regulatory barriers to entry to develop must be minimised and careful scrutiny maintained.

Case Study – Co-regulation

For architects, the regulatory role is shared between the state and territory governments, and industry. The regulation is effected through legislative reference or endorsement of the Code of Professional Standards and Conduct developed jointly by the Architects Accreditation Council of Australia and Royal Australian Institute of Architects. The code enables clients to understand the standards expected of architects and the level of accountability expected of them in the provision of architectural services. For example, the power of the Board of Architects of New South Wales to conduct examinations (Architects Act (NSW) 2003 s. 64) helps assure the public that people calling themselves 'architects' have qualified in relevant areas. This strikes the right balance between a mix of government legislation to ensure consistency and, on the other hand, training, discipline, registration and ethics regimes administered by the professions.

Table 1: Applications of Alternatives to Traditional Regulation

Alternatives to Traditional Regulation	Best Applications	Least Suitable Applications	Design Issues
Educations Programmes/ Information ▪ Provision on information about a specific issue, problem, product or service to targeted groups.	▪ Essential for Codes of Practice. ▪ Help to change behaviours and upgrade skills.	▪ Unsuitable when objectives are unclear or the campaign is poorly focused.	▪ Method of education (e.g. TV, newspapers, pamphlets, etc.) must be effective and economical in reaching target group. ▪ Widespread access to information is essential (publicity, awareness of the process, industry support for the process).
Codes of Conduct (Quasi-regulation) ▪ Set of agreed principles or guidelines outlining responsibilities and expectations. ▪ May be voluntary or mandatory.	***Self-Regulation:*** ▪ When there is shared interest and commonality within an industry. ▪ Non-compliance costs are low. ***Co-Regulation:*** ▪ Where strong industry associations already exist. ▪ When professional independence is important.	***Self-Regulation:*** ▪ When the cost of non-compliance is very high. ▪ When there is a lack of commonality of interest within the industry. ***Co-Regulation:*** ▪ Where there is a low degree of commonality of skills within the industry. ▪ When assessment of the industry is difficult.	***Industry Involvement:*** ▪ Extensive industry involvement in the design process is essential. ▪ Industry ownership of the Code is critical for compliance. ***Review Mechanisms:*** ▪ Use working groups and industry panels. ▪ Information strategies are very important. ▪ Define responsibilities and objectives for all parties involved. ▪ Include a review mechanism to ensure the Code stays relevant.
Standards (Quasi-regulation) ▪ Use existing or new measures to document outcomes. ▪ Controls on processes or performance.	▪ When outcomes or performance standards need to be measured. ▪ Where there are existing industry measures available and the capability for industry to record these measures. ▪ When well accepted standards exist (industry developed or Australian Standards).	▪ When the outcomes being measured are not central to regulatory outcomes. ▪ Where measurement and monitoring costs outweigh the benefits.	▪ Strong industry involvement essential. ▪ Determine whether minimum or ideal standards are required. ▪ Industry commitment and involvement required in monitoring and enforcement. ▪ Need to align controls and standards with industry values, capacity to achieve outcomes.

Section 3: Reducing Burden in Regulations

When, how, and why do we regulate?

Regulation is essential for the proper functioning of society and the economy. It includes any laws, subordinate legislation (also known as regulations) or other government-endorsed 'rules' where there is an expectation of compliance. There are a range of reasons why we regulate, including to: minimise risks, allocate responsibility, deter illegal or uncompetitive behaviour, and instigate behavioural change.

Managing risk

Recently there has been a shift in the way we manage risk. This shift emphasizes that regulations should not define and promote the ideal and include onerous requirements to meet such goals, but should be reserved for identifying and reducing harmful risks. Before resorting to regulation, you should consider the risk profile. In addition to the seven RIS questions you need to address when developing policy, these questions may assist you in determining whether regulation is necessary:

- what are the harmful risks?
- what is the size and impact of the risks you have identified?
- how will you apply strategies to manage the risks?
- how will you monitor and review the risk mitigation plan?

All of these questions should be considered in the context of a greater appetite for industry to manage their own risks. Remember to consider whether there are alternative pathways (or stakeholder groups) that could better manage these risks and reduce the overall burden on industry.

In the event that regulation is necessary, wherever possible we should minimise the regulatory burden through different types of regulatory approaches that focus on minimising harm and provide maximum flexibility. These can include:

- performance-based regulations;
- process-based regulations; or
- market/economic-based instruments.

It is critical that we ensure that existing regulations are implemented effectively and efficiently by harmonising and standardising processes. Furthermore, other measures or tools can also be used to minimise regulatory burden, these are outlined in **Table 2**.

3.1 Performance-based regulation

Performance-based regulation prescribes the outcomes to be achieved rather than focusing on the step-by-step processes to which businesses must comply. This allows businesses the flexibility to take different (and optimal) approaches to achieving outcomes or performance targets.

Why use it?

It is a more flexible option than traditional rules-based regulation because it focuses on outcomes to be achieved rather than on the precise risks to be controlled or the means of controlling them. Typically, these types of regulations are better suited to medium sized and larger firms. These firms have the resources to design tailored programmes to achieve outcomes and performance standards and are well placed to devise their own innovative and least cost means of achieving the desired outcome.

It is less suitable for smaller organisations as smaller firms may have little internal capacity to develop plans or flexible processes to achieve outcomes. One non-prescriptive means of meeting the needs of small business is to complement the performance standards with non-mandatory codes of practice. This provides concrete guidance which is not provided by performance standards. If compliance with the code of practice is treated as simply one way of achieving the performance standard, then flexibility can be maintained, while at the same time giving small business the concrete guidance it often requires.

Performance-based regulations can be used in quasi-regulation as well as in co-regulation situations. It can also involve regulatory tiering where different outcomes and requirements are specified for different industry groupings. This might involve development of specific guidelines for smaller businesses on how to achieve regulatory outcomes or performance standards.

Case Study – Performance-based regulation

The Australian Skills Quality Authority's (ASQA) role as a vocational education training regulator under the *National Vocational Education and Training Regulator Act 2011* is an example of a performance-based approach. Registered training organisations are required to ensure that their courses meet the competency standards required, but they can choose how to adopt and ensure these competencies.

3.2 Process-based regulations

Process-based regulations specify risk identification, assessment and control processes that must be undertaken, documented and (usually) audited. It is most commonly used in contexts in which there are multiple risk sources and multiple feasible risk controls.

When is it appropriate?

Given the right incentives, businesses are likely to prove more effective in identifying hazards and developing least cost solutions than is a central regulatory authority.

Case Study – Process-based regulations

Rail safety regulation is nationally harmonised and is largely process-based, being built around an accreditation process applicable to all rail operators and infrastructure managers. It requires that a 'safety management system' (SMS) be developed by the operator and assessed and approved by the regulator. The SMS is based on the identification and assessment of all significant risks and the development of mechanisms by which they are to be controlled. A process-based regulation is appropriate here because of the high level of safety standards required to minimise the risks to the community.

3.3 Economic/market-based instruments

This option relies on government intervention to influence market forces and thereby modify people's behaviour. This can be achieved directly with price intervention, such as taxes, or subsidies; or it can be achieved indirectly through regulating the quantity of goods/services available, such as quotas, permits and vouchers. Businesses and consumers will then consider whether the benefits justify the costs and change their behaviour accordingly.

Examples include: tariffs on imports to reduce import consumption, taxes on cigarettes to reduce consumer demand, subsidies to farmers on agricultural products to increase supply, and quotas on taxi licenses to limit supply.

When is it appropriate?

Economic incentives offer two important advantages over traditional "command and control" regulation:

1. *they allow business and others to achieve regulatory goals in a cost-effective manner as the same set of regulations affect all businesses equally; and*
2. *they allow market forces to determine the actual allocation of resources, whilst using macro-tools to change aggregate outcomes and achieve policy objectives. Accordingly, winners and losers are not picked, and competition can flourish. In some circumstances this can also provide market incentives to reward the use of innovation and technical change to achieve the policy objectives.*

3.4 Principles of commonality and convergence

To achieve harmonisation, establishing a common regulatory regime that is applied uniformly across jurisdictions, is imperative. This removes trade costs associated with multiple regimes and ensures consistency across jurisdiction. Furthermore, wherever possible, regulatory processes should be standardised and streamlined.

Case Study – Harmonisation

National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) is now the single point of contact for titleholders seeking regulatory approval for Commonwealth waters. Previously, the environmental impacts of offshore activities were regulated under both the *Environment Protection and Biodiversity Conservation Act 1999* and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. This one-stop shop will maintain strong environmental safeguards and high environmental standards through a more streamlined process. This streamlined approach will lead to savings for industry and environmental groups worth an estimated $120 million per year.

The role of standards in developing regulation

With appropriate consideration, standards can be of assistance to policy officers on technical matters. You should consider early engagement with standards bodies (including for example Standards Australia) to consider whether sufficient standards exist (either domestically or internationally), whether they are achieving the desired outcome and what changes can be made before resorting to regulation. Particular attention should also be given to how standards are incorporated into regulation to ensure consistency across jurisdictions. If you consider that a standard meets the needs of your policy response make sure you do the following:

1. *don't reference standards without engaging with standards bodies first;*
2. *if you are considering referencing standards, undertake an "environment scan" to ward against duplicating another reference to the standard in a different jurisdiction; and*
3. *ensure that the regulation is outcome focused and allow businesses flexibility to achieve the outcome by either using the standard, or any other means available to them.*

Table 2: Other Measures/Effective Tools to Reduce Regulatory Burden

Targeting (i.e., avoid 'one size fits all' regulation)	Regulation should address the identified risks. You need to understand the ***incidence of risks*** and the ***consequences*** of them arising. Often regulation is designed to target larger organisations yet regulatory arrangements often do not explicitly distinguish between firms based upon risk (or some proxy for risk, such as size). The consequence is over-regulating for small risks from specific business groups.
Regulatory tiering	Refers to a process whereby different industry segments are treated differently under regulations. It aims to provide equity across different sectors, for example through exemptions.
Information Disclosure (address information gap directly)	It is similar to public education and is often used in conjunction with a regulatory system. Covers publication or disclosure of poor or unacceptable performance. Rather than regulating to address the consequences of information gaps, in some cases such gaps can be addressed directly by government providing, or encouraging the disclosure of, relevant information.
Timing	You should always consider when regulation comes into effect, include regular review opportunities and consider when it should be repealed (if appropriate). Some practical examples to assist you in determining the timeliness of regulation include: ▪ ***grandfather clauses***. Retrospectivity in regulation should always be avoided to ensure that we are not capturing activities that have already happened. These clauses operate through old regulations continuing to apply to some existing situations while a new rule will apply to all future cases. ▪ ***sunset clauses***. These clauses provide that the regulation ceases to operate unless further action is taken to extend it. These clauses also incentivise policy officers to review existing regulations. See the Sunsetting Legislative Instruments Guidance Notes for further details.
Negative Licensing	A form of licensing which provides for automatic approval as long as a business is operationally complying with certain behavioural standards. It is seen as a less burdensome form of approval.
Mutual Recognition	The process whereby regulations in two jurisdictions are deemed comparable and hence a licence in one jurisdiction is recognised in the other. This process removes the need to be licensed in more than one jurisdiction. The downside of mutual recognition is that there is inevitably a cumbersome process requiring both jurisdictions recognise each other's licensing regimes as being comparable.
One-stop Processes and Information Sharing	'One-stop-shops' and similar processes can reduce red tape costs by concentrating the information sharing process and then reducing compliance costs. It is incredible how many approvals processes and standard reporting require the gathering of identical information from businesses. Sharing standardised information within government could reduce compliance costs.
Better Use of Information Technology	When organisations use technology correctly, it is seen as a driver of red tape cost savings as it reduces the need for physical transactions, allows pre-population of forms, etc.

Section 4: Existing Regulation Review Principles

It is critical that we engage in regular reviews of existing regulations to ensure they are proportionate to the purpose, relevant and reflect the current climate. We need to keep in mind that simply the existence of regulation creates a compliance burden on industry when they may have already been managing their risks and responsibilities. These compliance burdens include familiarising themselves with the regulation, ensuring strict compliance and developing mechanisms to monitor compliance.

Clearly there are many reasons why regulations should be reviewed. Two common reasons include macroeconomic, and organisational and sectorial changes that have occurred since the regulation was introduced.

Macroeconomic changes

Examples of macroeconomic changes include: changes in the overall economic climate (for example the Global Financial Crisis); the existence of similar regulation within a particular sector (for example multiple regulations in the environmental sector, where Australia imports products that are already well regulated) and new market-based incentives which instigate behavioral change (such as higher energy prices leading to changes in firm level practices or the creation of new businesses/markets).

Organisational and sectorial changes

You also need to consider the extent to which organisations have changed their behavior, thereby reducing the need for the existing regulation. Such change can also occur within particular industries or sectors, whereby key industry players (including industry associations) may have grown and matured over time. These changes should be considered when reviewing existing regulation to identify whether these players can better manage risk and develop alternative policy responses. This is particularly relevant where organisations capitalise on new markets or manufacture new technologies to increase their profitability. The case study below highlights how organisations can modify their practices to incorporate such changes.

To ensure that regulations reflect the current environment, reviews should continue through all stages of the regulatory cycle. Regulators reviewing existing regulations should consider the following:

- whether the regulation is achieving the intended behavioural change;
- whether previous estimates of costs and benefits have been met. This should be considered as early as possible after the introduction of the new regulations. Decision-makers should be informed if the actual cost impact of new regulations is substantially greater or benefits are substantially lower than expected so that they can consider options to adjust the regulation;
- if it has achieved the intended behavioural change, does it warrant moving away from regulation to a lighter touch approach;
- has new technology or conditions changed to make the existing regulation less applicable; and
- is there an alternative to regulation that can achieve a similar purpose.

Case Study – Changing conditions

The Australian Government is committed to the repeal of unnecessary regulation of Australian industry, where that regulation duplicates other regulated or market driven activity. This includes the reduction or removal of legislation where businesses or market forces have developed over time to achieve the same or better outcomes than the existing legislation, and the use of alternate voluntary measures to achieve similar outcomes.

In accordance with this policy, the Energy Efficiency Opportunities (EEO) Act 2006 was announced to be repealed, thereby terminating the EEO programme on 30 June 2014. Repeal of this legislation will save industry $17.7 million annually. The closure of this programme and consequent reduction in the burden on industry was based on two main considerations. Firstly, rising energy prices are creating a driver for industry to minimise their costs, either through energy efficiencies or reductions and secondly, the successful administration of the legislation since 2006 meant industry had improved their internal energy management processes, where seeking for and implementing energy efficiencies has become a business as usual practice.

Below is a table with list of ***best practice principles*** for undertaking review of existing regulations.

Table 3: Best Practice Principles for Review

Changing Conditions	▪ Is the regulation still relevant or applicable? ▪ Have macroeconomic changes occurred since the regulation was introduced? For example: – similar regulations that may have come into effect – a change in economic conditions (such as high energy prices) ▪ Have businesses changed their practices or modified their offerings in a way that reduces the need for regulation?
Net Benefits/Efficiency and Least Burden	▪ Does the regulation impose requirements on entities that are also subject to requirements under another regulation? If so, what is the cumulative burden and cost of the requirements imposed on the regulated entities? ▪ Does the regulation impose paperwork activities (reporting, record-keeping, or third party notifications) that could benefit from online reporting or electronic recordkeeping? ▪ Do feasible alternatives to this regulation exist that could reduce this regulation's compliance burden?
KPIs	▪ Are there adequate measures in place to assess outcome of regulation (e.g., activities, behaviours, and specific outcomes)?
Co-ordination, simplification, and harmonisation across agencies	▪ If there is an existing infrastructure or regulation undertaking a similar function to the reviewed regulation, could they be better coordinated or harmonised to reduce duplication?
Alternatives to direct regulation	▪ Could this regulation be modified to invite public/private partnerships while ensuring that policy objectives are still met? ▪ Does a feasible non-regulatory alternative exist to replace some or all of this regulation's requirements while ensuring that policy objectives are still met? ▪ What does industry want?
Innovation and Flexibility	▪ Have new or less costly methods, technologies, and/or innovative techniques emerged since this regulation was finalised that would allow regulated entities to achieve the intended results more effectively and/or efficiently?

Section 5: Best Practice Consultation Principles

This guide has so far identified how and when a RIS is required and what policy responses are available. Now you have to ensure that you have considered all the options, you need to test these with stakeholders.

There are many reasons why you should consult in advance of a policy decision. Common courtesy is one; not to mention being confident you have not missed something important in your analysis. But there are other reasons why consultation can make an important contribution to the success of your policy proposal. In particular, consultation can assist in:

- understanding the attitudes and key reactions of the people affected;
- making sure every practical and viable policy alternative has been considered;
- confirming the accuracy of the data on which your analysis was based;
- ensuring there are no implementation barriers or unintended consequences; and
- affected groups will feel you have listened and considered their views.

The Australian Government Guide to Regulation outlines the four options for consulting stakeholders on the design of regulation, including full public consultation, targeted consultation, confidential consultation and post-decision consultation. Below is a list of best practice principles for undertaking consultation with industry.[1]

[1] These principles have been extracted from the Department of the Treasury's Achieving Best Practice Consultation with Small Business: A Guide for Government. Further information can be found at: http://www.treasury.gov.au/PublicationsAndMedia/Publications/2012/sml-bus-consult-guide.

Table 4: Best Practice Principles for Effective Consultation

Continuity	▪ Consultation should continue through all stages of the regulatory cycle. ▪ It is important to consider ongoing consultative mechanisms such as establishing working groups, advisory/consultative councils etc.
Targeting	▪ Businesses likely to be affected should carefully be targeted for consultation. Need to ensure diversity and key differences including industry sector, the size and age of the business, location and characteristics etc. are captured. Industry associations and lobby groups are a good place to start. ▪ To reduce duplication between agencies, reduce burden on businesses and maximise resources. Joint consultation processes should also be considered.
Timeliness	▪ Consultation should occur when policy objectives and options are being considered. ▪ Consultations should also occur when proposals have been formulated and regulation has been drafted. ▪ Timeframes should be realistic to allow sufficient time for businesses to provide a considered response. ▪ Consultation programmes are likely to be more effective if industry is systematically and periodically notified of regulatory measures that regulators are developing or plan to develop in the future.
Accessibility	▪ Agencies should inform industry of proposed consultation via the most appropriate means, including, press releases and advertisements in media; newsletters of industry associations and lobby groups; trade and professional magazine and the business consultation website. ▪ Alternative methods of consultation may include stakeholder meetings, working groups, focus groups, surveys or web forums. ▪ Information provided to businesses should be easy to understand and read, be in plain English and clarify key issues. Any summaries should allow those consulted to quickly assess whether the material is relevant to them.
Transparency	▪ Businesses are entitled to know what use is to be made of the views and information they provide. ▪ To avoid creating unrealistic expectations, any aspects of the policy proposal that have already been finalised and will not be subject to change should be clearly stated. ▪ To provide credibility to the consultation process, agencies should also show stakeholders how they have incorporated the content of the consultation.
Evaluation and Review	▪ Evaluation of consultation processes may include examining the number and types of responses, and whether some methods of consultation are more successful than others.

Checklist A

Best practice considerations when faced with a policy problem

Have You

- ☐ consulted the portfolio Best Practice Regulation Coordinator?
- ☐ identified the type of RIS form required? (short, standard or long)
- ☐ considered the seven RIS questions?
- ☐ clearly articulated the type of market failure that requires addressing?
- ☐ identified what alternatives to regulation exist?
- ☐ identified costs and benefits to government and industry for each policy option?
- ☐ identified harmful risks and exhausted other policy responses before resorting to regulation?
- ☐ identified and consulted with relevant stakeholders?
- ☐ defined policy objectives/outcomes?
- ☐ developed appropriate KPIs (e.g., what does success look like)?
- ☐ contacted the Evaluation Unit at Evaluation.Unit@industry.gov.au to obtain further information?
- ☐ familiarised yourself with relevant information and guides?
  - Australian Government Guide to Regulation
  - Policy Development Toolkit
  - OBPR Guidance Notes include topics such as: RBM framework, cost-benefit analysis, competition and regulation, trade impact assessments, Australian Government programmes.

Best practice considerations for developing programmes

Have You

- ☐ developed programme guidelines that are clear and provide a comprehensive overview of what is required in order to determine eligibility?
- ☐ considered better ways of engaging with stakeholders and align these consultations with other information gathering exercises?
- ☐ considered how you can reduce reporting burdens?
- ☐ contemplated whether are there possibilities to achieve milestones more efficiently?
- ☐ considered using the short form grant template and including further conditions only if the benefits outweigh the compliance burden?
- ☐ considered the Commonwealth Programmes Guidance Note?
- ☐ contacted the Evaluation Unit at Evaluation.Unit@industry.gov.au to obtain further information?

Checklist B

Best practice considerations when reviewing existing regulations

Have You

- ☐ defined regulation objectives/outcomes?
- ☐ conducted a risk assessment and considered whether other stakeholders are best placed to manage these risks?
- ☐ considered whether the regulation is still relevant? Consider technological and other changing conditions.
- ☐ considered whether mechanisms such as public education could be used in conjunction with regulation?
- ☐ considered best practice consultation principles when engaging with stakeholders?
- ☐ developed appropriate KPIs to assess outcome of regulation in place (e.g., activities, behaviours, and specific outcomes)?
- ☐ is it feasible to alter the regulation in such a way as to achieve greater cost effectiveness while still achieving the intended results?
- ☐ considered whether the underlying evidence changed since this regulation came into effect such that the change supports revision to the regulation?
- ☐ considered alternatives and tested these alternatives with industry that could reduce this regulation's burden without compromising intended objectives?
- ☐ considered if this regulation requires coordination with other regulations, could it be better harmonised than it is now?
- ☐ included flexibilities within the regulation to encourage innovative thinking and identify the least costly methods for compliance?
- ☐ familiarised yourself with relevant information and guides?
  - Australian Government Guide to Regulation
  - OBPR Guidance Notes include topics such as: RBM framework, cost-benefit analysis, competition and regulation, trade impact assessments, Commonwealth programmes etc.