Small Business
Development Corporation

GOVERNMENT OF
WESTERN AUSTRALIA

Our Ref: D18/1640

Economic Regulation Authority
PO Box 8469
PERTH BC WA 6849

Email: publicsubmissions@erawa.com.au

To the Inquiry Team

Inquiry into Reform of Business Licensing in Western Australia

Thank you for the opportunity to submit comments to the *Inquiry into Reform of Business Licensing in Western Australia* (the Inquiry).

The Small Business Development Corporation (SBDC) is pleased to be involved in such an important Inquiry. The SBDC has considerable expertise in understanding the small business impacts of government regulation and licensing schemes, and looks forward to working with the Economic Regulation Authority (ERA) over the course of the Inquiry.

The SBDC was able to assist the Inquiry team in using the Western Australian Business Licence Finder and accessing the lists of licences and permits required in Western Australia, which are indeed numerous. The SBDC continues to maintain the Business Licence Finder as it is an important tool that helps new and established small business operators navigate the complex regulatory environment and understand what their compliance obligations are.

1. The role of the SBDC

The SBDC was established in 1984 to support the growth of Western Australian small businesses and help the sector to thrive. The organisation provides new and established small business operators with professional business advice and assistance, dispute resolution services and advocacy to all tiers of government.

One of the SBDC's strategic objectives is to advocate for a fair, conducive and productive environment for small businesses. The organisation does this through, among other things, reviewing and evaluating government policy (which includes licensing schemes) to examine their impact on small businesses, and assessing whether the proposed model of regulation is appropriate and proportionate to the

problem the regulator is trying to address. Specifically, the SBDC has a role in the Government's Regulatory Impact Assessment (RIA) process, and reviews regulatory proposals to ensure small business impacts have been appropriately considered, and mitigated, by the regulating authority.

The SBDC regularly partners with other organisations and government departments to undertake research and develop programs for the betterment of the small business sector, and considers this partnership approach to be very successful. For instance, through the Small Business Friendly Local Governments initiative, the SBDC is partnering with local governments to encourage a small business friendly approach to how local governments communicate and regulate their local small business community. It is promising to see that participating local governments are actively working to reduce the compliance burden placed on small businesses, and are supporting economic development through a range of innovative activities. Over time, the SBDC anticipates cultural change across the local government sector, and hopes that this small business friendly mindset can also be adopted within the State Government.

The SBDC regularly receives feedback from small business operators about the challenges they face when setting up their businesses, and when trying to expand or move premises. The SBDC has explained these challenges in submissions to a number of inquiries. The Inquiry team is encouraged to review these submissions (listed below) as they contain information relevant to this Inquiry:

- Submission to the Productivity Commission Inquiry into Regulator Engagement with Small Business, 2013[1]

  In this submission, the SBDC commented on how government agencies can improve their communication and engagement with small business operators, how they can improve their regulation, and how regulator performance can be measured.

- Submission to the ERA Inquiry into Microeconomic Reform – Issues Paper, 2013[2]

  The SBDC outlined the main sources of red tape for small businesses and argued for the need for agencies to streamline regulatory processes though better documentation, improving the interface between business and government, enabling business operators to self-assess their compliance with regulation, and the need for regulators to provide clear educational material to those they regulate.

  This submission also addressed the need for a cultural shift within regulating agencies.

---

[1] Available from: https://www.pc.gov.au/inquiries/completed/small-business/submissions#initial
[2] Available from: https://www.erawa.com.au/inquiries/industry-and-resources-inquiries/microeconomic-reform-2014/public-submissions

- Submission to the ERA Inquiry into Microeconomic Reform – Discussion Paper, 2013[3]

  The SBDC's second submission as part of the Inquiry into Microeconomic Reform responded to questions posed by the ERA. The submission addressed broadening the payroll tax, the progress of recommendations made by the Red Tape Reduction Group, other areas causing business red tape, and the improvements that the Government could introduce to minimise red tape.

2. Identifying priority areas for reform

The SBDC understands that after the ERA develops an analytical framework for regulators to use when assessing licensing schemes it will then test the framework against a number of business licences. The SBDC supports this methodology and considers that this testing process will help to refine the framework and may aid in its rollout across the public sector.

In considering which licences to select as case studies, the SBDC presents the following selection criteria for consideration:

- Economic importance
  - Number of businesses within an industry.
  - Number of people employed in the industry.
- Priority industry
  - Has the Government identified this as a growth area for the State?
  - Has the industry experienced, or is expected to experience, disruption from new technologies, business models or changing consumer preferences?
- Cumulative burden
  - Do licence holders have to hold a number of other permits or licences in order to operate?
  - How many other departments or levels of government is the licence holder required to deal with to obtain these additional licences?
- Competition
  - Is the licence restricting competition?
  - Does it represent a significant barrier to entry?
- Community interest
  - Is the community likely to support possible changes to the licensing scheme?
  - Are there any potential unintended consequences on the community as a results of this reform?

[3] Available from: https://www.erawa.com.au/inquiries/industry-and-resources-inquiries/microeconomic-reform-2014/public-submissions

The Australian Bureau of Statistics provides updated data on the number of businesses in Western Australia, with the latest data current as at 30 June 2017. The industry breakdown for the State is outlined in Table 1. This data can be used to help guide the ERA in identifying which industries to target and licences to test the framework.

Table 1: Small business industry breakdown

Industry Classification	**Total number of small businesses[4] in Western Australia**	**Total number of all businesses in Western Australia**
Accommodation and Food Services	7,712	8,733
Administrative and Support Services	7,746	8,180
Agriculture, Forestry and Fishing	16,502	16,835
Arts and Recreation Services	2,309	2,404
Construction	41,150	41,893
Currently Unknown	2,845	2,879
Education and Training	2,381	2,566
Electricity, Gas, Water and Waste Services	699	753
Financial and Insurance Services	21,038	21,069
Health Care and Social Assistance	11,727	12,082
Information Media and Telecommunications	1,519	1,556
Manufacturing	8,192	8,804
Mining	2,640	2,827
Other Services	9,905	10,108
Professional, Scientific and Technical Services	26,323	26,846
Public Administration and Safety	586	663
Rental, Hiring and Real Estate Services	24,192	24,383
Retail Trade	11,764	12,442
Transport, Postal and Warehousing	16,405	16,582
Wholesale Trade	6,419	6,838

[4] Small businesses with less than 20 employees.

3. The analytical framework

3.1. The Regulatory Impact Assessment Process

In Consultation Paper 2, the ERA states that the RIA process only applies to the introduction of new regulations and does not extend to existing regulation (and licensing schemes). This observation is incorrect; the RIA process covers both the introduction of new or amended regulatory proposals[5].

The RIA process has two stages that agencies must follow depending on the impact of the proposal. The Preliminary Impact Assessment (PIA) process identifies negative impacts on business, the community or the economy; and a Consultation Regulatory Impact Statement (RIS) followed by a Decision RIS is required for proposals that have a significant negative impact. The SBDC believes that it is very important that the RIA process continues to cover the full breadth of regulatory changes (including the abolition of regulation) as they can all have a number of intended and unintended consequences for the community.

The SBDC has previously argued[6] that the coverage of the RIA process should be extended to include all quasi-regulation and subordinate legislation, including local government laws and departmental policies that relate to approval guidelines and processes. In the SBDC's experience, local government laws and policies can create a large administrative burden for small businesses, sometimes more so than State Government regulation. When considering the large number of local governments in Western Australia, each responsible for their own local laws and policies, the lack of appropriate gatekeeper in the creation and amendment process further compounds this situation. Consequently, the SBDC asks the ERA to consider the applicability of the proposed framework to the local government sector.

The Better Regulation Unit at the Department of Treasury has recently reviewed its PIA template and amended it to specifically require agencies to identify and assess various regulatory options for all regulatory proposals. The SBDC has subsequently reviewed a number of PIAs submitted using this new template and does not believe this element is being done to the same standard across agencies. It also appears that in some instances these regulatory options have merely been listed because it is a requirement of the PIA rather than agencies genuinely considering multiple regulatory options.

The SBDC has also previously argued for agencies to undertake post-implementation reviews for all regulatory proposals. This process would require agencies to regularly review their regulations to ensure they are

---

[5] Refer to Regulatory Impact Assessment Guidelines for Western Australia, updated July 2010. Available from: http://www.treasury.wa.gov.au/uploadedFiles/Site-content/Economic_Reform/RIA_Program/ria_guidelines.pdf>. [20 March 2018].

[6] SBDC Second Submission to the ERA's Inquiry into Microeconomic Reform in Western Australia, December 2013.

relevant and appropriately meet their intended objectives while minimising impacts on individuals, businesses and the community. Post-implementation reviews also enable agencies to keep pace with changes to the industry, prevailing technology or community expectations, and are particularly important for proposals that are currently exempt from the RIA process[7]. These reviews can also help to ensure that competition is not unduly restricted[8]. The ERA should consider including reference to post-implementation reviews as part of the proposed framework.

3.2. The ERA's framework and guideline

While the RIA process is an important step in minimising the negative impacts of new or amended regulation, it is only applicable when a decision to act has been made by a regulatory agency or Minister, and is not in itself a driver of change. The impetus for agencies to review existing regulations and licensing schemes comes from other means (if at all) and not from the RIA process itself. This is where the ERA's framework and guideline could apply.

The SBDC is aware of a licensing framework published by the Independent Pricing and Regulatory Tribunal, New South Wales Government, that appears to meet the outcomes of the ERA's framework. This framework, 'A best practice approach to designing and reviewing licensing schemes'[9], should be examined by the ERA and consideration given to adopting this framework in part, or in its entirety (see attached).

The SBDC has some concerns that the creation of another regulatory framework and guideline may create a level of confusion for agencies, particularly as the Better Regulation Unit and Economic Policy division of the Department of Treasury also provide a number of tools to help regulators assess the impacts of regulation. The SBDC recommends that the ERA work closely with the Economic Policy division so that the framework can be aligned with the existing suite of tools and guidance, and consideration is given to handing carriage of the framework and guideline to the Better Regulation Unit to administer.

Finally, while the SBDC acknowledges that the ERA has been tasked with examining State Government business licences only, it is important to still consider the impact that local government regulation has on small businesses, particularly when considering the cumulative burden of State and Federal approvals. Developing the framework in a way that could be extended to local government regulation would be strongly supported by the SBDC. The Western Australian Local Government Association should be consulted in this

---

[7] Agencies can apply for a Treasurer's Exemption for election commitments and proposals aimed at providing an emergency response.

[8] Refer to the Competition Policy Review Final Report 2015 for further commentary on the impacts of occupational licensing on competition. Available from: http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf

[9] Available from: https://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/pwc_-_a_best_practice_approach_to_licensing_schemes_-_conceptual_framework_-_march_2013.pdf

regard, as the SBDC understands they are currently progressing a local government economic development framework, which may align well with the ERA's framework.

4. Assessing the cumulative burden

The SBDC agrees with the ERA's assessment that the RIA process does not protect against the cumulative burden of regulation as each proposal is considered in isolation. In completing a PIA, regulators are required to focus on:

- the problem they are trying to solve/the reason for change;
- the desired outcomes;
- the level of consultation undertaken; and
- an analysis of the impact of various regulatory options.

Agencies are not required to estimate the cumulative burden for proposals at the PIA stage. For more complex proposals requiring a Consultation RIS, agencies generally address the costs to industry and government for different regulatory options (including a positive licensing scheme), but do not include an assessment of the cumulative burden the options may be imposing on businesses.

When thinking about the cumulative burden of licences for small businesses, the following factors are relevant, and could be incorporated into the framework:

- the number of other approvals the licensee is likely to need;
- the number of different regulators the licensee is likely to interact with when seeking these alternative approvals;
- the type and amount of information that needs to be provided at an initial licence application and at renewal periods;
- the frequency of renewals for all licences;
- the fees that must be paid (for an individual licence and all licences), and the fee structure;
- the frequency of inspections by all regulators; and
- the costs of complying with the regulation (e.g. shop layout requirements, police checks, securing dangerous items, specified security system requirements etc).

The Productivity Commission has previously addressed the cumulative burden of compliance in its report *Regulator Engagement with Small Business*[10]. It identifies ways that this overall burden can be reduced, which includes:

- considering whether there are certain industries for which a 'one business, one licence' approach may work, and lead to lower regulatory burdens with similar or improved regulatory outcomes;
- one regulator undertaking inspections or compliance checks on another regulator's behalf. In this model, the regulator whose area poses the greatest risk to the community would take the 'regulatory lead';

[10] Available from: http://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf

- recognising industry and other third party certification, accreditation and audit processes;
- considering the relevance and applicability of existing definitions for small business before introducing a new definition for a regulatory proposal; and
- implementing a range of formal and informal methods of improving information sharing and coordination across regulatory authorities.

The SBDC has identified some additional ways that the cumulative burden can be reduced by regulators:

- sharing data with other regulators across tiers of government so that the business operator only needs to provide information once;
- reviewing the information that needs to be submitted, and only asking for information that is truly required by the regulator to assess an applicant's eligibility for a licence;
- having a single access point for business operators to interact with government (regardless of which tier), so the experience appears seamless;
- considering fees charged and reducing these where possible; and
- coordination of site visits or inspections.

A central theme in reducing the cumulative burden for small businesses is information sharing and ease of access for licensees. The Office of the Government Chief Information Officer (GCIO) has made some progress in this regard through the wa.gov.au online portal and its suite of policies aimed at facilitating this joined-up government. A continued investment needs to be made by the Government to expand the wa.gov.au portal from being a triage site to a whole-of-government service delivery portal. Until this portal is expanded, regulators are restricted in the degree to which they can limit the cumulative burden on businesses.

The SBDC considers that a leading model that could be adopted in Western Australia (and would appear to be a natural progression of the wa.gov.au portal) is that being used by the New South Wales Government - 'Service NSW' and 'My Business Navigator'. The My Business Navigator is an online tool that enables business operators to login to one site and transact easily with all three tiers of government. This tool has been designed to save businesses considerable time, money and effort by requiring information only once. The additional service of a Business Concierge guides individuals through the approval processes, and ensures all information is correctly submitted.

The SBDC has commenced discussions with the Department of the Premier and Cabinet, Department of Treasury and the Office of the GCIO around adopting this model in Western Australia, but no commitment has yet been made to progress this work. While considerable financial commitment would be required from the State Government to plan and build such a service, the SBDC firmly believes the benefits to the business community and the economy far outweigh the initial investment costs.

5. Improving administration of business licences

One of the terms of reference for the Inquiry is to identify opportunities to improve the overall administration of business licences in Western Australia. The SBDC is aware of extensive commentary on this topic, and encourages the ERA to consider in particular the following documents:

- Productivity Commission Research Report 'Regulator Engagement with Small Business', 2013[11]
- Department for Business Innovation and Skills, Better Regulation Delivery Office, United Kingdom, 'Regulators' Code'[12]

By way of summary, the SBDC considers that administration of business licences can be improved through the following actions. Regulators should:

- actively try to limit the administrative burdens and costs they impose on those they regulate;
- actively engage and communicate with those they regulate, provide clear explanations designed at assisting them meet compliance requirements, and make it easy for complaints or appeals to be submitted;
- adopt a risk-based approach to regulation and show flexibility in meeting obligations;
- collect information only once, and if permitted, share information with other regulators;
- provide advice and guidance focused on assisting those they regulate to understand their obligations and meet their compliance requirements;
- provide information and guidance in plain, easy to understand formats, in a media best suited to the audience;
- create an environment in which those they regulate have confidence in the advice they receive and feel able to seek advice without fear of triggering enforcement action;
- work collaboratively with other regulators and actively try to come to agreement where advice to those they regulate may differ;
- aim to be as transparent as possible through publishing service standards outlining what they expect from those they regulate, how they can be contacted, their compliance approach, enforcement policy, fees and charges, and dispute resolution processes; and
- ensure regulatory officers act in accordance with the service standards.

It is the SBDC's observation that the culture of a regulating agency is paramount, and is what largely drives the administration of a licensing scheme. Culture can be hard to change and must be driven from the Executive team of an organisation. The ERA's framework could be used to encourage cultural change by listing and encouraging adoption of the points raised by the likes of the Productivity Commission and United Kingdom.

---

[11] Available from: http://www.pc.gov.au/inquiries/completed/small-business/report

[12] Available from: https://www.gov.uk/government/publications/regulators-code

The SBDC once again thanks the ERA for the opportunity to comment on the Inquiry and extends an offer to discuss the draft framework and guideline in more detail. For any questions on this submission, please contact Ms Lauren Westcott, Senior Policy and Advocacy Officer, on 6552 3307 or at lauren.westcott@smallbusiness.wa.gov.au.

Yours sincerely

David Eaton
SMALL BUSINESS COMMISSIONER

3 April 2018

Att.

A best practice approach to designing and reviewing licensing schemes

Guidance material

Independent Pricing and Regulatory Tribunal

A best practice approach to designing and reviewing licensing schemes – Guidance material

March 2013

pwc

Disclaimer

This Report has been prepared by PricewaterhouseCoopers (PwC) in our capacity as advisors to the Independent Pricing and Regulatory Tribunal (IPART) in accordance with our consultancy agreement.

The information, statements, statistics, material and commentary (together the "Information") used in this Report have been prepared by PwC from publicly available material and from information provided by IPART. PwC has relied upon the accuracy, currency and completeness of the Information provided to it by IPART and takes no responsibility for the accuracy, currency, reliability or correctness of the Information and acknowledges that changes in circumstances after the time of publication may impact on the accuracy of the Information. The Information may change without notice and PwC is not in any way liable for the accuracy of any information used or relied upon by a third party.

Furthermore PwC has not independently validated or verified the Information provided to it for the purpose of the Report and the content of this Report does not in any way constitute an audit or assurance of any of the Information contained herein.

PwC has provided this advice solely for the benefit of IPART and disclaims all liability and responsibility (including arising from its negligence) to any other parties for any loss, damage, cost or expense incurred or arising out of any person using or relying upon the Information.

Liability limited by a scheme approved under Professional Standards Legislation.

Contents

Introduction to the licensing framework

Background

The Independent Pricing and Regulatory Tribunal (IPART) has been asked by the New South Wales (NSW) Government to examine licensing scheme in NSW and identify those where reform would produce the greatest reduction in regulatory burden for business and the community. As part of this review, the NSW Government has requested that a conceptual framework be developed to help:

- assess when licensing is the most efficient way of addressing identified problems and risks compared with other options (and hence identify the key purpose, or purposes, of licensing)
- assess whether the design elements of a licence are consistent with its purpose – this includes: the scope of the licence; conditions of the licence and how this affects licensees' behaviour; whether licence duration is appropriate for the risks being regulated; and principles for setting fees and charges
- assess any other significant ways to improve the administration of licences
- consider best practice design elements across licence types and in other jurisdictions.

PwC was engaged by IPART to develop a conceptual framework for licence design and review in line with this request. The conceptual framework (referred to as 'the licensing framework' or 'the framework' in this document) has been developed based on best practice principles. It is intended to be applied as an assessment tool to both existing and proposed licensing schemes.

Intention of the framework

The framework is designed to allow people to quickly and easily determine whether licensing is:

- an appropriate option to consider (Stage 1)
- well designed (Stage 2)
- administered effectively and efficiently (Stage 3)
- ultimately the best response to address identified problems or objectives (Stage 4).

The main focus of the framework is on evaluating existing licences and identifying areas where there are likely to be significant gains from reform. This is more likely to be the case in instances where there has been significant change to the context surrounding the existing licensing scheme. For example, there may be changes in technology, demographics, social norms, other relevant regulation, national reform and so on. If the licensing scheme has not been reviewed in the context of these changes, it is necessary to re-assess the fundamental rationale for licensing, licensing design and administration. The licensing framework has been designed to reflect this.

The framework can also be used to determine whether a particular area that is not currently licensed may be suitable for licensing. In doing so, the framework is applied to the proposed or hypothetical licensing scheme.

Intention of this document

A high level summary of the licensing framework is provided in the document 'A best practice approach to designing and reviewing licensing schemes'. This document supports the licensing framework by providing detailed guidance notes and case studies that show how the framework can be applied in practice.

The aim of this document is to provide more detail and explanation of the key questions that underpin each of the four stages of the framework. For each question (or step), this document:

- outlines the 'tests' that should be met at that step
- provides guidance notes that:
  - explain the aim of the step and the key concepts involved
  - outline the factors that should be considered in undertaking the analysis for that step
  - list the key questions that should be answered through the analysis.

The four case studies in Appendices B to E also demonstrate how the framework can be applied in practice. These case studies can be used as a guide to the type of analysis required at each step. However, each licence may differ in the level of analysis required at each step of the framework, reflecting the complexity of the area being considered and the extent of the scheme in place (or being proposed).

The definition of licensing

For the purposes of assessing licensing schemes under the framework, 'licensing' includes any regulatory instrument that gives permission or allows an entity to undertake a particular activity. This is a broad definition and means that all possible licensing schemes are captured even if they only exhibit limited characteristics that are traditionally associated with licensing.

Specifically, the definition of licensing includes any of the following instruments:

- licence
- registration
- notification
- authorisation
- accreditation
- approval
- certification
- permit.

An important concept related to the definition of licensing is the target of the licensing scheme. The application of licensing is not limited to targeting individuals or people (i.e. where a person is able to do something if they hold a licence). Licensing is broader than this. There are three broad entities that a licensing scheme can target:

- **Product** – licensing a good or service being delivered (e.g. registration of a vehicle).
- **People** – licensing a person undertaking an activity (e.g. licensing of a profession or occupation undertaken by individuals such as plumbing).

- **Place** – licensing a place where an activity is undertaken such as a place of business (e.g. liquor licensing for a premises where alcohol is sold).

Licensing schemes that relate to a product or a place should also be considered under the definition of 'licensing'.

This definition of licensing is used throughout the framework. When designing a 'fit for purpose' licensing scheme, agencies should consider the range of options within this broad definition (e.g. from notification, registration etc).

Another key concept used in the framework is the difference between privilege and permission. Privilege licensing gives a limited number of licensees the right to undertake an activity to the exclusion of others. This is used to restrict the quantity of an activity. Permission licensing gives licensees the right to undertake an activity, but the number of licences is not limited, meaning any applicant that satisfies the requirements can hold a licence.

Guiding principles

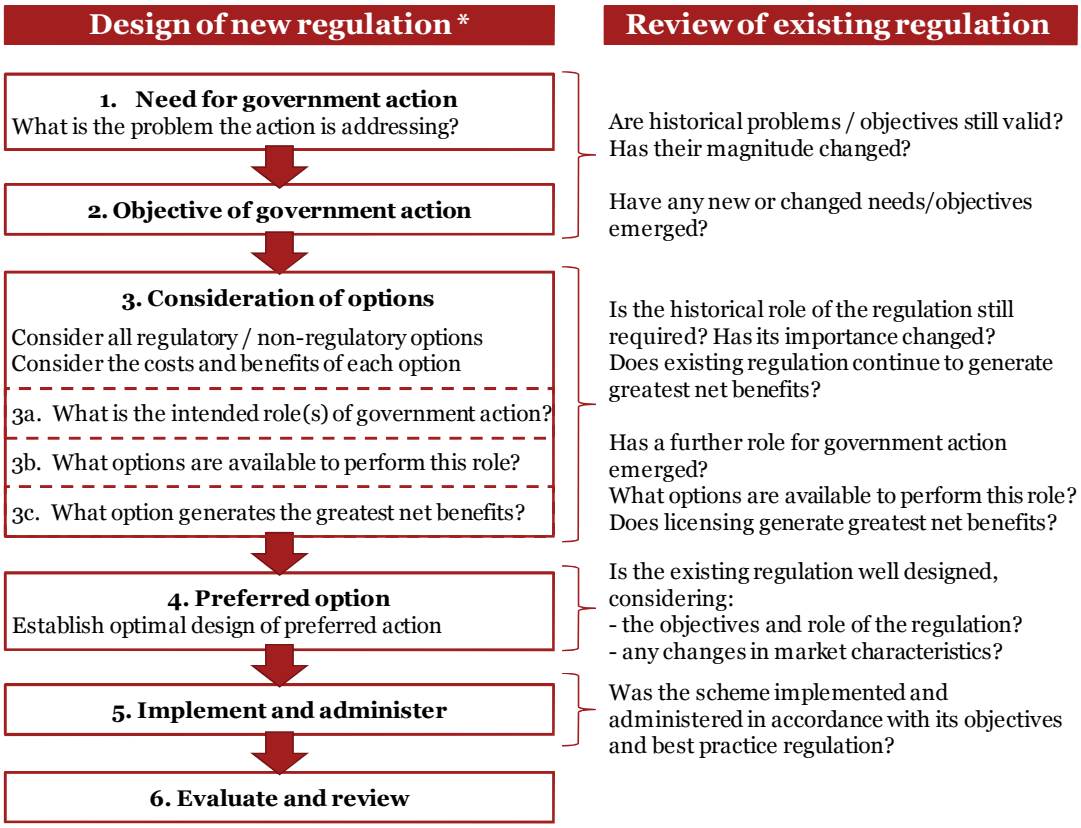
The licensing framework is intended to be an assessment tool for existing and proposed licensing schemes. The development of the licensing framework has been guided by the best practice principles outlined by the Better Regulation Office (BRO). The Better Regulation Principles are as follows:

Principle 1:	The need for government action should be established.
Principle 2:	The objective of government action should be clear.
Principle 3:	The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options.
Principle 4:	Government action should be effective and proportional.
Principle 5:	Consultation with business and the community should inform regulatory development.
Principle 6:	The simplification, repeal, reform or consolidation of existing regulation should be considered.
Principle 7:	Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness.

The application of these principles to the development of new regulation or other government action is generally well understood. The Better Regulation Statement template developed by BRO demonstrates the process that should be followed to develop new regulation in line with these principles. This has been stylised below in Figure 1.

Figure 1 also demonstrates how a review of existing regulation can follow the same broad approach as designing new regulation. However, the focus needs to be on whether the original rationale for government action (i.e. the problem and associated objectives) remains valid over time or anything new should be considered. For each step in the process for developing new regulation, Figure 1 outlines some relevant questions for the review of existing regulation. Each step is still relevant, but the questions posed shift the focus towards looking at changes over time and new or emerging problems.

Figure 1: The process for assessing new and existing regulation



* **Source:** The 'Design of new regulation' has been adapted from the Better Regulation Office's Guide to Better Regulation, November 2009. The 'Review of existing regulation' demonstrates some of the key questions for the review of existing regulation that have been taken into account when developing the framework.

The Better Regulation principles and this process underpin the framework. The framework is a targeted application of these principles and process to the specific issue of licensing.

The framework is also consistent with other principles of best practice regulation, such as those incorporated in the National Competition Policy (NCP). The NCP enshrined the principle that legislation (such as licensing regimes) should not restrict competition unless it can be demonstrated that the benefits of doing so outweigh the costs, and that the objectives of the legislation can only be achieved by restricting competition. Where the application of this framework concludes that licensing is the best option, the analysis will also have satisfied these two principles. That is, the need for licensing will have been established (Stage 1), the various aspects of the licensing scheme that may restrict competition will be the minimum necessary (Stage 2), the licensing scheme will be efficiently administered (Stage 3), and licensing will be the best response to achieve objectives (Stage 4).

Relationship between the framework and existing government requirements

As outlined above, the framework has been guided by and developed in line with the principles underpinning the existing BRO requirements for new regulation. As such, many of the issues considered in the requirements set out by BRO are reflected in the framework. For example, some common elements include: outlining the need for government action; the consideration of options other than licensing; efficient and effective administration; and continual evaluation and review.

While the existing BRO principles have been reflected, the framework is not intended to replace the existing requirements set out by BRO or other government agencies. The framework offers a way to assess whether 'licensing' should be considered as a potential option, or is still appropriate in the current landscape.

Existing licensing schemes

For existing licensing schemes, the framework offers an approach for reviewing the licensing scheme to identify whether reforms may be needed. Rather than completing a full Regulatory Impact Statement (as per the BRO guidelines) for the existing scheme, the framework can be used to identify whether licensing is still an appropriate option and whether there may be opportunities to reform the design and administrative elements of the scheme. For existing schemes, a more detailed cost benefit analysis and Regulatory Impact Statement process is only likely to be required if significant reform opportunities are identified. At the last stage of the framework, if reforms are identified, a cost benefit analysis may be required and this can feed into the existing requirements for considering regulatory change.

Proposed licensing schemes

For proposed licensing schemes, the framework can be used to identify whether licensing should be included as a potential option to address the problem and if so, identify the design and administrative elements that could apply. This can then inform the analysis required in a Better Regulation Statement or Regulatory Impact Statement. If licensing is identified as an appropriate option through the framework, the last stage of the framework may require a cost benefit analysis, which would lead into the analysis required to meet existing BRO requirements. It is also expected that the information collected and analysis conducted while progressing through the framework would assist in completing a cost benefit analysis and meeting the government requirements for new regulatory proposals. Rather than duplicating the process, the framework can feed into existing requirements where licensing is deemed appropriate.

Overview of the framework

The diagram in Figure 2 outlines the overall structure of the framework. The framework involves a series of steps or questions, separated into four major stages:

- Stage 1 – Is licensing appropriate?
- Stage 2 – Is licensing well designed?
- Stage 3 – Is licensing administered effectively/efficiently?
- Stage 4 – Is the licensing scheme the best response?

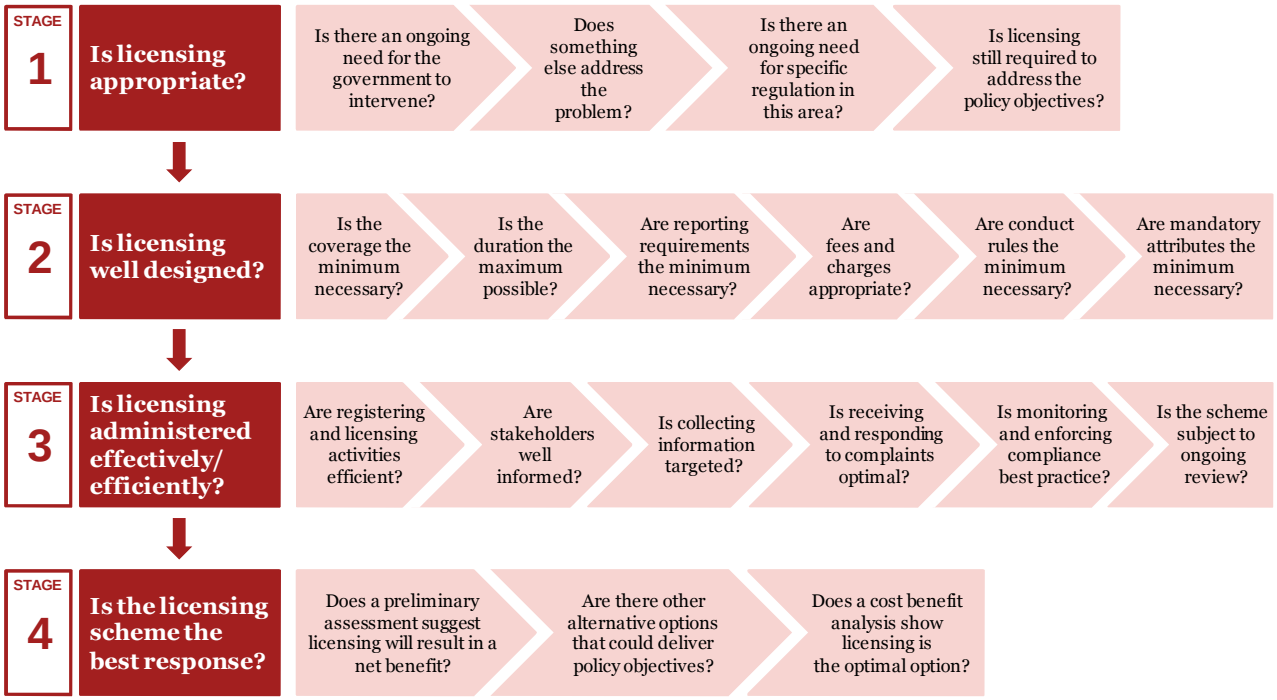
The first stage of the framework looks at what the government is trying to achieve and essentially acts as a screening tool to identify whether licensing should even be considered as a *potential* option. Stage 1 consists of four consecutive questions. Licensing should be considered appropriate and therefore a potential option if:

- there is an ongoing need for action (i.e. the first question is answered with a 'yes')
- nothing else addresses the problem (i.e. the second question is answered with a 'no')
- there is an ongoing need for a regulatory response and licensing is still required to address the policy objectives (i.e. the last two questions are answered with a 'yes').

Once licensing has been identified as a possible way forward, the design and administration of the potential licensing scheme is assessed (Stages 2 and 3). The questions posed in Stages 2 and 3 should also be answered with a 'yes' in order to say that the licensing scheme is well designed and administered effectively and efficiently.

After considering whether licensing is a 'potential' option and assessing the design and administration of this option through Stages 1 to 3, it is still necessary to go a step further and assess whether licensing is actually the ***best*** approach to take. This is the aim of Stage 4. Rather than a series of questions, Stage 4 consists of three steps that walk through the analysis needed to identify the best government response. The last two steps in this stage may not be necessary in all cases.

Figure 2: Framework structure – review of existing and proposed licensing schemes



What if one of the questions or stages cannot be met?

At each step throughout stages 1 to 3 of the framework, a particular answer is required to progress forward in the framework. These answers are demonstrated in the decision tree version of Stages 1 to 3 shown in Appendix A. The decision trees also show the outcomes that should occur if the answer does not allow for progression through the framework. A high level outline of the necessary answers and outcomes is given below:

- In Stage 1, if the answer to one of the questions suggests that licensing is not appropriate, alternatives to licensing – including regulatory and non-regulatory options, as well as no government intervention – should be considered. The type of alternatives that may be appropriate will differ depending on which step has indicated that licensing may not be appropriate.

- In Stage 2 and 3, a 'no' answer suggests that licensing is either not well designed (Stage 2) or not administered effectively/efficiently (Stage 3). In this case, the elements of licensing design and administration for which a 'no' applies (e.g. coverage, duration, registering and licensing activities, informing stakeholders etc) should be reformed. Once the design has been reformed so that it does meet the requirements outlined, the application of the framework should continue.

- In Stage 4, if licensing is not deemed to be the best response, then the option identified as the best should be adopted.

Applying the framework to proposed licensing schemes

The language used in the licensing framework tends to imply that a licensing regime already exists and assesses whether the elements of that regime are appropriate. However, this does not mean that the framework is only applicable to the review of existing licensing schemes. This framework is designed to be applicable to both existing and proposed licensing schemes.

When applying the framework to a proposed licensing scheme, each stage and the questions underlying them are still relevant. The concepts and issues to be considered for a proposed scheme are the same as when reviewing an existing licensing regime. However, the ideas or concepts being considered need to be applied to the proposed scheme or a hypothetical licensing scheme. If a proposed licensing scheme has not been fully developed, the ideas in the framework can also be used to develop a scheme that would meet the requirements at each step. For example, the framework could be used to identify whether exemptions and thresholds are needed and where, as well as to assess whether the current exemptions are appropriate in existing schemes.

To apply the framework to newly proposed licensing schemes, the language at each step needs to be considered slightly differently. To assist in understanding this, some examples are provided below in Table 1.

Table 1: Examples of applying the framework to proposed licensing schemes

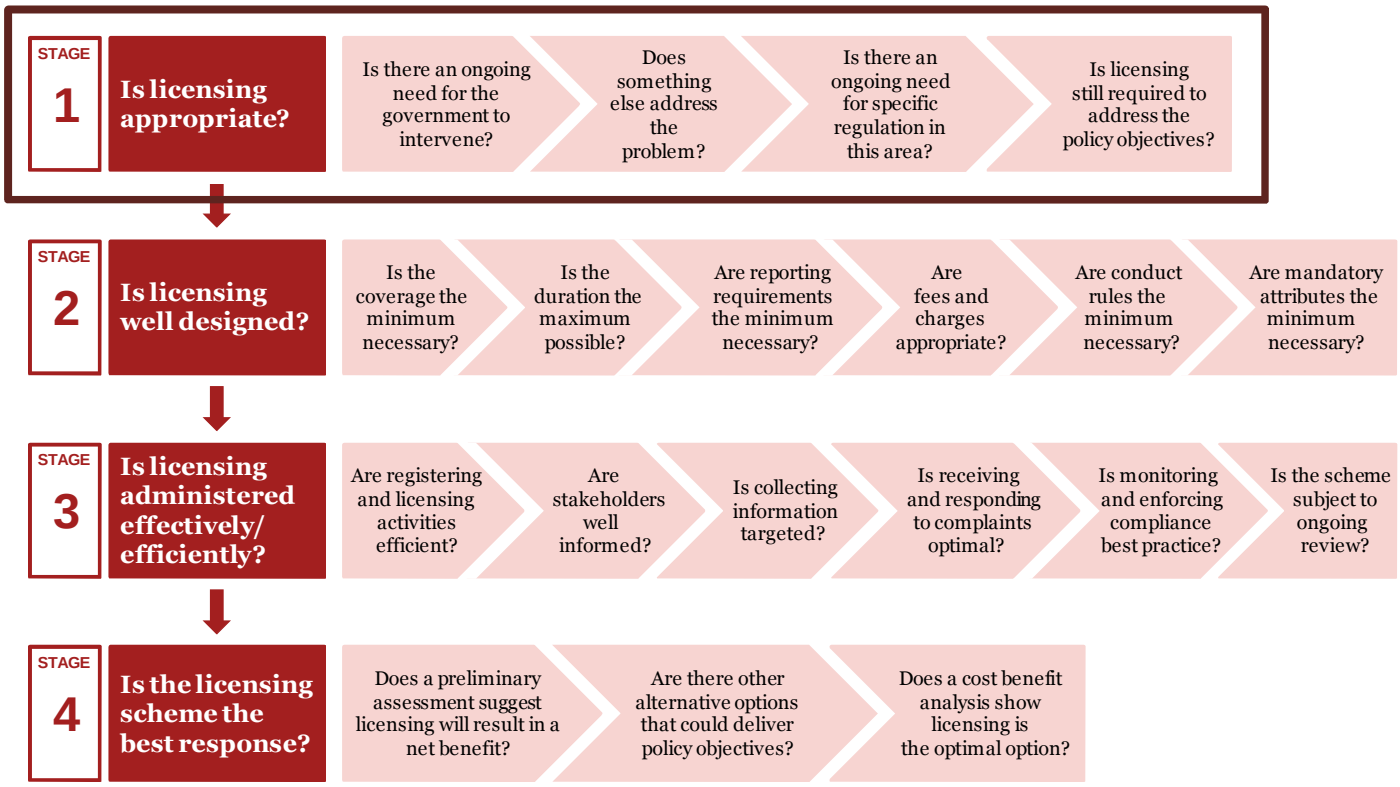
Stage	Question as phrased in the framework	Question re-phrased as it would apply to a proposed licensing scheme
Stage 1	Is there an ongoing need for the government to intervene?	Is there a need for the government to intervene?
Stage 1	Is licensing still addressing the policy objectives?	Would licensing address the policy objectives?
Stage 2	Is the coverage the minimum necessary?	Is the proposed coverage the minimum necessary? What coverage would be the minimum necessary?
Stage 3	Are registering and licensing activities efficient?	Are the proposed registering and licensing activities efficient? What registering and licensing activities would be efficient?
Stage 3	Are stakeholders well educated?	Will the proposed administration activities ensure stakeholders are well educated? What administrative activities would be needed to ensure stakeholders are well educated?

Each stage of the framework should be applied to both new and existing licensing schemes. The only point at which the application would vary between new and existing is for Stage 4. The first step of this stage is a preliminary assessment as to the likely net benefit of licensing. The outcome of this preliminary assessment will determine whether further, more detailed, analysis should be completed. That is, whether the next two steps (identify options and undertake a cost benefit analysis) should be completed.

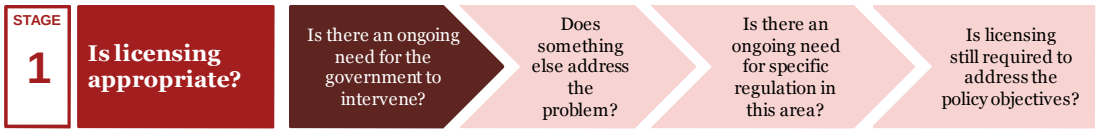
For existing schemes, a clear net benefit of licensing suggests the final two steps of Stage 4 may not be necessary. However, for proposed schemes, a net benefit from licensing suggests the remaining steps should be completed to identify if licensing is the *best* approach. For new schemes, this would also lead on to the options assessment and cost benefit analysis needed to meet the requirements of BRO.

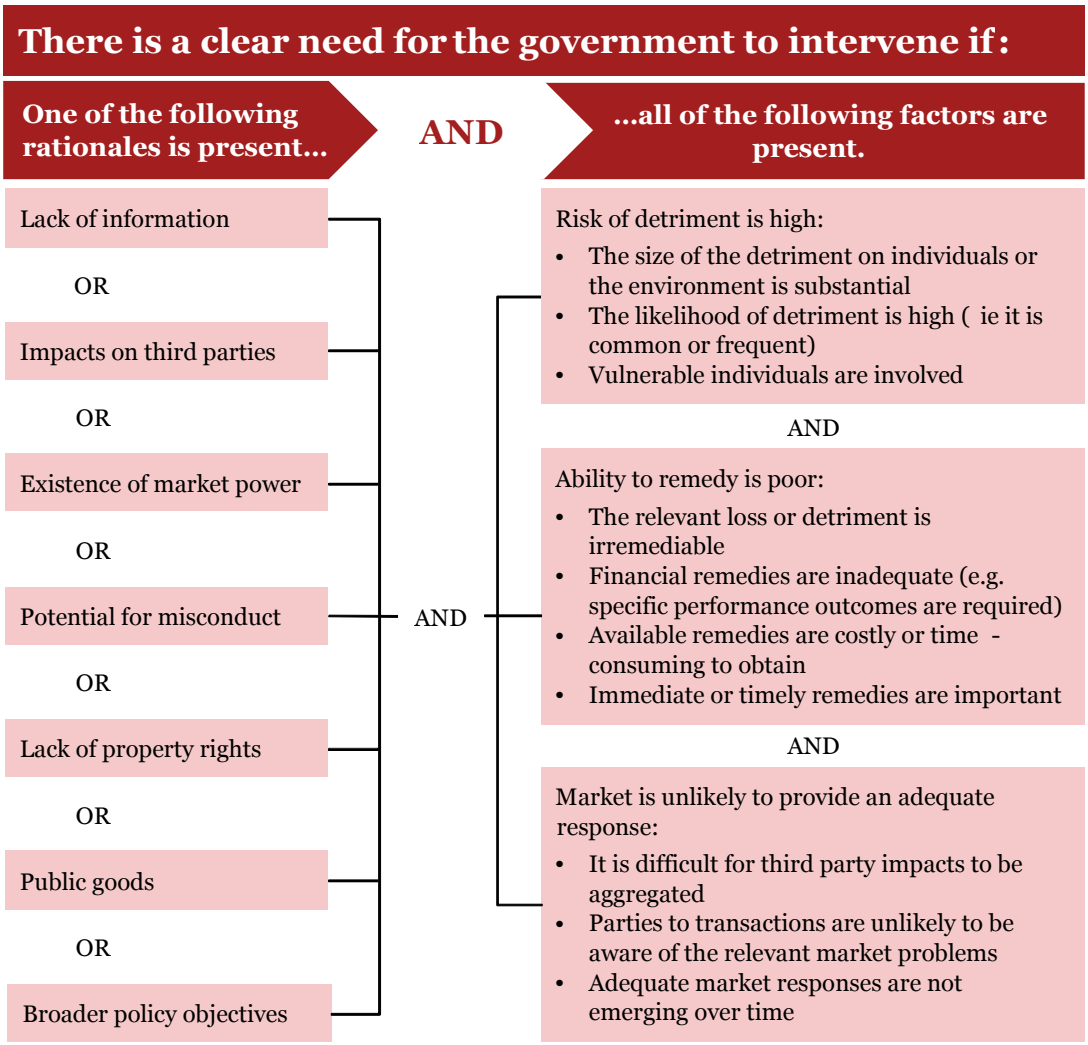
Stage 1

Is licensing appropriate?



Is there an ongoing need for the government to intervene?





Guidance notes

Answering this question is a two-step process. First, there must be an ongoing rationale for the government to intervene. Second, there must be additional factors that suggest the benefits of government action are likely to outweigh the costs.

The government needs to have a clear rationale for action

One of the rationales listed above must be present for there to be a clear and ongoing need for the government to intervene. The rationales listed above represent government objectives or reasons for intervening in the private markets or activities. For existing licences, it is necessary to consider whether there is still an ongoing rationale for the government to have a licensing scheme (that is, to intervene).

A policy rationale is generally identified by the existence of a market or regulatory problem that currently exists or would exist in the absence of government action (e.g. in the absence

of licensing). The presence of these problems represents a rationale for government action if these issues are not adequately being addressed by the market. A rationale may also be in the form of a broader policy objective where the government is trying to achieve social or environmental outcomes. A detailed explanation of each rationale listed above is provided below in Table 2.

Table 2: Explanation of the policy rationales

Policy rationale	Description and example
Lack of information	A significant lack of information can potentially prevent consumers or other parties from making fully informed decisions, leading to the potential for inefficient market outcomes. A key aspect of this is information asymmetry; where one party to a transaction possesses greater information and has an incentive not to disclose this information in order to obtain a more favourable market outcome. Example: Consumers may be unable to adequately assess the quality of a product or service either before or after purchasing.
Impacts on third parties (i.e. externalities)	An action by one party may affect the interests of third parties, who are not directly involved in the activity or decision making process. The costs or benefits accruing to third parties may not be considered by those controlling the decision making, meaning too much or too little of the action may occur. Example: Pollution imposes costs on society, which may not be factored in to the private decisions of polluters.
Imperfect competition or market power	Unequal bargaining power may allow a buyer or seller to extract excessive profits (e.g. through excessively high or low prices), through the lack of alternatives available to the other party. Example: Utilities may be uneconomical to duplicate, meaning consumers have only a single provider available to them.
Potential for consumer detriment from misconduct	A range of market conditions can give rise to the potential for consumers to suffer detriment from misconduct of traders (e.g. lack of information, presence of market power). While not a separate market failure of itself, protecting consumers from detriment is a common ground for government action in consumer markets. Example: Deliberately false or misleading behaviour by traders may lead to consumers being unable to exercise informed choice.
Lack of property rights	Some important resources (e.g. natural resources) are not subject to clearly defined property rights. Without these property rights, no parties have the power or incentive to manage these resources to prevent damage, allocate scarce resources or prevent over-use. Example: Appropriate controls may be required to prevent fishing stocks in public waterways from being depleted.
Public goods	Public goods are those where: it is not possible to prevent others from consuming the good ('non-excludable'); and consumption by one party does not impact on the consumption of others ('non-rivalrous'). These products are likely to be under-provided by private markets, as individual private actors do not have sufficient incentives to purchase or supply these products. Example: Street lighting in public areas are available for use by all parties and are used simultaneously.

Policy rationale	Description and example
Social or environmental objectives	The government may wish to pursue a range of social or environmental objectives to achieve broader policy goals, including protecting environmental systems, promoting cultural heritage and ensuring social welfare, health and safety or equity.

Additional factors must be present beyond the identification of a policy rationale

The need for government intervention does not automatically follow from the existence of a government rationale or market problem. In some instances, and particularly over time, the private sector may find alternative solutions to address market failures or meet broader objectives (i.e. by providing information). The government action must be expected to improve outcomes that would otherwise occur in the market. To do so, additional factors must be present.

Along with the existence of a government rationale, ***all*** of the following factors must be present for there to be a clear need for government action.

In assessing existing licences, it is necessary to consider the environment that would occur if the current licensing scheme did not exist. That is, if the licence was removed, would these factors be present in the current market?

There is a high risk of detriment

This essentially requires a risk assessment to identify and assess whether the likelihood of negative outcomes occurring is high and/or the size of the detriment that would result from this event is large. A risk assessment should also consider the level of vulnerability of the individuals involved. This might be informed by considering the ability of people to make informed decisions, whether this is impacted by their access to information, age or other characteristics.

'Risk' requires the consideration of *both* the likelihood (or probability) of a negative event occurring and the size (or possible magnitude) of the detriment that would occur as a result of that event. One way of thinking about a risk assessment may therefore involve the use of a matrix with likelihood of detriment on one axis and size of detriment on the other (see Figure 3). Any combination that sits in the shaded area would be considered to have a high risk of detriment for the purposes of this framework.

Assessing risk is a subjective process. To reflect this, the mid to high risk outcomes have also been included as 'high risk'. While a mid to high risk of detriment may not be significant on its own, in combination with a government rationale and the other two factors (poor remedies and no market response), this could suggest an ongoing need for the government to intervene.

Figure 3 Risk assessment matrix

		Size of detriment		
		Low	**Moderate**	**High**
Likelihood of detriment	**Low**	Low risk	Low risk	Mid to high risk
	Moderate	Low risk	Mid to high risk	High risk
	High	Mid to high risk	High risk	High risk

The ability to remedy is poor

Remedies refer to the avenues available to repair, restore or otherwise compensate for the detriment that occurs. These might include: sanctions; ability to recover losses under contract; and the possibility of repair or correction. Depending on the nature of the risk and

possible detriment involved, the presence of effective remedies can often alleviate the need for government intervention (such as licensing schemes).

Consider the nature of the remedies available. Are they limited to damages, or are injunctions or more specific performance remedies available? If there are no specific remedies, consider whether damages (i.e. financial compensation) would be sufficient to remedy the detriment. Also consider the forum in which the matter would be heard and the amount of time it would typically take to resolve a matter through these means. Are quicker and lower cost options such as administrative tribunals available or would the courts need to be used? If only higher cost (in term of time and fees) options are available, the ability to remedy may be lower.

By way of example, financial losses may be easier to recover, but other losses such as environmental damage or physical injury may be more difficult to remedy.

The ability to remedy should be considered as a separate factor to the risk of detriment. In some cases there may be a high risk of detriment, but this detriment or loss could be addressed through available remedies. Financial losses provide a good example of this. In this case, the risk of detriment may be high because a large amount of money could be lost and the likelihood of losing that money could also be high (i.e. due to misconduct or other behaviour that is likely to occur). However, the ability to remedy financial loss is fairly good as mechanisms such as insurance can be used to mitigate it prior to the loss or civil claims can be made to retrieve part or all of the money after the loss. In this case, the ability to remedy would not be poor and there may be no ongoing need for the government to intervene.

The market is unable or unlikely to respond

Private markets often develop their own solutions to the problems outlined in Table 2. For example: providers of information, insurance, or avenues for complaint or redress. The presence of these solutions can overcome the need for government intervention.

Consider the experience of the market to date in solving the problem identified, or similar problems in other areas. Has the market been shown to be effective in this area before? It may be necessary to consult with stakeholders to identify whether they believe the market is likely to respond in an adequate way. In assessing if and how the market may respond, it is also important to consider how the market has changed over time. Are there characteristics of the current market that suggest a market response could develop in the absence of licensing or other government action? This is discussed further below.

In assessing existing licences, as outlined above, it is necessary to consider what may occur if the licensing scheme was not in place. Given the current market environment, would the market respond and address the problem in some other way if licensing was removed?

As an example, the market or social pressures created by social media, news and advertising campaigns may be sufficient to ensure markets will address market failures. Another market response is the development of information through consumer guides or other means. For example, information about several consumer products can now be found through online review sites and other social media.

Relevant considerations when answering questions in this step

In identifying whether the additional factors are present, consideration should be given to:

- **Relativity to other sectors** (for example, how high is the detriment compared to other areas of government action or non-action?). Some of the concepts in this step are subjective. For example, the extent to which the likelihood and size of the detriment are 'high', the extent to which the ability to remedy should be classified as 'poor', how 'likely' the market is to respond and how 'adequate' the response would be.

  For example, an overseas holiday has historically been considered a significant financial purchase relative to a person's income. However, given changes in the cost of travel, the average cost of a holiday is now only a fraction of average incomes. This comparison could suggest that travel may no longer represent a substantial financial investment and hence not require licensing.

- **Changes over time** that have affected the extent to which each factor is still relevant (for example, changes in technology, legal and regulatory changes, social norms, information availability through the internet or other means).

  As an example, the internet has had a profound impact on the ability for consumers and other parties to access information. Therefore, if the market problem relates to a lack of information, it is necessary to consider whether new information sources are now available that impact on the ability of the market to respond to this problem. The advent of review sites for example has meant that consumers have more information about the potential quality of a product before they purchase it.

  Case study example: Property valuers

  The case study in Appendix D on property valuers demonstrates how changes over time may impact on the need for government action. The industry and market place surrounding property valuers has experienced changes that may mitigate the need for government action resulting from information asymmetry. The changes that have occurred relate to:

  - the introduction of the Australian Consumer Law
  - the emergence of professional associations
  - the nature of the client base of property valuers
  - the significant amount of information available via the internet.

  See Appendix D for the full case study.

- **Think about the *potential* ability** for remedies to develop or the market to respond, rather than focusing only on current or past experience. Thinking about the potential remedies or responses can help to identify the barriers that are preventing these from happening. These barriers may actually represent an underlying problem, which if fixed, could address the initial problem being considered.

  There may also be potential remedies or market solutions that do not occur simply because a regulatory scheme is in place. Once these potential options have been identified, an assessment can be made as to whether these would emerge if the government did not intervene. For example, insurance will not be provided in a particular area if the government provides financial protection through other means. However, if the government removes its protection, insurance markets may develop.

- **Separation of each point** to ensure that the reasoning for each factor is distinct. For example, a lack of remedies does not imply there is a high risk of detriment. Each requirement or question in this step is independent and should be considered in isolation.

Summary of the key questions to be answered

The assessment for this step needs to answer the following questions:

- Is there a clear and ongoing rationale for government intervention?
- Is the risk of detriment high?
- Is the ability to remedy poor?
- Is the market unable or unlikely to provide an adequate response?

In assessing existing licences, these questions should be answered by considering the environment that would occur if the current licensing scheme did not exist. That is, if the licence was removed:

- would there be a clear and ongoing rationale for the government to intervene?
- would the other three factors still be present in the current market?

Does something else address the problem?

Something else may address the problem if:	
Other generic laws are sufficient to address the problem.	**Questions to consider in determining whether other generic laws are sufficient include…**
	Is the need for government action especially high, meaning the risk of detriment is very high and/or the ability to remedy is very poor or irremediable? If so, generic laws may not be sufficient.
	If licensing did not exist, would something still be needed to address the risk beyond what already exists?
	Is the problem particular to a specific area or is the problem captured and addressed by a broader set of laws?

Guidance notes

The aim of this step is to identify whether a specific government intervention (such as licensing or some other government action) is still required in the specific area being assessed. Key to this is identifying whether something else can address the identified problem and meet the objectives of government action. The 'something else' in this case is generic rules and existing laws.

Individuals, organisations and businesses are already subject to a range of generic or broadly applicable laws and other government actions. These actions target a range of problems or objectives that may be relevant to the area being considered and may address, at least in part, some of the identified problems that give rise to the need for government action. If there are other generic or existing laws (beyond the licensing scheme) that adequately address the problem, then a more specific action (such as licensing) is not needed.

For existing licences, it is necessary to consider the environment that would exist if the current licensing scheme was not in place. For example, if the licensing scheme was not in place, would there be something else (broader generic laws or related regulations) that would be sufficient to address the problem that licensing targets (i.e. the problem identified in the first step of the framework).

This step is also an opportunity to consider the full range of regulatory (and non-regulatory) measures that apply to the sector, and the cumulative impact these measures have on the regulatory burden faced by licensees. This step considers whether another government intervention is necessary, in addition to these other measures impacting the sector, and what role this intervention should play (or be limited to) in this context.

What is meant by generic laws?

Generic laws are existing laws that apply more broadly than the area being considered (e.g. to many businesses or individuals or span across several sectors, regions or groups of people). Examples of generic laws include:

- **Competition, consumer and fair trading** laws, which include rules against conduct such as misleading, deceptive or anti-competitive behaviour
- **Company** law, which includes a series of rules that regulate the behaviour of company directors and other entities related to a company
- **Criminal** law, which prohibits a range of behaviours that impact others.

Some generic laws have a particular focus, but apply to a broad range of sectors and entities. For example:

- **Occupational health and safety** laws, which apply to all businesses across all sectors and generally requires that businesses create a safe workplace
- **Food safety** laws, which regulate practices around the provision of food, but are not specific to the provision of food in any one sector.

Generic laws are preferred to specific action unless they are insufficient to address the problem. Relying on generic laws provides greater consistency in the way problems and issues are addressed and often imposes less of a burden on individuals or organisations.

Generic laws are relative

One difficulty in this step is identifying where to draw the line in what is determined as 'generic' laws. To do this, generic laws should be identified in a **comparative** sense. The definition of 'generic' is **relative** to the specific area being considered for action. The generic laws that should be considered are those that already exist and sit above or at a broader level than the specific area being considered.

An example of the relative nature of generic laws is the application to food safety. If the problem being addressed is the safety of food being sold in specific circumstances (e.g. school canteens), applicable generic laws that should be considered would include general food safety laws that sit above that and potentially broader negligence and occupational health and safety laws. If however, the specific area being considered was the handling and preparation of food (across all sectors, entities, etc), food safety laws would be considered specific to this field. In this case, broader negligence or occupational health and safety rules may be the relevant generic laws to consider.

Identifying whether generic laws are sufficient or whether something specific is needed

There are three general points to consider in identifying whether something else would address the problem or whether a specific action in this area is needed. These are explained in more detail below.

1 If the reasoning behind the need for government action is particularly strong, it may not be sufficient to rely on generic laws to address the problem. To identify if this is the case, it is necessary to consider the extent of the factors identified in Step 1. The need for government action could be seen as particularly strong if the detriment is not possible to remedy, there is a high likelihood of the detriment occurring, the size of the detriment is high, or parties have a high degree of vulnerability.

   Looking at the risk assessment done in the previous step, consider how the level of risk compares to other similar sectors where only generic rules apply. Is the level of risk sufficiently great in this area to justify specific action?

2 If licensing did not exist, would something specific still be needed to address the risk beyond what already exists or would be encompassed by broader laws?

Consider how well the generic laws operate in respect to the area in question. If the generic laws are well designed and appropriately enforced and the problem still occurs, then something specific to this area may be needed. However, if there are issues with design or enforcement, rather than creating something specific to the area, addressing these issues may resolve the problem. If this can be controlled by the government concerned, then this would be preferred over a specific action. The ability to control and impact on generic laws may be an issue for national laws (i.e. company law), so this will need to be taken into account when making this assessment.

3 Is there something specific about the people, product or place in question that necessitates a specific action to be taken? If the problem is particular to a specific area and does not relate to broader issues, it may be more likely that generic or other existing laws would be insufficient.

Similar to this issue is a consideration of whether the problem relates to a specific entity rather than being systematic to a sector or group of entities. If the problem is contained to one entity (i.e. one particular business), greater enforcement of existing laws in respect of that business may be sufficient rather than imposing specific action (e.g. licensing) on the wider group of entities.

Example: the regulation and licensing of explosives

Explosives are used by a variety of groups in society for legitimate purposes. However, there are potential problems associated with explosives due to negative impacts on third parties and potential misconduct. The relevant generic laws in this case would be occupational health and safety laws and criminal law. While these laws improve safety surrounding explosives, they may be insufficient because there are risks specific to explosives which if not addressed, could have very high consequences (i.e. the potential detriment from explosives could be catastrophic, resulting in death and widespread property damage). In addition, these impacts cannot be remedied with any close substitute (i.e. financial compensation is likely to be insufficient). If licensing did not exist, it is unlikely that something else (in terms of generic laws) would address the problem. Hence, there may be a role for regulation, licensing or other specific actions for explosives despite the presence of generic laws.

Case study example: Property valuers

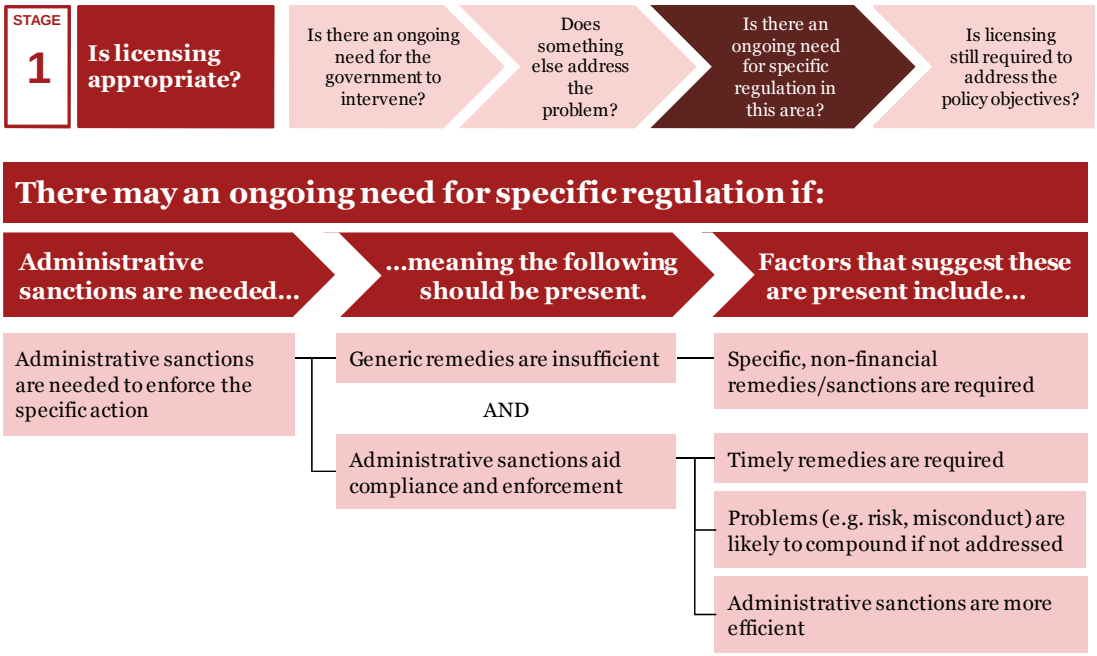
The case study on property valuers in Appendix D demonstrates a situation where generic laws and remedies could be sufficient. In this case study, it is found that the Australian Consumer Law may meet the objectives of government invention in the property valuing industry and may mitigate the need for industry specific regulation.

Summary of the key questions to be answered

The assessment for this step needs to answer the following questions:

- What are the generic laws that exist relative to the specific area being considered?
- How do the generic laws relate to the area in question?
- In the absence of licensing, would the generic laws identified be sufficient to address the problem identified in the previous step?

Is there an ongoing need for specific regulation in this area?



Guidance notes

The previous step looked at whether generic laws would be sufficient to address the problem and therefore whether something specific is needed. That is, whether a specific government action should be undertaken in order to address the problem in the area being considered.

If specific action is required, there are a range of different government actions that could be chosen, including:

- introducing new regulation (the creation of enforceable rules and/or administrative sanctions)
- providing information through targeted information or education campaigns
- undertaking targeted compliance and enforcement action using existing laws and regulations
- creating mechanisms that encourage (rather than mandate) certain actions, behaviours or attributes (e.g. the creation of sector-specific codes of conduct or accreditation schemes).

The aim of this step is to explore whether regulation is the appropriate form of action for the government to take. Generally, non-regulatory measures (e.g. providing information) are preferred over regulation to address the problem, as they impose less cost and fewer restrictions on businesses and competition.

Central to regulation is the creation of additional regulatory obligations or requirements that can be enforced with the threat of various administration remedies or sanctions. The need for regulation is therefore dependent on the need to enforce the action through administrative sanctions to support the new action. As such, regulation should only be considered appropriate if the following two factors are present:

- **Generic or existing remedies (which generally apply after the event) are insufficient to adequately address risks.**

  Generic remedies refer to the application and enforcement of generic laws identified in the previous step.

- **Administrative sanctions are necessary to support effective compliance and enforcement.**

  Administrative sanctions include powers that enable enforcement outside of the courts (i.e. the power for a regulator to impose fines or other sanctions), as well as allowing enforcement of specific provisions through the courts that do not exist in generic laws.

A common theme across these two factors is that they enable enforcement to occur. Therefore, a key consideration is the extent to which the new government action needs to be enforced.

Generic remedies are insufficient

Generic remedies refer to the application and enforcement of generic laws. While the previous step identified that generic laws were not sufficient on their own, it may still be possible to leverage these laws, but target government action to the specific area being considered. For example, these generic laws could be enforced in a specific way that targets the area being considered, but utilising existing law enforcement mechanisms. An example may be an enforcement and education campaign relating to misleading and deceptive conduct, but specific a particular industry or sector (e.g. travel agents). Simply having the generic consumer law in place may not address the problem, but initiating the specific application of generic laws could be sufficient.

This may be deemed insufficient if the remedies available are unlikely to provide adequate redress, or it is difficult to enforce these rules in the specific area being considered. Taking parties to court can be time consuming and expensive and the decisions made only relate to the immediate case in question. While the precedent it creates may be of value in influencing behaviour, the time and effort involved in legal action may diminish the perceived threat of legal action. In this case, administrative sanctions may be more effective.

Where the current generic remedies are insufficient, it may be desirable to reduce the risk of the detriment occurring, if the benefits of doing so outweigh the costs. This may mean encouraging parties to behave a certain way or have certain attributes that lower risk. One way to achieve this is through mandating new rules and creating administrative sanctions to enforce them (i.e. regulation). However, other non-regulatory options including information provision or non regulatory codes of conduct may also achieve these ends. There is only a role for regulation if administrative sanctions are also needed to ensure relevant entities have these attributes or conduct and to enforce compliance.

Administrative sanctions are needed to aid compliance and enforcement

Administrative sanctions may be needed to enforce new rules or to support the enforcement of existing rules. The need to enable compliance and enforcement through administrative sanctions requires that enforcement is, in fact, needed. That is, voluntary rules or actions not supported by enforcement must be insufficient to address the problem. For example, information provision through a consumer information campaign would not prevent the detriment from occurring. Similarly, voluntary rules or codes would not sufficiently address

the risk. Enabling enforcement may be required if timely remedies are needed, the problem is likely to compound over time, or enforcement through specific laws or new powers would be more efficient.

As an example, generic remedies could theoretically be used to address the problem of malpractice by doctors through targeted enforcement of negligence laws. However, the remedies that can be given after malpractice has occurred are unlikely to provide adequate redress for the victim and may be insufficient to adequately change behaviour in the industry. Hence, generic remedies would be considered insufficient. In addition, voluntary codes of conduct would not be sufficient. Given the serious consequences that may result and the difficulty in identifying the competence of a doctor, regulation would be needed to ensure medical practitioners have the necessary competence.

Factors to be considered

In considering whether enforcement through administrative sanctions is needed, consideration should be given to the following:

- Have generic remedies been pursued and tested and, if not, can they be?
- Has previous experience with generic remedies or non-regulatory actions demonstrated that it is insufficient because it failed to generate compliance, or persistent and long term issues arose that were not sufficiently resolved?
- Is there evidence of a non regulatory response working well in other jurisdictions or comparable sectors? Examples and comparison with other like sectors or jurisdictions will assist with highlighting potential areas for reform or the likely need for regulation.

Examples

In the case of dangerous goods, there is a role for regulation because generic remedies and sanctions would be insufficient to ensure compliance before an adverse event occurred. For these goods, safety requirements are regulated and enforced through infringements notices and prosecutions. If safety concerns are not addressed quickly or able to be enforced, the problem may compound and lead to an incident occurring. The detriment could then be substantial. In this case, regulation also allows for specific sanctions in terms of specifying that businesses are set up or act in a certain way.

An example can also be given where regulation was not required. In August 2012, the Office of Fair Trading undertook a targeted enforcement campaign to address the problems associated with travelling conmen. While the general laws in this area already cover fraud, a new, specific action was needed to target this area of concern. However, additional regulation was not required because traditional remedies and enforcement mechanisms can be used under existing legislation.

Non-regulatory government actions

As an alternative to regulation, there are a series of non-regulatory responses that could be used to address a specific problem identified by government. Some of these are outlined above (i.e. education campaigns, codes of conduct etc). The merit of non-regulatory approaches should be considered in this section. If any of these responses would be sufficient to address the problem, there is no ongoing need for regulation.

Non-regulatory responses are considered in the framework in more detail in the second step of Stage 4. This section considers what other alternative options beyond licensing could be used to deliver policy objectives. This section also maps the different options to the policy objectives being sought to demonstrate, at a high level, when these other options may be appropriate (see Table 6).

Summary of the key questions to be answered

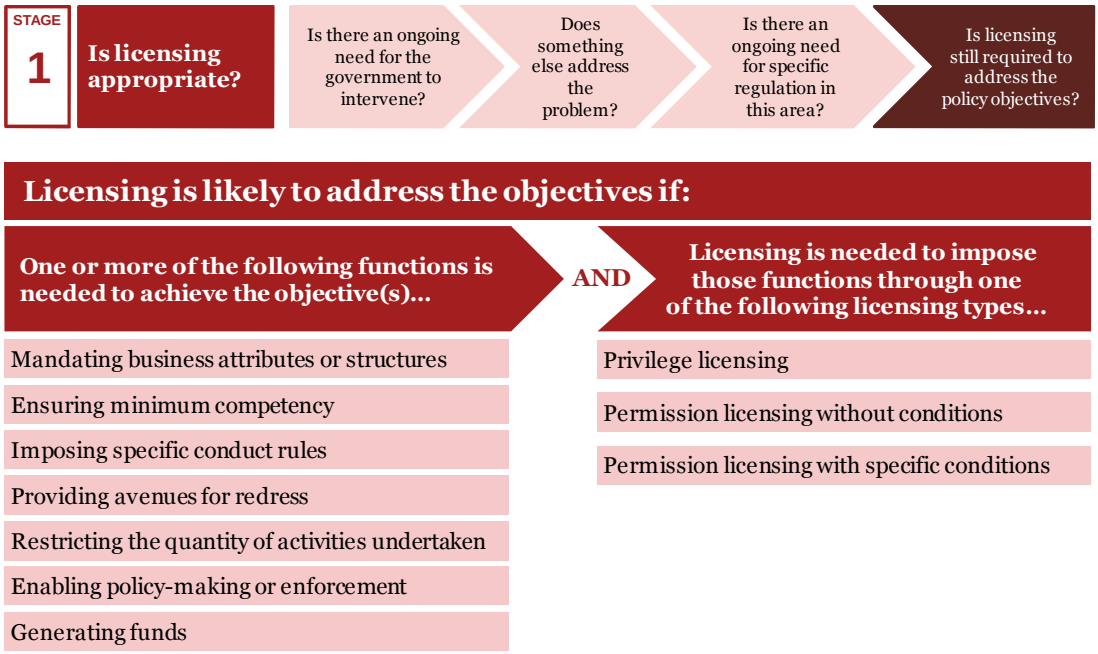
The assessment for this step needs to answer the following questions:

- Does the specific government action need to be enforced?
- Would enforcing generic laws in a targeted way be insufficient? That is, are generic remedies insufficient to address the problem?
- Are administrative sanctions needed to ensure compliance and enforcement of specific rules?

  *There is only an ongoing need for specific regulation if enforcement of the specific government action is needed **and** targeted enforcement of other, existing regulation or legislation would not be sufficient **and** administrative sanctions are needed (i.e. the first three questions are answered with a 'yes').*
- Would a non-regulatory response be sufficient to address the problem?

  If so, a regulatory response should not be used and there is no ongoing need for specific regulation.

Is licensing still required to address the policy objectives?



Guidance notes

The aim of this step is to identify whether a licensing scheme is necessary (or still necessary) to achieve the desired policy objectives.

Primarily, this step is about whether the 'functions' that licensing schemes perform are necessary. If so, licensing may be an appropriate option to achieve the underlying objectives. If not, other regulatory or non-regulatory options are likely to achieve these objectives in a more efficient and effective way.

This step is in two parts:

1 Are the possible functions of licensing required to achieve the policy objectives, and, if so, which function(s) are required?

2 Is licensing necessary to perform those functions?

However, prior to addressing these questions, the objectives of the licensing scheme should be clearly understood, in order to 'match' the possible functions of licensing to these objectives.

The next section provides guidance in identifying objectives. The further detail and guidance on the two parts of this step are then provided.

What are the objectives of the licensing scheme?

This step (and many of the steps in Stage 2) refers to the policy objectives for the licensing scheme. Therefore, to complete this step, the objectives of the relevant licensing scheme must be identified and articulated.

For existing licensing schemes, this includes identifying the original objectives of the scheme, and reviewing whether they are still appropriate (in light of market or regulatory changes) and/or whether new objectives have arisen.

What are objectives?

Developing and articulating clear objectives is an important step in effective policy-making. Objectives specify what government action (such as licensing) is intended to achieve, including its desired outcomes. The Better Regulation Office provides guidance on setting effective objectives, including that they:

- directly target the root cause of the problem
- be 'ends' based, rather than focusing on the means by which something will be achieved
- be clear, concise and specific
- where possible, be measurable (e.g. by specifying an outcome and a time period over which the objective is to be achieved)
- be consistent with existing government objectives or policies.[1]

Most importantly, the objectives of regulation should directly target the identified problem this action is intended to address. That is, the objectives should be based on the issues raised in the preceding steps of this framework, namely:

- the need for government action – identified market failures or broader government objectives (Step 1)
- recognising other regulatory and non-regulatory government actions relevant to the problem – e.g. generic consumer, fair trading, corporation or health and safety laws (Step 2)
- the need for government action to be regulatory, as opposed to non-regulatory options (Step 3).

---

1 Better Regulation Office, *Guide to Better Regulation.*

What objectives are relevant to licensing?

Broad categories of objectives, relevant to licensing, are identified in Table 3. The objectives of most licensing schemes should relate to one of these categories, albeit sometimes using different words or phrases.

Table 3: Explanation of the objectives that are relevant to licensing

Objective	Description
To promote informed choice	To improve the ability of individuals (e.g. consumers) to exercise informed choice by ensuring the ability to access information relevant to decision-making.
To address the risks of misconduct	To reduce the likelihood of participants in the sector engaging in misconduct or the potential detriment that would arise from misconduct.
To promote competence, quality or safety	To promote standards of competence, quality or safety or reduce the likely consequences of poor standards.
To improve market competition	To promote competition within markets or to overcome a lack of competition where competitive markets are not feasible (e.g. for natural monopolies). Meeting this objective should not involve duplication of existing broader competition laws.
To manage or protect common resources	To manage the use of common resources or ensure private actions do not unduly damage common resources (e.g. environmental systems, heritage).
To facilitate the provision of public goods	To create the market conditions necessary to ensure public goods are sufficiently provided.

Considering the list above and the guidance earlier, the specific objective(s) of the licensing scheme should be identified. These objectives inform the following parts of this step, and later stages of the framework.

Licensing's functions must be necessary to achieve the objectives

The point of this step is to identify whether the functions of licensing (and which functions) may be required in order to meet the identified objectives.

Identifying the role(s) that licensing should play (its 'function') in achieving regulatory objectives is central to determining whether licensing is necessary and, if so, the appropriate form that licensing should take. These functions are limited – that is, there are only a limited number of roles licensing can perform. If these functions are not well matched to the objectives of the regulatory action, licensing is not the best regulatory approach to take. Similarly, other regulatory (or non-regulatory) options may be available to perform these functions more efficiently and effectively.

What are functions?

'Functions' refer to the role(s) licensing can play in achieving regulatory objectives. Specifically, it refers to the regulatory requirements the license imposes on regulated entities or the activity or opportunity the licence enables.

The possible functions of licensing are outlined in Table 4. These functions can be broadly divided into two types:

- Policy driven – those necessary to, and targeted at, addressing identified market problems or broader policy objectives.
- Administrative – those which aid regulation and compliance and enforcement.

In practice, licensing schemes will often perform more than one (or even all) of these roles.

Table 4: Explanation of the possible functions of licensing

Function	Examples of licensing requirements that perform this function
Policy driven functions	
Mandating business attributes or structures	• Prudential requirements (e.g. insurance) • Probity requirements (e.g. 'fit and proper person' test, criminal record) • Minimum age
Ensuring minimum competency	• Ensuring minimum qualifications, training or experience • Competence testing or assessments • Ensuring ongoing professional development or training
Imposing specific conduct rules	• Information disclosure • Prohibiting specific conduct • Requiring certain business practices (e.g. use of equipment)
Providing avenues for redress	• Mandatory dispute resolution processes • Creating administrative sanctions or remedies
Restricting the quantity of activities undertaken	• Limiting participants in the sector • Limiting total quantum of activities undertaken

Function	Examples of licensing requirements that perform this function
Administrative functions	
Enabling policy-making or enforcement	• Collection of information related to regulated entities • Creation of regulatory powers • Creation of administrative sanctions (e.g. fees)
Generating funds	• Collecting revenue to fund regulatory activities • Collecting revenue that reflects the 'rents' associated with scarce licences

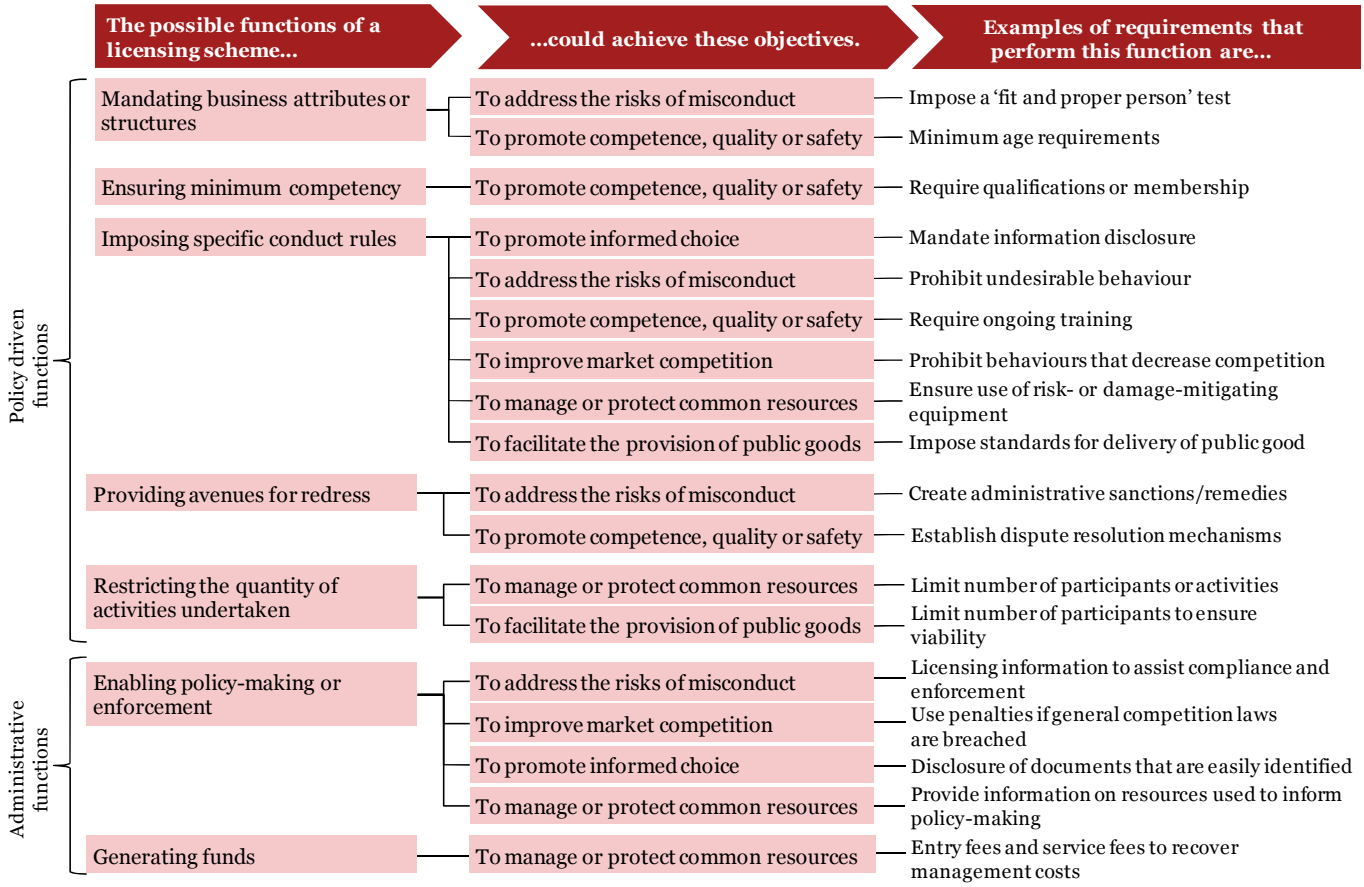
Are these functions necessary to achieve policy objectives?

Given the possible functions of licensing outlined above, whether licensing is the appropriate regulatory measure depends to a large extent on whether (and which of) these functions are needed.

This question is about whether the function(s) of licensing 'match' the underlying problem and policy objectives. Where the function(s) closely match the need for government involvement and the desired objectives, licensing may be an appropriate option. Where they do not, other regulatory (or non-regulatory) options are better suited.

The diagram below (Figure 4) assists in 'matching' functions to policy objectives by identifying the types of objectives each function might address. The diagram lists each function (from Table 4) and identifies possible objectives (from Table 3) that they might address. Examples of how these functions might achieve such objectives are also provided.

Figure 4: The matching of policy objectives to functions and requirements that can be achieved through licensing



Importantly, 'administrative' functions ('Enabling policy-making or enforcement' and 'Generating funds') may also be needed to support any 'policy driven' functions that are necessary. If any policy driven functions are identified, the need for administrative functions to support that function(s) should also be considered.

On the basis of the above, identify which function(s) (if any) is necessary for the licensing scheme in question. That, which function(s) is matched to the need for government action and its objectives?

Example

For the licensing of firearms, one of the objectives would be 'to address the risks of misconduct'. As outlined in the diagram (Figure 4), there are four possible functions that match this objective. Currently, existing licensing utilises two functions to achieve this objective: mandating attributes (i.e. the licensee must have a genuine reason); and enabling enforcement (i.e. a register of firearms is kept to trace their use). Hence, the functions are matched to the objectives.

Another separate objective relating to firearms is 'to promote competence, quality or safety'. This is disaggregated from the risk of misconduct. It addresses the fact that firearms are often used for legitimate reasons but, given their dangerous nature and the potential irremediable harm that may result, must be used in a safe manner and only be used by competent individuals. For this objective, the current licensing regime for firearms uses these functions: ensuring minimum competency (i.e. firearms safety training courses are required); imposing specific conduct rules (i.e. safe storage and transport); and mandating attributes (minimum age for a firearms licence is 18 and there is a minimum age of 12 for a minor's firearms licence).

How to choose between functions where more than one matches the objective

An implicit assumption in the matching process is the acknowledgement that all regulatory measures impose a cost and administrative burden on licensees and regulators. The functions – being types of regulatory action or requirements imposed on regulated entities – should only be employed where they are necessary to achieve objectives.

For some objectives, several functions of licensing could feasibly achieve the desired outcome.

Where this is the case, the preferred function or combination of functions should be chosen based on the most efficient and effective means to achieve the objective.

Ultimately, this is a case by case basis decision. Generally, the function that most directly targets the problem will achieve the objectives most efficiently. However, other circumstances may mean it is necessary to depart from the most direct approach. Such circumstances may include:

- difficulty in monitoring or enforcing the more direct functions
- using a less direct approach would impose lower costs on licensees and/or regulators, and the objective can still be achieved.

Key questions for part 1 of this step:

Are one or more of the possible functions of licensing necessary to achieve policy objectives?

If any, which function or combination of functions closely match the need for government action and the policy objectives?

Licensing must be necessary to achieve those functions

Once the desired function(s) of the licensing scheme have been identified, the next step is to consider whether licensing is necessary to implement these functions.

Is licensing necessary?

In broader terms, licensing is only necessary if:

1. There is a need to restrict the quantity of activities undertaken (one of the policy driven functions identified above), and/or

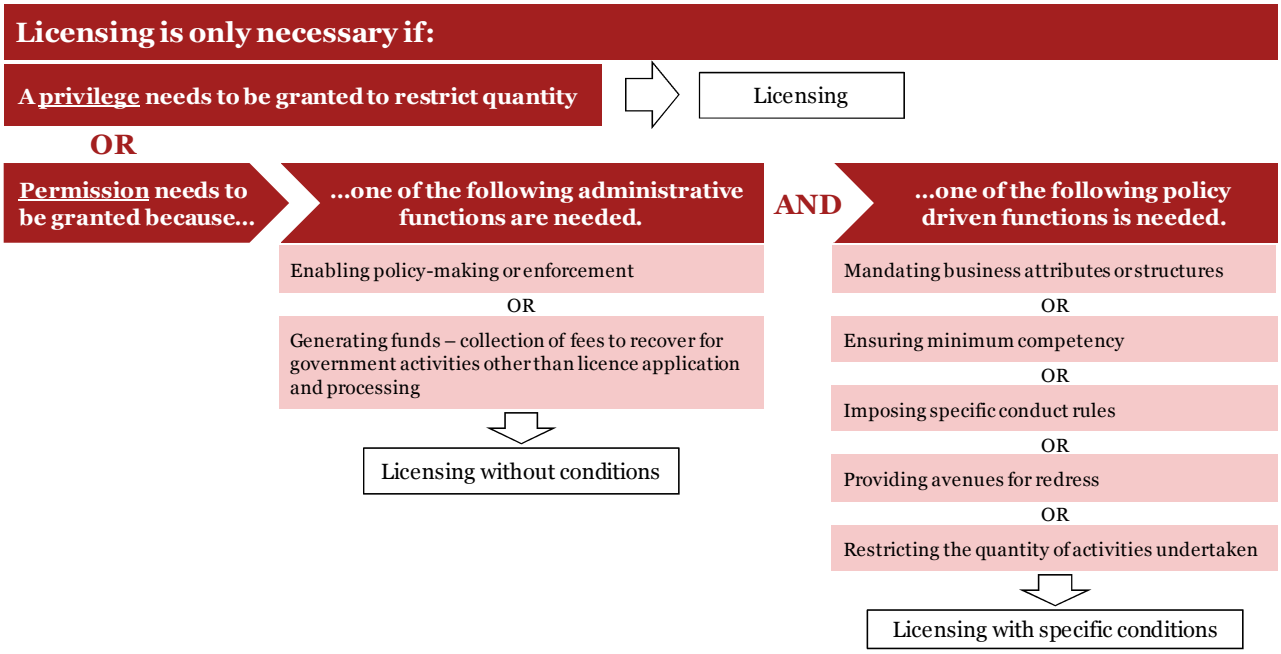
   Licensing is the only feasible way to grant a privilege in order to restrict quantity. A licence can allow only a limited number of licensees to undertake the activity, thereby limiting the quantity of that activity undertaken.

2. The administrative functions of licensing ('Enabling policy-making or enforcement' and 'Generating funds') are necessary.

   Licensing may be the best way to facilitate these functions. This is achieved by: collecting information on licensees; creating administrative sanctions related to the suspension or cancellation of a licence; and/or charging licence fees.

In either case, one or more of the policy driven functions of licensing may also be necessary. If so, the licence should include conditions to give effect to these functions. If not, the licence should not impose conditions (e.g. authorisation or registration schemes).

Figure 5: Licensing must be necessary to implement the required functions



Importantly, Figure 5 has the following implications.

- If only policy driven functions are necessary, licensing is not an appropriate option.

  Licensing is only necessary if its administrative functions ('Enabling policy-making or enforcement' and 'Generating funds') are necessary.

  If only policy driven functions are required, these can be implemented, for example, through specific (non-licensing) regulations. Such regulation could introduce the function (conduct requirements, etc) without the regulatory burden and restriction of competition that licensing creates. Other options are outlined in Stage 4 in Table 6.

- While administrative functions include 'Generating funds', the collection of fees to recover for *licence processing activities* is not a justification for having licensing in and of itself.

  'Generating funds' is only a valid function on its own if it recovers for activities such as monitoring and enforcement. If 'Generating funds' is the only function needed and it only refers to fees that fund the *processing* of applications, the rationale for the licensing regime would be circular and may not be necessary. This is not to say that recovering funds for processing activities is never justified. Licensing (and the associated fee collection) is not justified however, if funding licence *processing* is the *only* reason for the licence to exist.

Case study example: Commercial fishing licence

This case study offers a good example of how to answer 'Is licensing necessary?' and how to identify the type of licensing required. For commercial fishing, a privilege licence is necessary to restrict the quantity of activities undertaken. In addition however, permission licensing with conditions is also necessary in order to monitor the activities of licensees and enforce the privileged licensing of fishery businesses, as well as to impose specific conduct requirements. See Appendix B for the full case study.

Key questions for part 2 of this step:

Is licensing necessary to implement the required function?

Is it necessary to restrict the quantity of activities undertaken? Is one or more of the administrative functions of licensing required?

Can the policy driven functions be achieved through (non-licensing) regulation or non-regulatory measures?

Implications for Stage 2

Understanding the desired functions of the licensing schemes is also central to the appropriate design of the scheme (addressed in Stage 2 of the Framework). Accordingly, the necessary functions identified in this step should inform the issues considered in Stage 2.

In particular, this step may have the following implications:

- The number of licences issued should only be limited if the function 'Restrict the quantity of activities undertaken' is an expressly desired function.

  Some licences (referred to as 'privilege licences') give a limited number of licensees the right to undertake an activity to the exclusion of others. This is used to restrict the quantity of an activity. This form of licence clearly imposes a high degree of restriction on competition. Accordingly, licensing schemes of this form should only exist where there is an express need to restrict the quantity of activities undertaken.

  The distinction between 'privilege' (where quantity is restricted) and 'permission' licensing is also important in Stage 2 when considering the appropriate fees and charges that should be set.

- Where only administrative functions are required ('Enabling policy-making or enforcement' and 'Generating funds'), the licensing scheme should not impose conditions on the licence.

  Some licences exist purely to generate funds (through licensing fees) and/or obtain information on licensees to assist policy-making or enforcement. In this case, forms of licensing that impose no conditions for approval or holding of a licence achieve the

necessary policy aims with minimal restriction on competition and regulatory burden. Such licences include:

- Notification
- Registration
- Accreditation
- Permits.

Conditional licences are only appropriate where one or more of the policy driven functions are required.

As discussed later, these observations have implications for steps in Stage 2. For example, if only administrative functions are required, the minimum necessary 'conduct rules' (Step 5) and 'mandatory attributes' (Step 6) should in fact be nothing.

Summary of the key questions to be answered

The assessment for this step needs to answer the following questions:

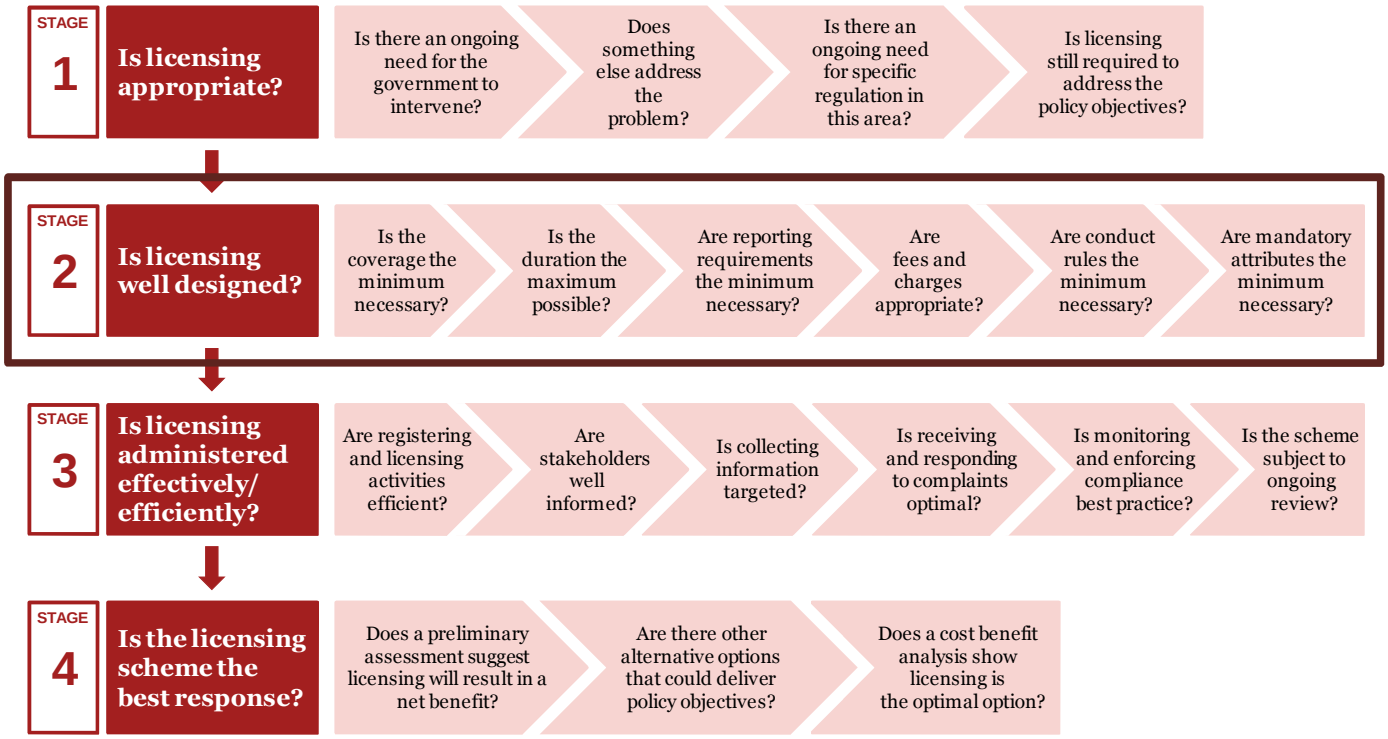
- What are the objectives of government action in this area?
- Are any of the following function(s) of licensing required to achieve the objectives:
  - Mandating attributes?
  - Ensuring minimum competency?
  - Imposing conduct rules?
  - Providing avenues for redress?
  - Restricting the quantity of activities undertaken?
  - Enabling policy-making or enforcement?
  - Generating funds?
- If so, which function(s)?
- Is licensing necessary to achieve this function(s)? Could these functions be achieved by regulatory (or non-regulatory) measures in the absence of licensing?

  If only policy functions are required, licensing may not be necessary and other regulatory measures could be used.

  If licensing is necessary, consider which type(s) of licensing is necessary (i.e. privilege versus permission). A licensing scheme may have elements of both depending on the functions required.

Stage 2

Is licensing well designed?



Overarching considerations for licensing design in Stage 2

The intent of this stage is to identify and assess whether an existing or proposed licensing scheme is well designed or 'fit for purpose'. This means that the requirements and conditions of the scheme should generate the least burden possible on both licensees and licensors while achieving the policy objectives.

The design elements assessed in this section may not be necessary for all licensing schemes. To reflect this, when considering the minimum necessary requirements, it is important to consider the absolute minimum to be zero – that is, having no requirement. For example, for a simple notification scheme, 'minimum' conduct rules may actually mean having no conduct rules at all. This is particularly relevant if the last step in Stage 1 indicated that 'licensing without conditions' is the most appropriate form of licensing. In this case, it is likely that the minimum necessary 'conduct rules' (Step 5) and 'mandatory attributes' (Step 6) would in fact be nothing.

In considering each design element, the following sections outline some overarching concepts that should be taken into account. These concepts apply across the board for all design elements.

Opportunities to harmonise

For each step, consider the requirements imposed by other jurisdictions and comparable sectors and where appropriate, seek to harmonise or offer mutual recognition.

When assessing the minimum requirements necessary, they should be contrasted and compared to requirements in **other jurisdictions and comparable sectors**. Comparing the design element being considered with the requirements imposed in other areas highlights other options in terms of the way in which licensing schemes are designed and the requirements that are chosen. This could mean looking at the same area in a different jurisdiction or looking at other sectors that may have similar characteristics to the area being assessed. There may also be a national licence or broader national reform that relates to the licence being considered.

If differences are identified, they may represent an opportunity to **harmonise**. The potential for **mutual recognition** arrangements should also be considered. This would increase the level of consistency between jurisdictions and across sectors, making it easier for individuals and businesses to comply.

For example, in assessing the licensing regime for explosives, the licensing regime could be compared to other jurisdictions in Australia. In this case, in considering whether the scheme's coverage is the minimum necessary, the following questions could be relevant:

- are the same explosives subject to the licensing regime (i.e. how is 'explosives' defined) in other jurisdictions?
- are the same exemptions and thresholds used in other jurisdictions, and in comparable areas such as weapons or firearms licensing?

Harmonisation generally creates beneficial outcomes for individuals and businesses that live and/or operate across multiple jurisdictions. Harmonisation on its own however, should not be the sole reason for choosing a particular requirement. Developing a harmonised approach may need to be balanced against the aim of generating the best design outcome.

Be proportionate to the risk being addressed

For each step, consider whether the requirements being imposed are proportionate to the risk being addressed.

All regulatory requirements impose costs on licensees and regulators and should only be imposed if the benefits of doing so exceed these costs. The benefits of licensing are generally associated with addressing the risk of detriment. To identify whether the benefits outweigh the costs, it is therefore necessary to consider the level of risk being addressed. Is the level of risk high enough to justify the requirement in place? Further to that, is the extent of that requirement proportionate to the risk that exists?

For example, does the risk necessitate imposing minimum attributes? If so, what types of attributes need to be imposed? Can a less imposing attribute requirement still address the risk of detriment? For example, if the problem relates to a low impact activity, it may be appropriate to require a single training session, rather than a full qualification, with no need to redo the session once complete (i.e. the validity of the session would have no fixed term for the purposes of the licence).

One way to apply a risk based approach to licence design is by rewarding licensees who maintain long term compliance. Under this scenario, licensees would only have to meet certain requirements if they demonstrate non-compliant behaviour. This concept of can be applied to several of the design elements of a licensing scheme. For example:

- reporting requirements could only be imposed on licensees that have shown non-compliance or had substantiated complaints raised against them
- the duration of a licence could be longer or in fact have no fixed term until non-compliant behaviour is demonstrated or found.

Engage and consult with stakeholders

Seek information and views from industry, consumer and government stakeholders to better inform the analysis, but ensure the context surrounding stakeholder views is considered.

Engage and consult with stakeholders to understand their views on how the licensing scheme should be designed. Engagement with industry stakeholders may be particularly beneficial, as it is industry that bears the burden of the licence requirements that are determined by the design elements. This gives industry a practical understanding of how the licensing scheme impacts on licensees and the way they operate. Consumer groups and government stakeholders may also prove to bring useful insights to the analysis throughout Stage 2.

Consultation can enrich the analysis by offering a practical view as to the impacts of licensing design. It also allows particular issues with licensing requirements to be raised and considered in the review process.

When engaging with stakeholders however, it is important to take into account the perspective that a stakeholder brings. Each stakeholder group will have different pre-conceptions and motivations behind their views. This framework considers licensing as a last resort due to its high cost nature. This may be in contrast to some stakeholder groups. For example, some industry stakeholders may favour licensing to restrict market access. Similarly, some government stakeholders could be highly motivated by revenue, or impacted by regulatory capture due to influences from industry or historical conditions.

The importance of 'unbundling' licence functions

For licensing schemes imposing more than one function, the steps within Stage 2 should be completed separately for each function and its specific requirements.

The steps in Stage 2 consider whether the various components of a licensing scheme (referred to as 'design elements') are tailored to achieving regulatory objectives most efficiently and effectively. These elements refer to the specific details of licensing schemes: who is covered (coverage); how long licensing is provided (duration); the conditions imposed (administrative requirements, mandatory attributes and conduct rules); and the applicable fees or charges.

Importantly, the most appropriate settings for each of these elements may differ for different licensing functions. For example, schemes to aid policy-making or enforcement (by collecting information) may require renewal on an annual basis; meanwhile, those imposing mandatory attributes (e.g. qualifications) may have longer durations or be issued with no fixed term. Likewise, the coverage of a scheme to aid policy-making or enforcement might apply to all participants in a sector, while more onerous schemes (e.g. imposing mandatory attributes) might be limited to higher risk or impact participants.

Unbundling licensing functions can therefore allow the scheme to be well targeted and minimise the burden for licensees and regulators.

In practice however, licensing schemes will often involve two or more licensing functions. Tailoring the design of a licensing scheme therefore often involves considering the potential to 'unbundle' the different licensing functions (and their associated requirements), and establishing different settings for design elements as fitting the functions and objectives. See Table 4 on page 29 for a list of licensing functions.

Unbundling can be demonstrated by considering the appropriate duration for a driver's licence. In this case, the following functions can be unbundled: 'Enable policy-making and enforcement' and 'Ensuring minimum competency'. To enable enforcement, the licence must be renewed periodically (i.e. it has an expiry, after which it must be renewed to ensure the individual's details are up to date). To ensure minimum competency however, it is only necessary to pass the licence test once, meaning there is no fixed term associated with the competency test (i.e. once complete, it does not need to be re-done).

Opportunities to consolidate licensing requirements

In completing the steps in Stage 2, consider whether each design element can be consolidated with other similar or relevant licensing schemes.

Given that licensing can involve significant costs, it is also important to consider what can be done to minimise the compliance and administrative costs for licensees and the regulator. One way to do this is to consider elements of the licensing scheme that could be consolidated or made consistent with other licences.

Where similar licences exist, certain requirements could be made the same and the two licences could be 'consolidated' into the one licensing scheme. This should assist in reducing costs on licensees and/or the regulator. If requirements cannot be made the same and consolidation is not possible, increasing the consistency with other related requirements will still help to reduce compliance costs.

An example of consolidation can be seen in the design of the driver's licence scheme. While there are separate licences for driving a car, motorcycle and truck, certain design elements of these licences are brought together into the one licensing scheme. For these licences, there is consolidation of duration, meaning the renewal period and time of renewal is the same for all

three licences. However, where appropriate, other elements of the scheme are unbundled. In this example, mandatory attributes are unbundled by having different competency tests for each licence. While these tests cannot be the same, a level of consistency is still maintained.

Other factors to consider across all steps

In considering the design elements in this stage, it is useful to undertake the following:

- **Consider changes that may have occurred over time** and how they are impacting each design element. Are there external factors or changes that alter the rationale underlying the scheme and impact on whether certain elements are still required?

  Being aware of changes over time is particularly important when reviewing an existing licensing regime, as the context around the scheme may be different to when it was first designed.

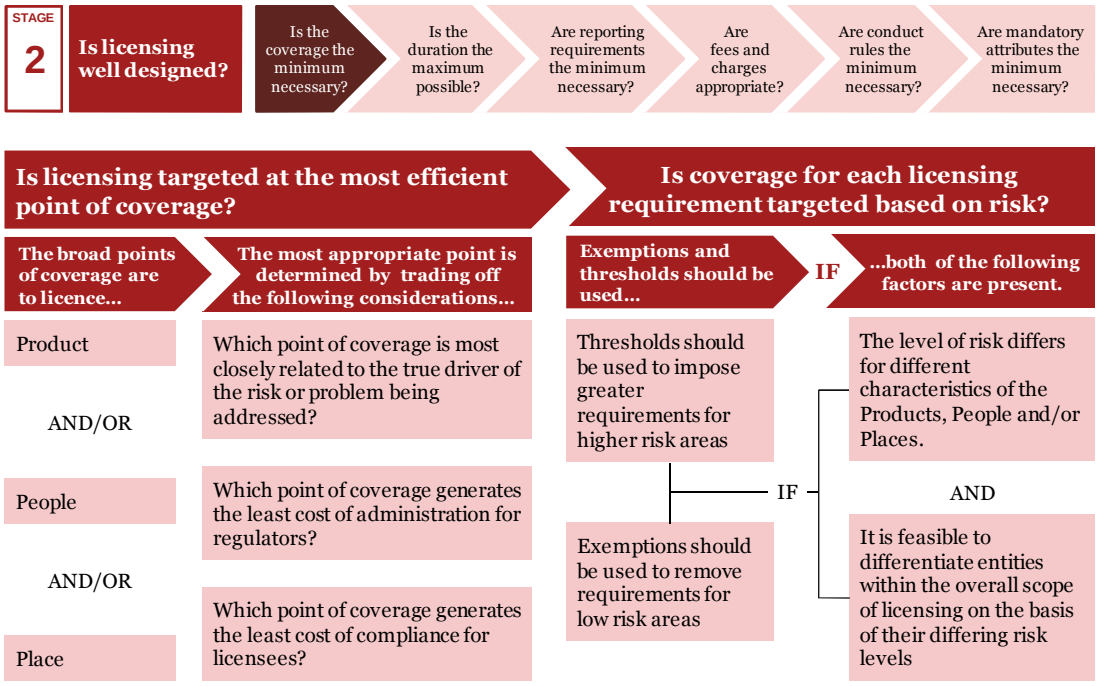
- **Where possible, quantify the impacts (in terms of cost and benefits) of different approaches** to help highlight the trade-offs between different requirements and the most efficient and effective approach.

  In answering questions in this section, it is important to make an assessment of the costs and benefits of the different options being considered. For example, in assessing whether it is necessary for information to be reported rather than merely made available, you will need to consider:

  – costs to the regulator in seeking out the information when required

  – savings to licensees in not having to record or supply information.

Is the coverage the minimum necessary?



Guidance notes

The coverage of the licensing scheme refers to the entities that are required to be licensed and/or to comply with each of the licensing requirements. For example, in fishing, it is the person who undertakes the activity of fishing who must be licensed.

Coverage also refers to the scope of the entities licensed, meaning how the group of entities is defined. In the fishing example, this involves considering whether licensing is required for all fishermen, versus just commercial fishermen, versus just those fishing for a particular type of fish such as abalone, etc.

Given the compliance and administration burden associated with licensing requirements, the coverage of the scheme and each requirement should be targeted in a way that most efficiently achieves objectives. As per the discussion of 'unbundling' above, the licensing scheme's coverage can differ for different licensing requirements. In particular, more onerous requirements could be limited to higher risk areas.

Identify the efficient point of coverage

Assessing the coverage of the licensing scheme is a two-step process. The first step is to identify the most efficient point (or points) of coverage. The three broad options for the point(s) of coverage for a licensing scheme are to impose requirements on:

- **Product** – on the good or service being delivered (e.g. registration of a car).
- **People** – on the person undertaking an activity (i.e. a profession).
- **Place** – on a place where an activity is undertaken (i.e. a place of business).

The first step is to identify which of these options the licensing scheme should target and which specific product, person or place will be licensed. Sometimes the answer to this

question may be obvious. However, it is often possible to impose licensing on more than one of these entities.

The most appropriate point(s) of coverage for the licensing scheme should be determined by considering which point is most closely related to the risk, but also trading this off against which point will generate the least cost to regulators and licensees. Key questions relating to these considerations are outlined below:

- Where does the true driver of the risk lie? For example, is it the person undertaking an activity that drives the risk, is the risk driven from the product being used, or is the risk specific to a particular location or place of business?

- Which point would generate the lowest compliance and administrative costs for licensees and the regulator? For example, licensing 'people' may impose costs on a large number of people as opposed to licensing a 'place', of which there may be fewer.

Once the point of coverage (i.e. product, people or place) has been identified, an assessment should then be made about how extensive the group of regulated entities needs to be. That is, the group of entities should be defined, and limited to the minimum group for which the identified problem and objectives apply.

Example

In determining the efficient point (or points) of coverage, it may be helpful to consider the industry's production chain. In doing so, the competing priorities of directly targeting the risk and minimising compliance/administrative costs for licensees and regulators should be balanced.

In some cases, the relevant risk will arise independently at each point in the production chain. The case study on Farm Milk Collectors (Appendix C) provides an example. In that example, the relevant risk (handling milk, which generates food safety risks, and the lack of consumers'/other stakeholders' ability to monitor activities and assess product quality) arises at each point in the production chain. It may therefore be appropriate to regulate (and licence) each point in production chain.

In other cases (for example, where the risk arises because businesses are engaging with potential vulnerable or uninformed consumers) it may only be necessary to licence that point in the production chain that generates or manages the risk (e.g. deals directly with consumers).

Where possible, imposing licensing requirements at a single point of the production chain (rather than multiple points) will likely minimise the compliance/administrative activities of licensees and regulators.

Developing coverage based on risk

The second step in assessing coverage is to identify whether thresholds and exemptions should be applied to more closely target coverage. Thresholds and exemptions should be used if there are certain groups or entities that have a different level of risk than others due to particular characteristics. If it is feasible to identify the differences between entities and the varying levels of risk, exemptions and thresholds should be put in place to reflect this.

As an example, liquor licensing involves the licensing of a place (i.e. the premises that sells or serves alcohol). In this case, the risk is specific to the area concerned, as the purchasing and/or consumption of alcohol is allowed in that specific location. For liquor licensing, there are characteristics of premises that impact on the level of risk and as such thresholds are used. For example, the type of licence held depends on the trading hours of the premises. There are also exemptions applied. For example, where alcohol is sold as part of a genuine gift (i.e. flowers or a gift basket), a liquor licence is not required.

Summary of the key questions to be answered

In completing this step, the following questions should be answered:

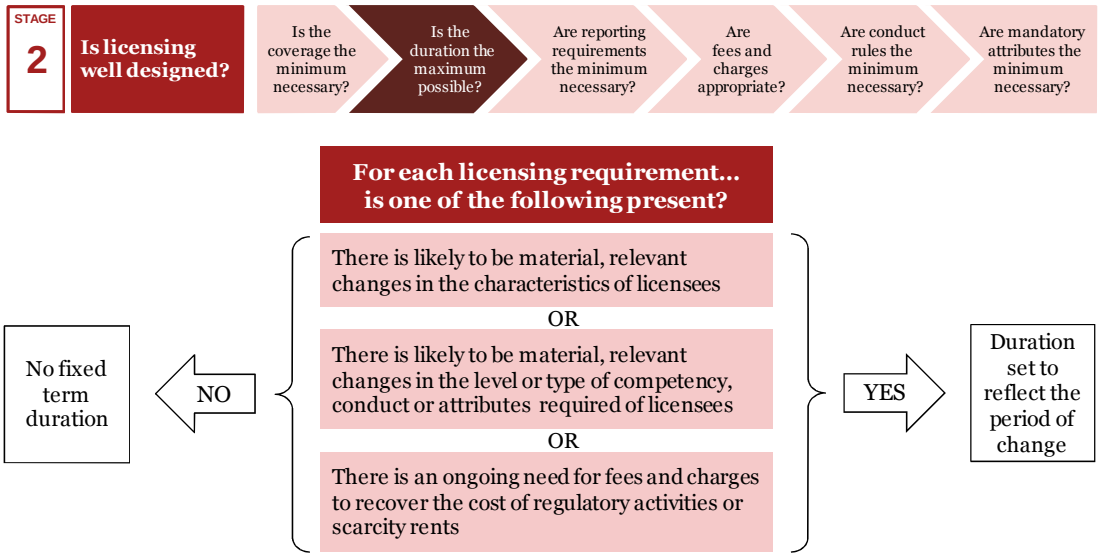
- Which point of coverage is most closely related to the true driver of the risk or problem being addressed?
- Which point of coverage generates the least cost (taking into account administration costs of regulators and compliance costs of licensees)?
- Based on the first two questions, would it be most efficient to licence the product, person or place?
- How broad is the definition of a licensed entity?

  Consider whether the definition could be narrower and still meet the policy objectives. That is, could the scope of licensed entities be defined so that a smaller group of entities would need to be licensed?
- Does the level of risk differ for different characteristics of the product, person or place? If so, is it feasible for the regulator and/or licensees to identify the differences in their characteristics such that entities can be differentiated based on their risk levels?

  If the level of risk differs and these differences can be identified, thresholds and exemptions should be used.
- If relevant, based on the previous question, what thresholds or exemptions could be used to differentiate based on risk?

  If possible, put in place thresholds and exemptions that allow for differentiation based on risk.

Is the duration the maximum possible?



Guidance notes

Duration refers to the length of time for which permission to undertake the activity is granted (e.g. before the licence expires or must be renewed). In relation to each licensing requirement, duration can be thought of as the period of time for which compliance with the requirement remains valid. For example, duration for mandatory qualifications or training attributes is the period of time before which training must be renewed (e.g. annual, every three years). Likewise, for requirements to aid enforcement (e.g. information reporting), duration is the frequency of reported information (quarterly, half yearly, annually, etc). For some requirements (particularly mandatory training) licences are provided with no fixed term (i.e. of permanent duration).

When considering duration, unbundling is particularly important. The duration for each requirement of the scheme should be considered separately. As an example, for a driver's licence, there should be unbundling of minimum attributes, generating funds and reporting requirements. Licensees must meet competency requirements only once (i.e. there is a no fixed term duration), renew their licence periodically, and have to provide information such as change of address upon the change occurring.

No fixed term duration as the default option

A longer duration implies less administration for the licensor and a lower compliance burden for licensed entities. Therefore, the preferred duration for licensing schemes is to issue them with no fixed term, meaning permission is ongoing and nothing further is required to continue to hold that licence. This is in keeping with the objective of imposing the minimum possible burden to achieve the policy objectives. Durations may depart from this default position if doing so is likely to improve the efficiency and effectiveness of the scheme.

Is there a rationale for departing from a no fixed term duration?

Licensing should not be periodic unless there is a clear rationale for departing from the default of setting no fixed term for the licence and its requirements.

The key rationale for requiring a licence or licensing conditions to be renewed periodically (and hence depart from the default) is the likelihood of change occurring over time. Such changes might include:

- the characteristics of licensees – for example, is there information required about the licensee that may change and need to be updated (i.e. address, name, nominated responsible person such as the manager or owner, areas of operation, currency of memberships, business details etc)

- the level or type of competency, conduct or attributes required of licensees – for example, due to:

  – changes in the market environment – e.g. new technology, changing the nature of the skills, knowledge or competence required of the licensees

  – legal or regulatory changes.

As these changes occur, something will be needed to trigger a change in the licensing scheme. If the characteristics of the licensee change, the regulator may need to be informed of that change. If the licence requirements change, the licensee may need to be re-assessed to ensure they still meet all of the requirements. The duration of a licence can be used to trigger these events by setting a maximum time before the licence must be re-assessed.

Another rationale for departing from the default of having no fixed term is where there is an ongoing need to generate funds. In this case, consideration should also be had to: ongoing costs incurred by regulators for compliance and enforcement activities and the need for ongoing funds to support these activities; or the ongoing need for fees and charges to capture the scarcity rent associated with a privilege licence. If funds are needed on an ongoing basis, it may be necessary to set a periodic term for the fees and charges associated with the licence.

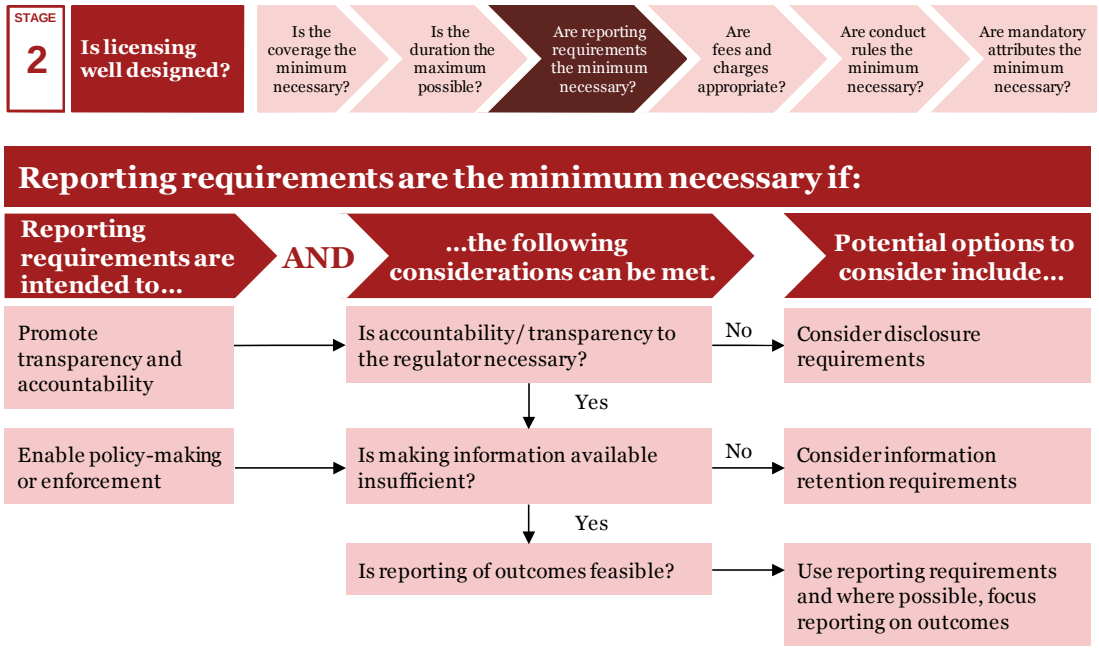
If there is no change present and no ongoing need to generate funds, a no fixed term licence should be preferred. For each unbundled requirement of licensing, an assessment should be made as to the likelihood that changes will occur. If they do occur, the duration should be set to align with the frequency of change expected. A change includes an ongoing need to generate funds.

Summary of the key questions to be answered

In completing this step, the following questions should be answered:

- Considering the concept of unbundling, what requirements are imposed that have a duration associated with them?
- For each requirement identified:
  - are there likely to be material, relevant changes in the characteristics of licensees that relate to the requirement?
  - is there likely to be material, relevant changes in the level or type of competency, conduct or attributes required of licensees and would this impact on the requirement being considered?
  - is there an ongoing need for fees and charges to recover the cost of regulatory activities or scarcity rents relating to the requirement considered?

Are reporting requirements the minimum necessary?



Guidance notes

Identify the intention of reporting requirements

Licensing schemes often impose periodic or occasional reporting obligations on licensees. These obligations are generally targeted at:

- promoting transparency and accountability for the use of certain funds (i.e. public subsidies, donations), typically to overcome problems of information asymmetry and the associated potential for misconduct
- to assist policy-making or compliance and enforcement.

The first step in assessing reporting requirements is to identify why the reporting requirements are in place (i.e. what are they intended to achieve?). That is, are they intended to promote transparency and/or accountability, or enable policy-making or enforcement? If neither of these rationales are present, reporting requirements may not be necessary.

Is accountability to regulators necessary?

If the intention is to promote transparency and accountability, the first step is to assess whether accountability to regulators is necessary. If the intention is to enable policy making or enforcement, this step is not necessary and the first step is to consider whether making information available would be sufficient (considered in the next section).

Where reporting obligations are designed to promote transparency and accountability (to overcome information asymmetries), there are often other parties (other than the regulator or licensor) to whom the licensed party ought to be accountable. For example, community organisations or charities might be more appropriately accountable to their members or donors; service delivery organisations to their clients.

Where possible, licensing schemes should promote direct accountability to customers/clients/members etc. Where accountability to these other parties would be more

appropriate, reporting requirements may not be necessary. Instead, conduct requirements such as mandatory disclosure may be more appropriate. Mandatory disclosure is where licensees are required to provide information directly to the party that would use that information to make decisions. For example, the requirement to provide a product disclosure statement to customers when they purchase a financial product. Accountability to regulators (including reporting) should only be used where these measures are unlikely to enable effective oversight and accountability by these other parties.

As an example, one reason to promote transparency may be to deter illegal activity. For example, by making the details and information about a transaction transparent, it may be much harder for people to steal or commit fraud as a result. In this case, it is less likely that accountability to parties other than the regulator will be sufficient, as they have less power or ability to act on the information they receive and link it into enforcement activities. By contrast, transparency for charities or not for profit organisations might be effectively ensured by requiring, for example, that audited accounts be made available to interested parties.

This question is only relevant if the intention of reporting requirements is to 'promote transparency and accountability'. This question recognises that activities may be subject to other forms of oversight. If accountability to regulators is not necessary and/or direct accountability to other parties can be developed instead, the use of reporting requirements should be re-assessed (i.e. other requirements such as mandatory disclosure should be considered instead).

Consider whether merely making the information available would be sufficient

If the provision of information to regulators is necessary – either for accountability or to enable enforcement – it may be unnecessary for this information to be reported. In particular, where this information is only used occasionally, requirements for licensees to retain this information and provide it on request (to the regulator or other parties) may be sufficient. These obligations can ensure requisite information is available without the administrative burden of periodic reporting.

Focus reporting requirements on outcomes

Where information reporting is necessary, reporting requirements should (to the extent feasible) focus on the quality, safety, probity or other outcomes the licensing scheme is intended to promote. That is, they should focus on outcomes rather than outputs (the activities performed by the licensee such as the number of products sold) or inputs (the human, physical or financial resources used to perform these activities). Examples of outcome focused information might include: injuries or safety incidents for safety-related schemes; consumer complaints for consumer protection schemes; or environmental damage, pollutant discharges, etc for environmental protection schemes. If it is not feasible to focus on outcomes, the next best alternative is to focus on outputs rather than inputs.

Other factors to consider

Where reporting requirements are necessary, another factor to consider is how the information reported will be used by the regulator. If the information is not utilised by the regulator or other parties, the reporting requirements may not be the minimum necessary. Alternatively, not using the information could actually be an oversight in administration. That is, the reported information may be necessary to inform policy or enable enforcement and its lack of use may suggest it is not being used effectively. This is considered further in Stage 3 – 'Is collecting information targeted?'.

Reporting requirements is one area where significant benefits could be gained from consolidation. For licensees, unnecessary costs can be incurred if they have to report slightly different information, or the same information in different formats. Therefore,

where possible, reporting requirements should be consolidated (or at least made consistent) with similar requirements in other jurisdictions or sectors. See the overarching considerations section (starting on page 37) for a more detailed discussion on opportunities for consolidation.

Summary of the key questions to be answered

In completing this step, the following questions should be answered:

- What is the intent of the reporting requirements?

  The intent should be one of the two listed – 'Promote transparency and accountability' or 'Enable policy-making or enforcement'.

- If the intent is to 'promote transparency and accountability', is accountability to the regulator necessary?

  If accountability to other parties such as customers/clients/members would be more appropriate, consider using disclosure requirements instead of reporting requirements.

- Is making information available insufficient?

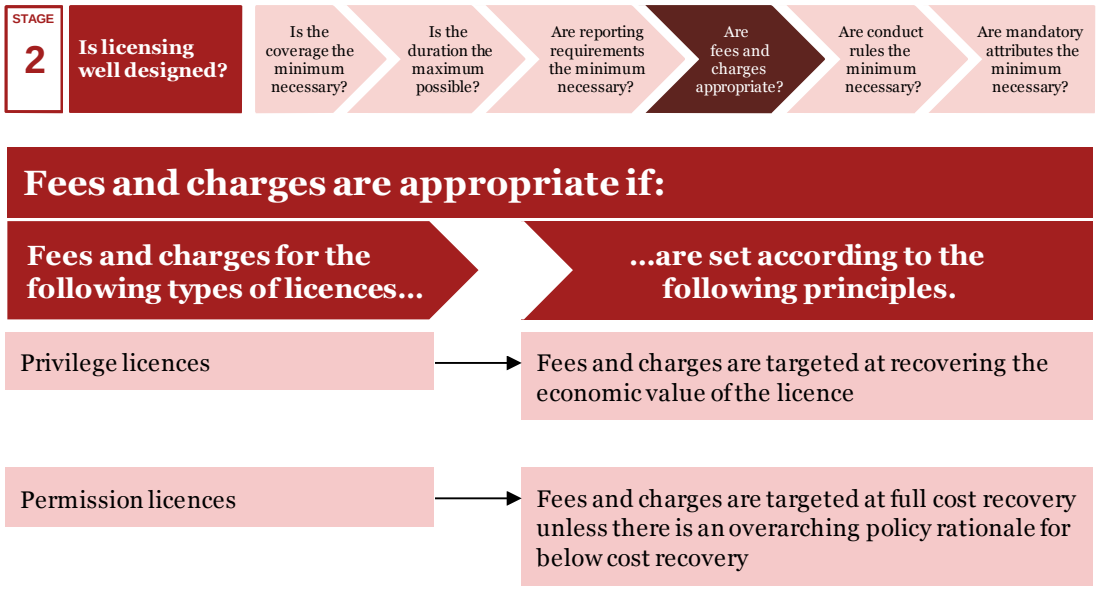
  Consider the costs and benefits of this alternative in assessing the question. If making information available would be sufficient, consider information retention requirements instead of reporting requirements.

- Is reporting of outcomes feasible? If so, how can reporting requirements be designed so that they focus on outcomes? If not, can reporting of outputs be used as opposed to inputs?

- Is the reported information being used or should it be used?

- Are there opportunities to consolidate or increase the level of consistency with reporting requirements in other jurisdictions or sectors?

Are fees and charges appropriate?



Guidance notes

The approach to setting fees and charges should differ depending on whether privilege or permission licensing is being used. If both types of licensing are being used, then fees should be unbundled to identify the appropriate fee relating to each licence type.

Privilege licences

Privilege licences, which limit the quantity of activities undertaken in the sector, often convey economic value to licensees by virtue of the scarcity of permission. For example, privilege licences create a barrier to entry into certain industries or markets and limit the supply of goods or services, enabling licence holders to charge higher than competitive prices for their goods or services and earn excess profits.

Imposing fees and charges that reflect this economic value enables governments, on behalf of the community, to retain the benefits conveyed by the exclusivity (or privilege) of the licence. Licensors can achieve this by:

- auctioning the licence, so that competing bidders increase the price of the licence to a point at which it includes the economic value of the scarcity
- estimating the economic value of the scarcity through proxies or other means, and setting fees and charges accordingly.

Permission licences

For permission licensing, the fees or other charges imposed are intended to recover costs associated with:

- administering the licensing scheme (e.g. applications, maintaining registers)
- monitoring and enforcing compliance.

Charging fees that represent the efficient cost of undertaking these activities promotes efficiency by ensuring the full societal cost of the sector is incorporated into individuals' or organisations' operational costs and, therefore, decision-making.

When setting fees and charges at full cost recovery, it is important to ensure that:

- the fees reflect the *efficient* cost of activities
- the activities being recovered for reflect an *effective and efficient* administration system for the licensing scheme.

That is, fees and charges should reflect activities that demonstrate the best practice administration practices outlined in Stage 3. If a full cost recovery model is used, there is potential for regulatory creep or the risk of increasing activities and costs over time. To ensure this does not occur, there should be periodic review of administration and therefore fees and charges. This is reflected in the final step of Stage 3 – Is the scheme subject to ongoing review? Mechanisms that can also help to alleviate these risks include efficiency dividends, benchmarking and market testing.

Analysis is required to set the quantum of fees

While this step identifies the principles that should be followed to set fees and charges, identifying the actual quantum of the fees and charges set will require further analysis. For privilege licensing, an understanding is needed of the value gained from holding the licence to the exclusion of others. For permission licensing, analysis is needed to quantify the efficient cost of activities that fees and charges recover.

The appropriate level of analysis needed to establish the correct quantum of fees and charges may be informed by the overall size of the fees or revenue generated. If a large fee is likely to be set or a large amount of revenue would be collected, a more extensive analysis of the correct fee level may be appropriate.

The Productivity Commission has published an enquiry report into this area. The key principles of cost recovery identified by the Productivity Commission are outlined in the box below. The Australian Government Department of Finance and Deregulation also publishes guidelines on cost recovery.

Cost recovery principles

For regulatory agencies, in principle, the prices of regulated products should incorporate all of the costs of bringing them to market, including the administrative costs of regulation.

Cost recovery should not be implemented where:

- it is not cost effective
- it would be inconsistent with policy objectives
- it would unduly stifle competition and industry innovation (for example, through 'free rider' effects).

Operational principles for cost recovery include:

- using fees for service where possible
- applying cost recovery to activities, not agencies
- not using targets
- not using cost recovery to finance other unrelated government objectives
- not using cost recovery to finance policy development, ministerial or parliamentary services, or meeting certain international obligations.

Design principles for cost recovery include:

- generally, avoiding cross-subsidies
- ensuring transparency and accountability
- undertaking industry consultation.

Source: Productivity Commission, 'Cost Recovery by Government Agencies', Inquiry Report, Report No. 15, 16 August 2001.

Summary of the key questions to be answered

In completing this step, the following questions should be answered:

- Which type of licensing is being used?

  Identify whether privilege and/or permission licensing is necessary. This should have been identified in the final step of Stage 1.

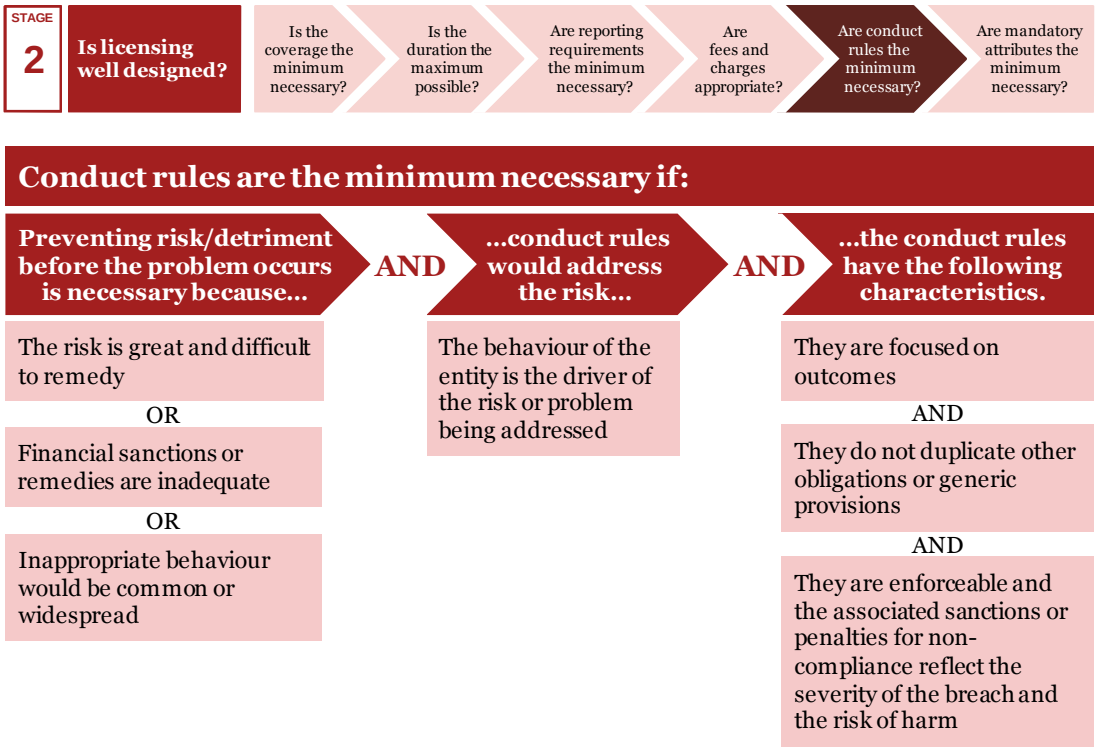
- For privilege licensing, do the fees and charges reflect the economic value of the licence? Can this value be identified through an auctioning process or through proxies or other means?

  Set the fees and charges so that they recover the economic value of the licence.

- For permission licensing, do the fees and charges reflect the efficient cost of the activities they are recovering for?

  Set fees and charges so that they fully recover the efficient costs (or less than recover if there is an appropriate rationale).

Are conduct rules the minimum necessary?



Guidance notes

Conduct rules require or prohibit certain activities or behaviours for licensees. These rules are intended to improve market outcomes by, for example, improving information, reducing the risk of misconduct, or promoting quality or safety. Some examples include:

- holders of a driver's licence must obey all road rules when driving a vehicle on the road
- financial services licensees have disclosure requirements such as providing product disclosure statements
- lawyers are required to provide their clients with a bill in writing within a specific timeline and format upon request
- many professions or trades are required to undertake ongoing training or professional development, in order to ensure the currency of their skills and knowledge.

The aim of this step is to identify whether conduct rules are necessary and then if so, whether they are designed so as to minimise the cost to licensees and the regulator. The first step is to identify whether the risk or detriment needs to be avoided before a problem occurs, as opposed to providing remedies after the fact. If this is established, the second consideration is to identify whether conduct rules would actually be effective in addressing the risk or detriment. This would only be the case if the risk or detriment is driven by the *behaviour* of the entity being licensed.

These two considerations establish that conduct rules may be necessary. The next step is to consider the design of the conduct rules. To be the minimum necessary, they should ideally be outcomes focused, not be duplicative, and be enforced with appropriate sanctions.

Is preventing the risk/detriment necessary?

Broadly, licensing requirements can reduce the risk of detriment in two ways:

- reducing the likelihood of the risk or problem eventuating and/or the size of the potential detriment (ex ante)
- providing remedy or redress when the risk or problem occurs (ex post).

Conduct rules tend to focus on the former. In general however, requirements that provide remedy or redress *ex post* impose less regulatory burden than those designed to prevent losses *ex ante*. *Ex post* measures focus on instances of actual damage or harm and avoid costly burdens on compliant individuals or organisations (often the majority).

In many instances however, measures to limit the likelihood or size of detriment may be preferred if the risk is great and difficult to remedy, financial sanctions or remedies are inadequate or non-compliant behaviour is common or widespread.

Is mandating or prohibiting outcomes feasible?

If possible and sufficient, conduct rules should focus on the quality, safety, probity or other outcomes the licensing scheme is intended to promote, rather than outputs or inputs. For example, if safety of a service was an issue, an outcome focused conduct rule may relate to mandating the safety standards of the job, as opposed to setting how many jobs can be done each day (output focused) or how many hours must be spent completing the work (input focused).

A focus on outcomes is more directly linked to the scheme's objectives, and typically imposes a lesser reporting burden. If is it not feasible to focus on outcomes, the next best alternative is to focus on outputs rather than inputs.

Do conduct rules duplicate or overlap with generic provisions?

Where conduct rules are imposed, these rules should be cognisant of the requirements of generic fair trading, health and safety, or other regulations. In some cases, conduct rules that address the issues covered by these generic regulations can create additional compliance burdens and/or uncertainty for licensees without creating any enhanced conduct requirements. For example, licensing schemes might contain prohibitions against commercial misconduct (e.g. misleading and deceptive conduct) which are already prohibited by generic fair trading and consumer protection regulations. Therefore, conduct rules that deal with issues that are already (in part) addressed by generic or overarching legislation should be limited to the specific problems the licensing scheme is intended to address and minimise any overlap with other regulatory obligations.

Do associated penalties and sanctions reflect the severity of breach and risk of harm?

In order to ensure compliance obligations are proportionate to the risk of harm they address, penalties and sanctions for breaches of conduct rules should be proportionate to the severity and gravity of the breach and the risk of harm associated with non-compliance. In particular, greater sanctions should be imposed for breaches of substantive rules (i.e. those directly addressing the relevant risk or problem) than for administrative requirements (e.g. reporting obligations, renewals).

Conduct rules versus mandatory attributes

In some cases, imposing conduct rules (what the licensee must or must not do) can be considered as a substitute (or complement) to mandatory attributes (what the licensee must be). Guidance related to mandatory attributes is provided in the following section. For example, schemes aimed at minimising the risk of financial loss could be addressed by mandating certain business behaviour (conduct rules) or by ensuring the licensee holds insurance (mandatory attributes), against which an aggrieved customer could claim.

Choosing between imposing conduct rules, mandatory attributes or both is important to ensuring the licensing scheme achieves its objectives at least cost. Ultimately, this involves considering what requirements (or combination thereof) will generate the greatest benefits (in terms of addressing the risk) at least cost. In general, conduct rules are the preferred option where:

- the risk relates to a specific and identifiable action or inaction
- the relevant action/inaction can be easily identified, monitored and enforced
- the risk is not directly related to, or easily overcome by, the characteristics of the licensee.

Where these conditions are not met, mandating attributes is preferred.

Summary of the key questions to be answered

In completing this step, the following questions should be answered:

- Is it necessary to prevent the risk/detriment before a problem occurs?

  The three reasons that may exist are listed in the diagram above.

- Is the risk of detriment driven by the behaviour of the entity being licensed?

  If so, conduct rules may be appropriate.

- Is it feasible to have outcomes focused conduct rules?

  Where feasible, set outcomes focused conduct rules. If this is not possible, focus on outputs rather than inputs.

- Do the rules duplicate obligations imposed in another area on the same entity?

  If so, consider removing these conduct rules and relying on the broader obligations already imposed on the entity.

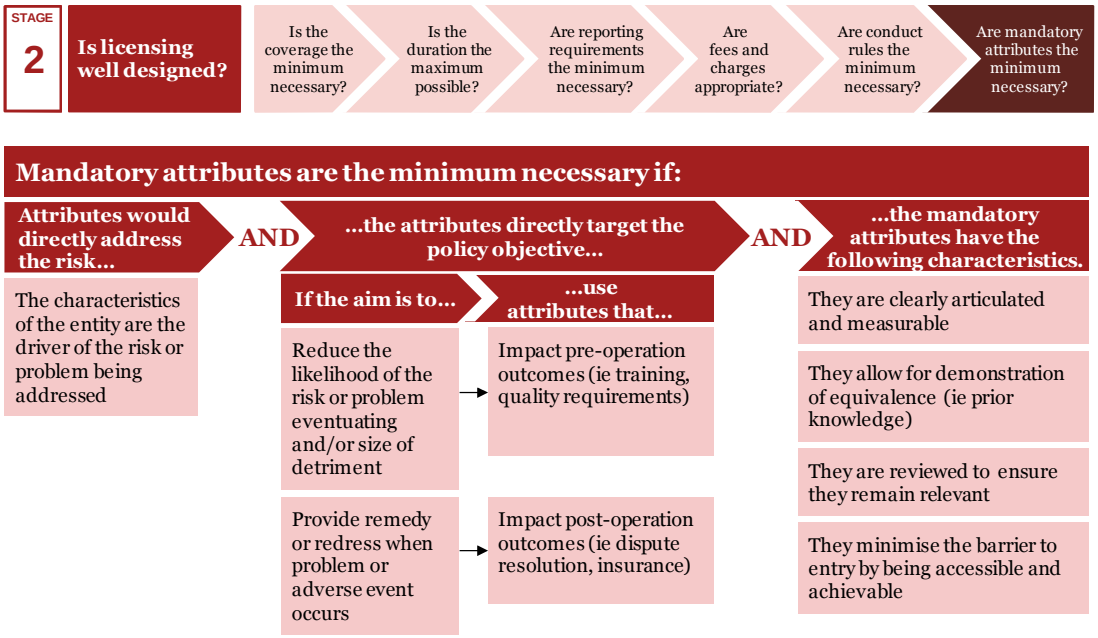
- Are the rules enforceable?

  Conduct rules will only be effective if they can be enforced. If they are not able to be enforced, consider using alternative options to address the problem (i.e. mandatory attributes may be an indirect way to achieve the same objective).

- Is compliance and enforcement activity commensurate to the breaches that occur and the risk of detriment?

  Conduct rules will not be the minimum necessary unless their associated sanctions are appropriate. Set compliance and enforcement activity so it is relative to the risks involved.

Are mandatory attributes the minimum necessary?



Guidance Notes

Is the driver of risk a characteristic of the licensed entity?

Mandatory attributes focus on regulating the specific characteristics or competence of the product, person or place that is licensed. Therefore, mandatory attributes should only be used if the nature of the risk is being driven by these specific characteristics. This ensures the requirements are directly addressing the problem.

The characteristics of the entity could include the entity's age, someone's level of competence or experience, whether insurance is held, whether certain crimes have been committed etc. If the entity's characteristics impact on the problem, then they may drive part or all of the risk and indicate that mandatory attributes are required.

Some examples of mandatory attributes include:

- age limit (e.g. individuals under the age of 16 cannot get a driver's licence of any sort)
- qualification requirement (e.g. to get an electrician's licence, you must complete a TAFE Certificate of electro technology)
- criminal history (e.g. company directors cannot have committed certain offences such as fraud or insolvent trading)
- business attributes (e.g. holding indemnity insurance, prudential requirements).

Mandatory attributes may also be relevant as an indirect way to address risk

In some circumstances, it may not be possible to address the problem directly due to the inability to monitor or enforce. While the previous step recognises that risks driven by behaviour should be addressed directly with conduct rules, it can sometimes be difficult to monitor or enforce behaviour. Where this is the case, it may be preferable to target the attributes of the person, product or place as an indirect way to address the problem. For example, one reason to have an age requirement for a driver's licence could be due to the

difficulty of monitoring and enforcing the safe driving practices of minors on the road and the high risk of detriment if they are unable to drive safely.

What should the mandatory attributes look like?

Once it is established that mandatory attributes may be required, the next step is to identify the type of attributes needed. If the risk or problem needs to be prevented before it occurs, requirements that directly address the reason for the problem occurring should be used (i.e. training that would address risks associated with incompetence). If the problem can be remedied after the event, attributes that provide redress or solve the problem after the event should be used (i.e. insurance).

Mandatory attributes should impose the minimum cost on licensees and be effective in addressing the problem. To meet this requirement, they should have the following four characteristics:

- clearly articulated and measureable
- allow for demonstration of equivalence
- be reviewed to ensure they remain relevant
- minimise barriers to entry by being accessible and achievable.

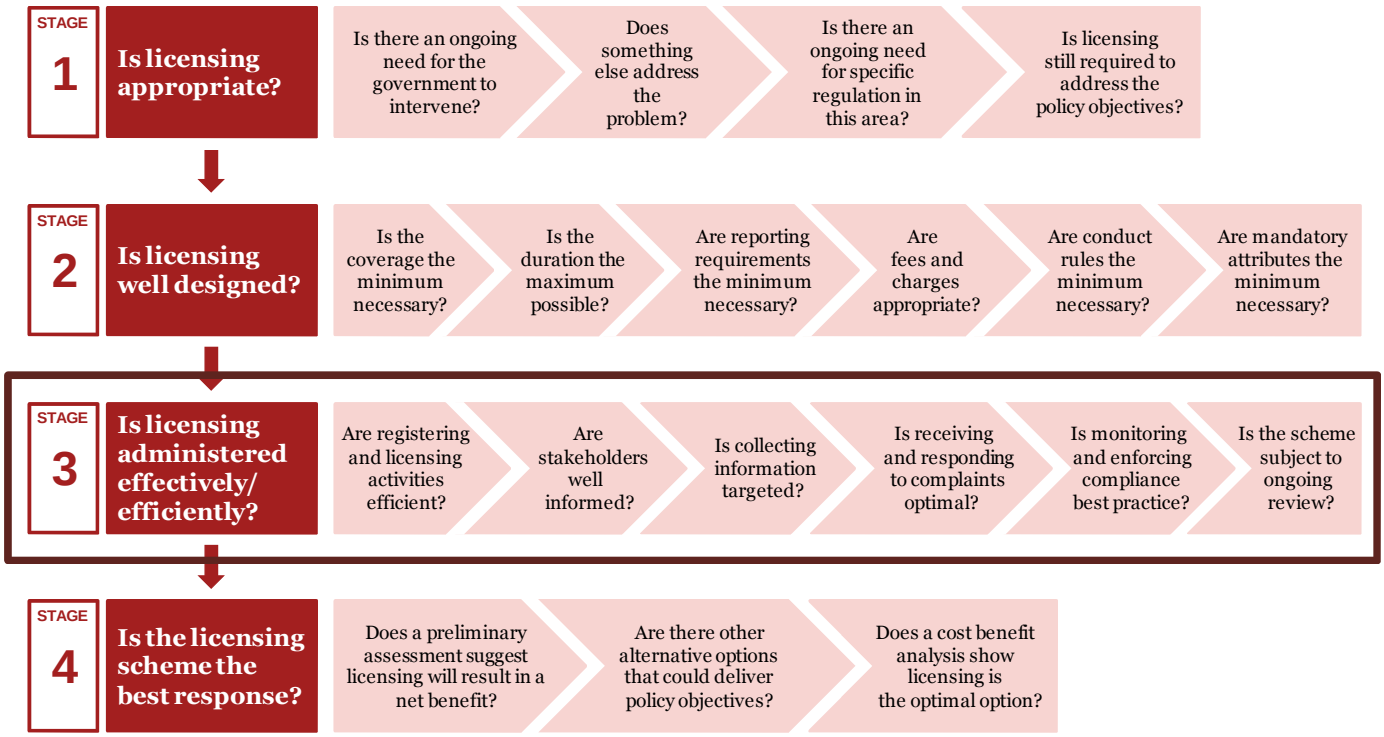
Summary of the key questions to be answered

In completing this step, the following questions should be answered:

- Is the risk of detriment driven by characteristics of the entity being licensed?
- Does the likelihood of the problem occurring need to be addressed prior to the event, or can remedies or redress be used after the event?
- Do the attributes relate to pre- or post- operation outcomes and does this align with the previous question?
- Do the attributes chosen relate to the characteristics that drive the risk?
- Are attributes clearly articulated and measurable?
- Do attributes allow for licensees to use an equivalent way of meeting the requirement that still achieves the objective?
- Are attributes reviewed to ensure they remain relevant?
- Are the attributes accessible and achievable? (i.e. is the requirement difficult to meet by someone who legitimately should meet the requirement?)

Stage 3

Is licensing administered effectively / efficiently?



Overarching considerations for the administration of licensing in Stage 3

Independent of the appropriateness of its design, the way a licensing scheme is administered and regulated can have a profound impact on its effectiveness and its costs. Having determined which design elements are 'fit for purpose', this stage of the framework is concerned with ensuring licensing schemes are administrated efficiently and effectively. That is, that licensing outcomes are successfully achieved with the minimum necessary cost to regulators and licensees.

Regulatory administration refers to a series of actions or activities that form the basis of how the scheme operates in practice. For example, regulators may collect information, inform stakeholders, process licences, undertake compliance activities, etc. The elements of administration are outlined in Table 5 below.

Table 5: The elements of administration

Elements of administration	Examples
Registering and licensing entities	Processing applications, undertaking assessments, ongoing updates and renewals
Informing stakeholders	Undertaking education campaigns, interactions with licensees, consumer advice
Collecting information	Maintaining registers, sector research and analysis, analysing licensee or compliance information
Receiving and responding to complaints	Maintaining contact mechanisms, providing avenues for redress or dispute resolution
Monitoring and enforcing compliance	Inspections, enforcement actions, use of administrative sanctions, court-based prosecutions

For each of the elements of administration, there are best practice principles that guide the types of specific activities that are needed. For each high level activity, regulators should ideally be able to answer 'yes' to all questions under the best practice activities. If the answer is 'no', this aspect of regulatory administration could potentially be improved.

The structure of this stage

The steps in this stage are all structured in the same way. For each element of administration, a series of practices (i.e. an activity or the way in which administration is undertaken) are listed that should ideally be undertaken by the regulator. Linked to these are questions that will assist in identifying whether the practice is being undertaken or how the practice could change or be undertaken more efficiently.

Assess the most efficient option

Many of the questions posed in Stage 3 require the consideration of different options for the way in which administrative activities occur. Each option is likely to impose different costs on regulators and/or licensees and may transfer the onus of responsibility between licensees and the regulator. In answering these questions, analysis of the costs and benefits of the options available is required to identify the most efficient way to perform that activity. If a number of options allow the desired outcome to be achieved, the least cost option should be chosen to minimise the compliance and administrative cost on both licensees and regulators.

If an option would impose higher costs on the regulator, but reduce costs for all licensees, it may be beneficial if the savings for licensees outweigh the additional cost to the regulator.

Note that it is important that the regulatory objective(s) is still achieved. A lower cost option should not be considered feasible if it undermines the objectives of the scheme.

In some cases, the effectiveness and efficiency of the administration may need to be traded off, balancing the costs and benefits of greater effectiveness or efficiency. In all cases, the goal is to ensure, for all regulatory activities:

- the benefits of the activities outweigh their costs
- the activity is conducted in the most efficient and effective manner.

As an example, in assessing whether some licensees could be surveyed instead of collecting comprehensive information from all licensees, the following should be considered:

- costs of administering and undertaking the survey
- savings to licensees and the regulator in not having to record and supply information
- costs of reduced currency, accuracy and completeness of information available to regulators in terms of its impact on the scheme's objective.

Summary of the key questions to be answered throughout Stage 3

For each step in Stage 3, the following questions should be answered:

- Are the practices that are outlined undertaken by the regulator?
- Do any of the more detailed questions highlight feasible options that could increase the efficiency or effectiveness of administration?

Are registering and licensing activities efficient?

Registering and licensing activities are best practice if:

The following practices are met...	Considerations to determine whether the practices are met include...
The regulator captures application details (including payment) accurately and promptly	Can the application processing time be reduced?
	Are mistakes made in licensing processing?
	Are electronic systems used to capture details and automatically generate licence outcomes/forms etc.?
There are convenient mechanisms for applicants to contact the regulator and lodge applications	Can applications, payments and licence updates be completed online?
	Is information about how to do this easily accessible?
	Can details be automatically generated for renewals?
The regulator assesses applications against the requirements of the scheme	Does the regulator impose specific conditions on some licensees that were not originally set out under the scheme? If so, are these necessary and can they be removed?
The impact of licensing decisions on third parties is considered and if relevant, they are informed of the decision	Are other agencies consulted in relation to licensing decisions that impact their sector?
The licensing decision (with reasons) is communicated to applicants within agreed timeframes	Are there agreed timeframes for licensing decisions/outcomes?
	Are reasons for licensing decisions provided?

Guidance notes

Licensing authorities assess and approve applications for licences, as a precursor to entities performing the relevant activities. The complexity of this task varies with the nature of the scheme. For most licences, ongoing processing of renewals and updates is also necessary.

This aspect of regulatory administration is primarily a service delivery function. The focus should be on delivering a timely, accurate and reliable service in the most efficient manner possible.

Having efficient registering and licensing activities means minimising costs. This does not just mean minimising the cost to the regulator however. It is also important to consider minimising impediments to the activities of businesses and the community. The assessment should therefore consider how the applications and approvals process impacts on licensees. One of the key considerations in this section is offering electronic and online transactions.

Are stakeholders well informed?

Informing stakeholders is best practice if:

The following practices are met...	Considerations to determine whether the practices are met include...
Each education or information initiative has clearly articulated objectives	
Information provided to stakeholders is reviewed to ensure it remains current	
Compliance obligations are explained simply, directly and repeatedly to ensure they are understood	Is information about licence requirements easily accessible? Are online mechanisms utilised?
	Does the regulator receive a high number of enquiries about licensing requirements or compliance obligations?
The impact of information campaigns is assessed (ie collect data)	
Standards and expectations about the way the regulator works are communicated	Are regulatory outcomes defined and published to enhance transparency?
	Are processing timeframes set, communicated and reported against?
	Is online communication used?

Guidance notes

Educating sector participants can have a large impact on the level of compliance by licensed entities, and the ability of aggrieved parties to access the available remedies. In many instances (for example, where the underlying policy rationale for licensing relates to information problems or the absence of convenient mechanisms for redress), education is central to achieving the scheme's objectives.

Educating stakeholders can often be more effective than compliance and enforcement activities. For example, non-compliance may occur due to ignorance of the requirements, rather than an intentional breach. Similarly, if consumers are well informed, they may make better decisions that help to solve the problem. Given this, it is important to provide good information, as inaccurate or bad information could be costly. Information should also be accessible and timely.

For this aspect of regulatory administration, the focus is on providing timely, accurate and accessible information for licensed entities and other stakeholders.

Is collecting information targeted?

Collecting information is best practice if:

The following practices are met...	Considerations to determine whether the practices are met include...
Information is only collected from licensees when it cannot be collected elsewhere	Is it more cost effective to use occasional research (eg using online information sources) to gather the information?
	Do any other agencies/organisations also collect this information? If so, is the data available for use (either openly or de-identified)?
Comprehensive data on all licensees is only collected if necessary to achieve licensing function(s)	It is more cost effective to use a sample instead (ie through a survey)?
	Is it more cost effective to use exception reporting?
The scope of data collected is appropriate	Is there information collected that is not used?
	Is the information collected used effectively? How does it add value to the licensing scheme?
Licensees are only required to provide information once	Could licensees be asked only to provide information only when changes occur?
There are convenient processes for annual reporting or information provision to the regulator	Do any other organisations also collect this information? If so, is the data available for use (either openly or de-identified)?
	Can reporting be done online?

Guidance notes

Most licensing regimes involve the collection of information from licensees. While such information may be valuable, collecting information is costly on both licensees (collating and sending the information) and regulators (collecting and storing the information). As such, it should only be collected if it is actually needed and it cannot be obtained more efficiently through other means.

In some cases, decisions regarding the type, quantum and frequency of information gathered is based on historical precedent, rather than a considered determination of need for and cost of obtaining this information. Considering the type of information collected, how this information is obtained and the frequency of these activities (including whether information is gathered periodically or only on specific occasions) could generate significant improvements in the administration of licensing schemes.

This element of administration is closely related to the minimum reporting requirements section in Stage 2. If it is considered necessary to report information in Stage 2, but that information is not currently used effectively, further analysis is needed to identify whether design or administration of the scheme needs improvement. In this case, first consider whether the reporting requirements are really necessary. If they are, improvements to

administration may be needed to ensure the information is used appropriately and effectively.

Is receiving and responding to complaints optimal?

Receiving and responding to complaints is best practice if:

The following practices are met...	Considerations to determine whether the practices are met include...
Do consumers have access to convenient mechanisms to make enquiries or complaints?	Can enquires and complaints be made online?
	Is information about how to make an enquiry or complaint easily accessible?
Accurate information is provided in response to enquiries/complaints within agreed timeframes	Are agreed timeframes set for responding to enquiries/complaints
	Is information provided tailored to be directly relevant to the enquiry/complaint made?
Complaint procedures (including timeframes) are explained to complainants	Are complaint procedures clearly articulated and communicated?
	Is information available online?
Complaints are resolved or referred using established protocols (including reasons for any decisions made)	Is the scope of the regulator's authority to resolve complaints clearly defined?
	Are the reasons behind decisions communicated to the relevant parties?

Guidance notes

Enquiries and complaints may be made by both licensees and consumers. Licensees need an avenue to enquire about licensing requirements, decisions of the regulator (i.e. granting or revocation of a licence) and compliance obligations. Information collected through enquiries and complaints may inform whether other elements of the licensing scheme or its administration are working well. Therefore, providing this avenue and administering it well may assist in other areas of the scheme.

Key to this area is to undertake complaints processes in an efficient and effective manner. Complaints can be used to identify the high risk areas of concern and therefore need to allow for accurate and timely information to be processed.

Is monitoring and enforcing compliance best practice?

Monitoring and enforcing compliance is best practice if:

The following practices are met…	Considerations to determine whether the practices are met include…
A risk based approach is used to identify priorities and objectives, and establish a monitoring/enforcement plan	Are risk factors considered in identifying compliance and enforcement activities?
	Is complaints data used to inform the development of monitoring/enforcement plans?
	Are high risk concerns pursued as a priority?
Breaches and other non-compliant behaviour is addressed in an appropriate manner with sanctions/penalties that are designed to achieve regulatory objectives/outcomes	Is the compliance effort commensurate with the breach?
	Are the sanctions imposed or other actions taken commensurate to the risk?
Regulators have an understanding of the reasons and context for non-compliance	
The reasons for enforcement outcomes are provided to licensees at the earliest opportunity	Are there systems in place to inform licensees when a decision is made?
There are transparent appeal mechanisms in place	Is information about appeal mechanisms provided when communicating with business about licensing, compliance and enforcement decisions?
	Are appeal mechanisms accessible and practical?

Guidance notes

Regulators undertake a range of activities that use the administrative powers and sanctions provided to them to reduce the risk of detriment in the relevant sector and improve the level of compliance amongst licensed entities. Best practice in relation to this aspect of regulatory administration is focused on utilising the full range of regulatory and non-regulatory 'tools' available to the regulator (including use of information, monitoring, trader interactions and enforcement actions) to best achieve the scheme's intended outcomes and ensure effective compliance.

Important in monitoring and enforcement is to take a coordinated and risk based approach. Given the cost of enforcement activity, a targeted approach based on risk and linking this into complaints procedures may be important. For example, compliance and enforcement efforts could be targeted so that licensees with high complaints may receive more attention, those with a good track record may receive fewer inspections.

Is the scheme subject to ongoing review?

Guidance notes

Is the scheme reviewed to ensure it remains fit for purpose?

Good regulatory administration includes ongoing review of the licensing scheme, to ensure:

- the need and rationale for licensing remains valid
- the design of the licensing scheme remains fit for purpose
- regulatory administration reflects best practice.

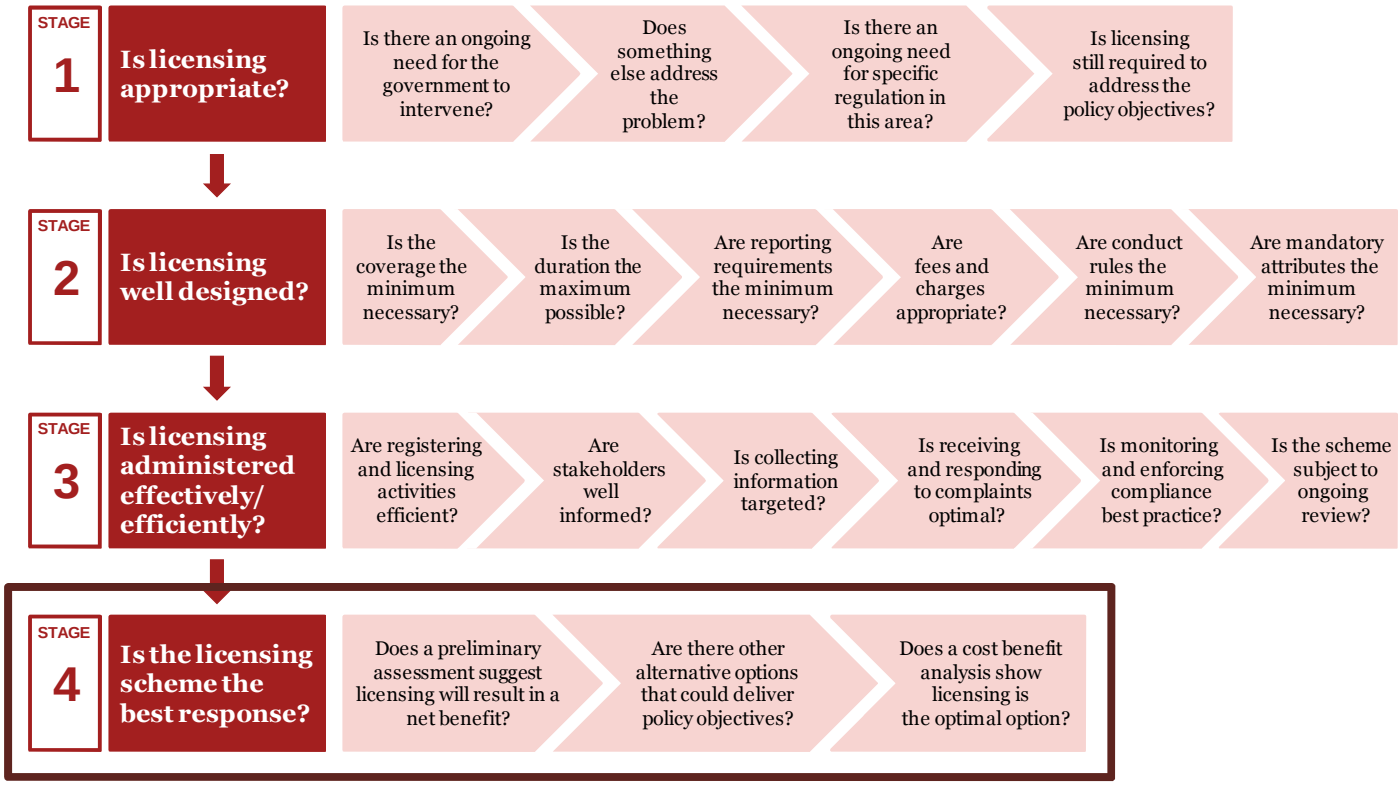
To facilitate this, it is necessary to have an ongoing system of review and evaluation. This requires the collection of data and other relevant information on a continuous basis. The information and data collected can then be used to inform regular assessments of the scheme against its objectives and desired outcomes. An ongoing process will facilitate continuous improvement of the licensing scheme and its administration.

As well as having an ongoing system for collecting information and evaluating performance, a more formal review procedure may be necessary to ensure that all aspects of the scheme are assessed at appropriate intervals. In general, licensing schemes that impose material regulatory burden on the sector and/or restrict competition should be reviewed at least every five to 10 years. More frequent review might be considered for:

- dramatically changing markets or sectors – for example, those subject to a high degree of globalisation or experiencing significant impacts from changing technology
- sectors with evidence of significant or frequent detriment or harm
- licensing schemes that have been subject to review, but reform recommendations have not been adopted.

Stage 4

Is licensing the best regulatory response?



Introduction to Stage 4

The aim of Stage 4 is to assess licensing in a more robust and detailed way against other options, as a final step to determining that licensing is the *best* approach for the government to take in the relevant situation. While Stage 1 identifies whether licensing may be an appropriate option to consider, a proper and full assessment cannot be made if the scheme is only reviewed from a hypothetical viewpoint. Stage 4 brings a practical lens to the analysis, with the actual costs and benefits of the current or proposed scheme being quantified and assessed (against alternative options) in more detail.

Stage 4 also enables a broader view to be taken on other potential options. While alternative options are implicitly considered in the framework (particularly in Stage 1), this is done so in a relatively focused way on particular issues and possible alternatives. By taking a higher level view in the final stage of the framework, it is possible to identify a broader set of options that may not have arisen or been thoroughly considered through the specific steps in Stage 1.

Why is this stage at the end of the framework?

This stage has been placed as the final part of the framework. By this stage, the framework should have:

- identified whether licensing is an appropriate option to be considered
- specified what the scheme would look like in terms of design and administration.

Conducting a detailed assessment of the licensing scheme at this stage ensures the full and specific costs and benefits of licensing – including those related to its design and administration – are considered. Many of the costs associated with a licensing scheme come from its design and administrative elements. Without a clear idea of the requirements imposed and how the scheme is administered, a cost benefit analysis may not fully reflect the true costs and benefits of the licensing option being addressed.

For existing licences, Stages 1 to 3 also offer a targeted way to review a licence without undertaking a full cost benefit analysis. After progressing through Stages 1 to 3, if it appears that there are net benefits from the licensing scheme, the final steps in Stage 4 (that require a full cost benefit analysis of licensing against other options) may not be necessary. This allows for a review of the licensing scheme that can identify improvements in design and administration without the need to fully re-assess licensing against a full suite of options through cost benefit analysis.

How does this relate to other government requirements?

Identifying a suite of options and undertaking a cost benefit analysis are both fundamental to the requirements of Better Regulation Statements and Regulatory Impact Statements. The last two steps in Stage 4 are not intended to duplicate this process, but are meant to reflect the natural progression of analysis into meeting these requirements at the final stage of the framework. Stage 4 essentially leads into the analysis required by BRO. The analysis conducted in this stage should address the questions in the framework, but should also be guided by and be consistent with the Better Regulation principles.

A lot of information will have been collected through Stages 1 to 3 of the framework that will help to inform the analysis required to meet both the steps in Stage 4 and BRO requirements.

Does a preliminary assessment suggest licensing will result in a net benefit?

Guidance notes

The first step in this stage is to undertake a preliminary assessment as to whether licensing is likely to result in a net benefit (that is, it is likely to generate benefits that outweigh costs). This step is designed to assist those applying the framework to prioritise their effort, by considering whether proceeding to subsequent steps of this stage is necessary. The key question is whether a change to the status quo may be worth exploring further. A change should be explored by completing the final two steps in the framework if:

- for existing licences, there are likely to be benefits of removing the scheme (i.e. there may be net costs of the scheme or there are better alternatives to licensing)
- for proposed licences, implementing the licence is likely to result in net benefits.

It is not necessary to conduct a full cost benefit analysis at this step. What is required instead is a plausible preliminary assessment of whether licensing is likely to result in a net benefit. The result of this assessment provides guidance on whether the remaining steps are necessary. The implications of this step are different depending on whether the assessment considers an existing or proposed licensing scheme.

Conducting a preliminary assessment

The following questions can help to inform the preliminary assessment. The relevant questions are the same whether an existing or proposed licensing scheme is being considered. However, to make it clear the phrasing for a proposed scheme is provided in brackets.

- How significant is the problem or issue that is (or would be) addressed by licensing?
- What impact does licensing have (or is it expected to have) on the problem or issue being addressed? That is, how significant are the (potential) benefits from licensing?
- How costly is licensing (likely to be)? That is:
  - What do (would) licensees have to do in order to obtain and maintain their licence? How frequently do (would) they have to provide reports or comply with licence obligations? How significant are those reports and compliance obligations (likely to be)?
  - Does (would) licensing affect a large number of businesses or regulated entities? The more entities that are affected, the more likely that costs would be greater. Depending on the licence, this may also mean the benefits are likely to be greater.

The aim of answering these questions is to identify what the key costs and benefits are likely to be and begin to assess their potential size. It may also be useful to consider the factors that are likely to influence them and how these can be assessed.

As an example, the key benefits of licensing often relate to a reduction in risk or detriment. The key factors to consider here are the magnitude of the detriment that might be avoided and the likelihood that licensing would prevent or reduce this detriment. The key costs of licensing are often fees and charges payable by licensees, time for licensees to comply with licensing, the cost of any specific requirements set and the cost to government of administrating the scheme.

Implications of the preliminary assessment

The implications of the preliminary assessment will differ depending on whether a proposed or existing scheme is being considered.

When considering an existing licensing scheme, the following outcomes should be followed:

- If the preliminary assessment indicates there are clear **net benefits** from the existing licensing scheme, it may not be necessary to continue through the framework as licensing appears to be the best response. The existing licensing scheme could remain in place.

  In this scenario, the remaining two steps of the framework – which would require a full cost benefit analysis of the entire licensing scheme – may not be necessary. While this detailed analysis may not be required, there could still be various design and administrative improvements that have been identified throughout the framework. These reforms should still be implemented if the existing licensing scheme remains.

- If the preliminary assessment indicates the existing licensing scheme is leading to **net costs**, or the **net impact is unclear**, continue through the framework to identify if the existing licensing scheme is best response. It may also be beneficial to continue through the framework if a viable alternative to licensing has been identified that may lead to net benefits.

When considering a proposed licensing scheme, the following outcomes should be followed:

- If the preliminary assessment indicates there are likely to be **net benefits** from the proposed licensing scheme, or the **net impact is unclear**, continue through the framework to identify if the proposed licensing scheme is the best response.

  While the preliminary assessment indicates that a net benefit may result, the remaining two steps of the framework are required to ensure a full and detailed analysis is undertaken before a new licensing scheme is introduced.

- If the preliminary assessment indicates there are clear **net costs** from the proposed scheme, licensing is unlikely to be the best response and may not be appropriate to consider as an option going forward.

  As licensing may no longer be a potential option, the remaining two steps of the framework might not be necessary. However, if desired these two steps can be used to identify and assess other alternative options. This would lead into the more detailed cost benefit analysis required by BRO for new regulatory or government actions.

If continuing through the framework, the outcomes of the preliminary assessment may assist in the next step where alternative options are identified. If there are certain aspects of the licensing scheme that appear to be very costly, these aspects of the scheme could be targeted when identifying alternative options. It may be useful to think about what options would reap the benefits that licensing brings, but reduce the costs that have been identified.

Prioritisation where multiple licences are being considered

If an agency is considering multiple existing licences, it may be necessary to prioritise them. This will enable effort to be targeted towards those areas where the most benefit would be gained from review.

One approach to prioritise licences is to focus on their likely net benefit from reform. A higher priority could be placed on reviewing those licences that appear to have a significant net benefit from reform.

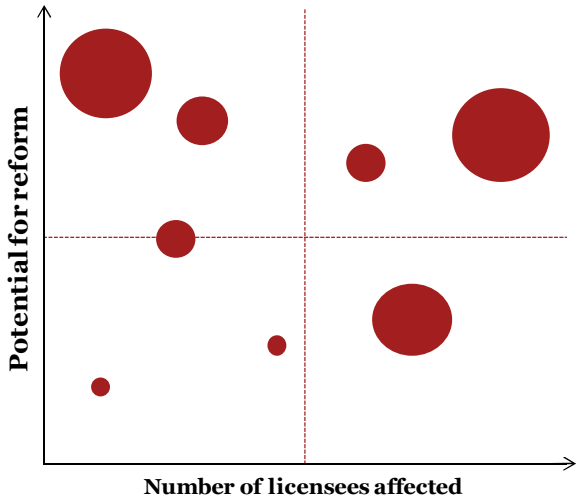
For each licence being considered, the following questions could be considered:

- What is the potential for reform to the licence (bearing in mind some existing licences may have already been found unnecessary and eliminated in Stage 1 of the Framework)? That is, coming out of the preceding steps of the analysis, what scope is there to reform certain aspects of a licence or the licence overall to better align with best practice? For example, can the design of the licence be improved by increasing duration, maximising exemptions, and better targeting coverage? Can the administration of the licence be improved, and so on.

- How many licensees are affected by any such reform? If particular aspects of a licence are reformed, then only a subsection of licensees may be affected.

Overall, the greater the scope for reform, and the larger the number of licensees potentially affected by it, then the more likely there is that there would be a more significant net benefit associated with reform. This is demonstrated in Figure 6 below. This figure also introduces another factor, being the value of the impact that reform would have. Even if a licensing scheme does not impact a large number of licensees, there could still be a net benefit from reform if the value of the impact is likely to be significant in dollar terms.

Figure 6: Mapping the net benefit of reform



Size = $ impact of reform

The mapping exercise shown in Figure 6 can be used to identify whether the benefits from reform should be considered significant. If the licensing scheme sits in the top right hand quadrant, then significant net benefits from reform are likely. In addition, if the scheme sits in the top left or bottom right quadrants and the size of the reform is substantial, the net benefit from reform could be significant.

Once prioritised, an agency can focus more effort on completing the remaining steps of the framework for high priority licences. While this approach allows the regulatory to target their

efforts, a low prioritisation outcome should not supersede the outcomes of the preliminary assessment. If the preliminary assessment suggests that a licence should continue through the framework, the analysis required in the remaining two steps is still necessary to fully complete the framework.

Are there other alternative options that could deliver policy objectives?

Guidance notes

Once a preliminary assessment has been made suggesting that licensing will result in a net benefit, the next step is to identify whether there are other alternative regulatory and non-regulatory options that could achieve the policy objectives.

The previous steps of the licensing framework provide some indication of potential alternatives to licensing. In this respect, it is important that alternative options are appropriately matched to the particular problem and objectives the action is designed to address. Table 6 below shows how some alternative options align with each of the objectives of licensing previously articulated in this document.

While certain alternative options may have arisen in earlier steps of the framework, it is important to take a broader view of alternatives in the step. Now that the licensing option has been fully reviewed through the framework, it may be possible to identify other options that would address the key benefits of the scheme at a lower cost.

In identifying whether there are any alternative options that could deliver the policy objectives, judgements around feasibility will need to be made. That is, if an alternative option is clearly inappropriate or unworkable, then it should be discarded. In undertaking this analysis, consideration should be given to a range of factors, including enforceability and compliance issues, as well as potential cost. The potential for regulatory failure and adverse consequences of government action should also be recognised. This process will facilitate a more rigorous and comprehensive analysis of any remaining, viable options (undertaken in the next step).

In most cases, the option of doing nothing should also be considered.

Table 6: Some alternative options matched to the objectives they could achieve

Objective	Examples of alternative options that may address that objective
To promote informed choice	• Targeted information or education campaigns • Other measures to empower individuals or consumers • Development of voluntary codes of conduct or accreditation • Imposing conduct requirements through regulation (without licensing)
To address the risks of misconduct	• Targeted information or education campaigns • Other measures to empower individuals or consumers • Targeted enforcement of generic laws and regulations • Imposing conduct requirements through regulation (without licensing) • Imposing mandatory attributes (e.g. 'fit and proper person' test) through regulation (without licensing)

Objective	Examples of alternative options that may address that objective
To promote competence, quality or safety	• Targeted information or education campaigns • Other measures to empower individuals or consumers (e.g. mechanisms for consumer feedback) • Creation of a quality assessment or rating scheme • Imposing conduct requirements through regulation (without licensing) • Imposing mandatory attributes (e.g. 'fit and proper person' test) through regulation (without licensing)
To improve market competition	• Targeted enforcement of generic competition and consumer protection rules • Monitoring and oversight of pricing and other conditions for goods and services • Direct regulation of pricing and other conditions for goods and services • Imposing conduct requirements through regulation (without licensing) • Structural separation of components of the supply chain
To manage or protect common resources	• Imposing conduct requirements through regulation (without licensing) • Creation of property rights for common resources (e.g. assign ownership of the resource) • Undertaking public investments to: protect or reduce the vulnerability of common resources; repair damage to common resources; or increase the supply to scarce resources
To facilitate the provision of public goods	• Imposing conduct requirements (e.g. standards of service delivery) through regulation (without licensing) • Public subsidies or direct tendering for the provision of public goods

Does a cost benefit analysis result in licensing as the optimal option?

Guidance notes

The final step involves undertaking a cost benefit analysis and comparing licensing against other options to test whether:

- the likely benefits of the proposed or existing licensing scheme are greater than the likely costs
- licensing is the best way to achieve the Government's objectives, relative to feasible alternatives to licensing (regulatory and non-regulatory).

This technique seeks to quantify (that is, assign a monetary value to) the benefits derived and costs incurred by those parties affected by an option, in order to compare them on a common basis and thereby determine the aggregate net impact of the option on society and the economy.

The net impact is expressed relative to a base case. For proposed new licensing schemes, this is typically the status quo. However, for existing licensing schemes, the base case should assume that the licensing scheme has lapsed. This means that the costs and benefits of the licence (with any amendments made through the framework) would be assessed against a scenario of no licence.

Some benefits and costs may be realised in the future. To account for this, future benefits and costs are translated into present value terms by applying a discount rate.

A comparison of costs with benefits is used to determine the net present value of the options. If the net present value is positive, benefits exceed costs, and the option represents an improvement overall relative to the base case. The option with the highest net benefit typically represents the preferred approach relative to the other options considered.

The Better Regulation Office's *Guide to Better Regulation* provides further guidance about how to undertake cost benefit analysis, as well as other techniques that may be used where particular impacts (such as certain benefits) are not easily quantified.

Competition test

The NCP and the NSW Government's Regulatory Impact Assessment process require that legislation (such as licensing regimes) should not restrict competition unless it can be demonstrated that the benefits of doing so outweigh the costs, and that the objectives of the legislation can only be achieved by restricting competition (these two principles are known as the 'competition test'). As noted in the introduction, the framework is consistent with these principles and assists their application to any given licensing scheme.

Where the application of the framework has resulted in licensing as the preferred option, the steps of the framework and their logic means that the two principles of the competition test will have been satisfied.

- Applying this step, the benefits of licensing will outweigh its costs

- Applying Stages 1 and 2, any restriction on competition will be necessary to achieve policy objectives. Specifically: the need for licensing will have been established in Stage 1; and, the various aspects of the licensing scheme that may restrict competition (coverage, conduct rules, mandatory attribute) will be the minimum necessary (Stage 2).

For this reason, thorough application of the framework will be consistent with the competition test. Furthermore, the research, evidence and analysis collated in applying the framework should position the regulator to easily assess the licensing scheme against these principles.

Appendices

Appendix A
Decision trees

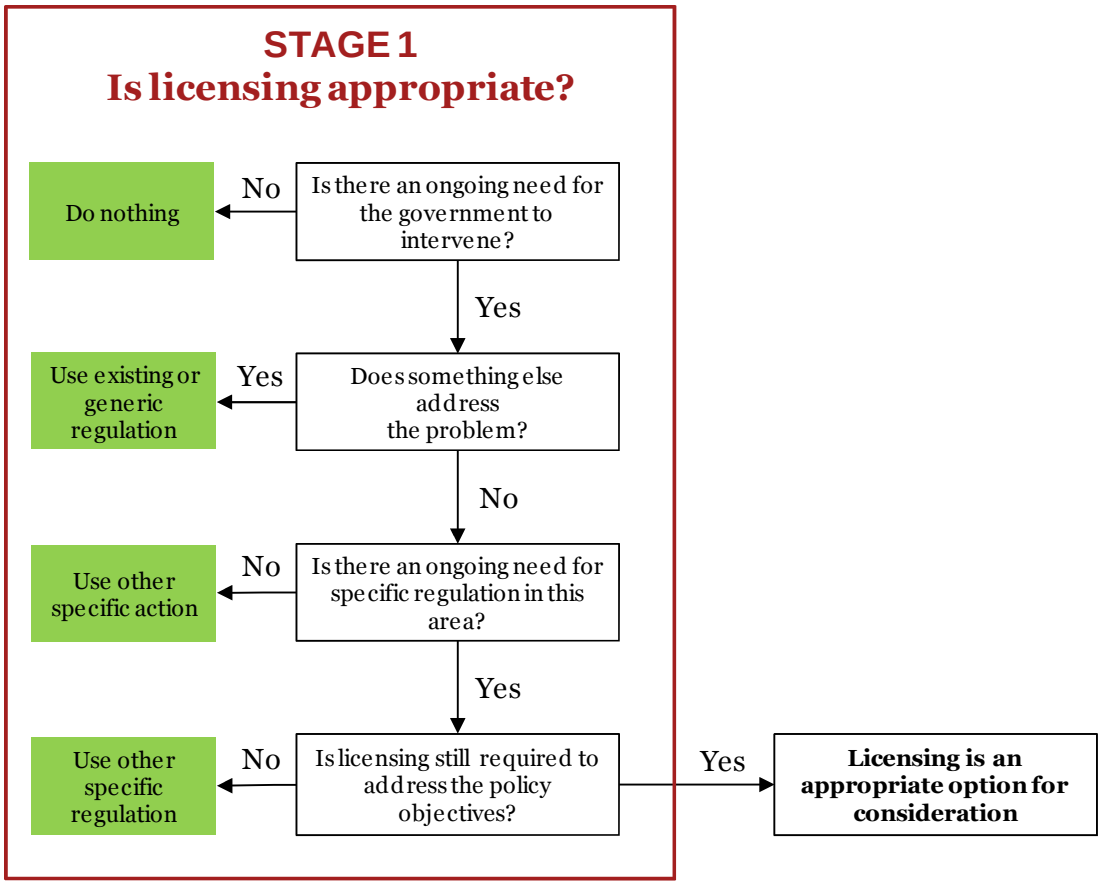
The following diagrams show the four stages of the framework in terms of a decision tree. For each stage, the corresponding decision tree shows the outcomes that should occur if the answer to any of the questions would not allow for continued progression through the framework.

Stage 1: Is licensing appropriate?

The decision tree for Stage 1 is shown in Figure 7. In this stage, the outcome varies for each question depending on the answer given. This reflects that each subsequent question further informs the type of government action that would be relevant. The answer to each question is accounted for in identifying the most appropriate outcome at each step.

In Stage 1, if an answer does not lead to the next step, it suggests that licensing is no longer an appropriate option for consideration. Given this framework focuses on assessing and reviewing licensing, the remaining steps and stages of the framework are no longer relevant and the form of government action should be re-assessed.

Figure 7: Decision tree for Stage 1 of the licensing framework

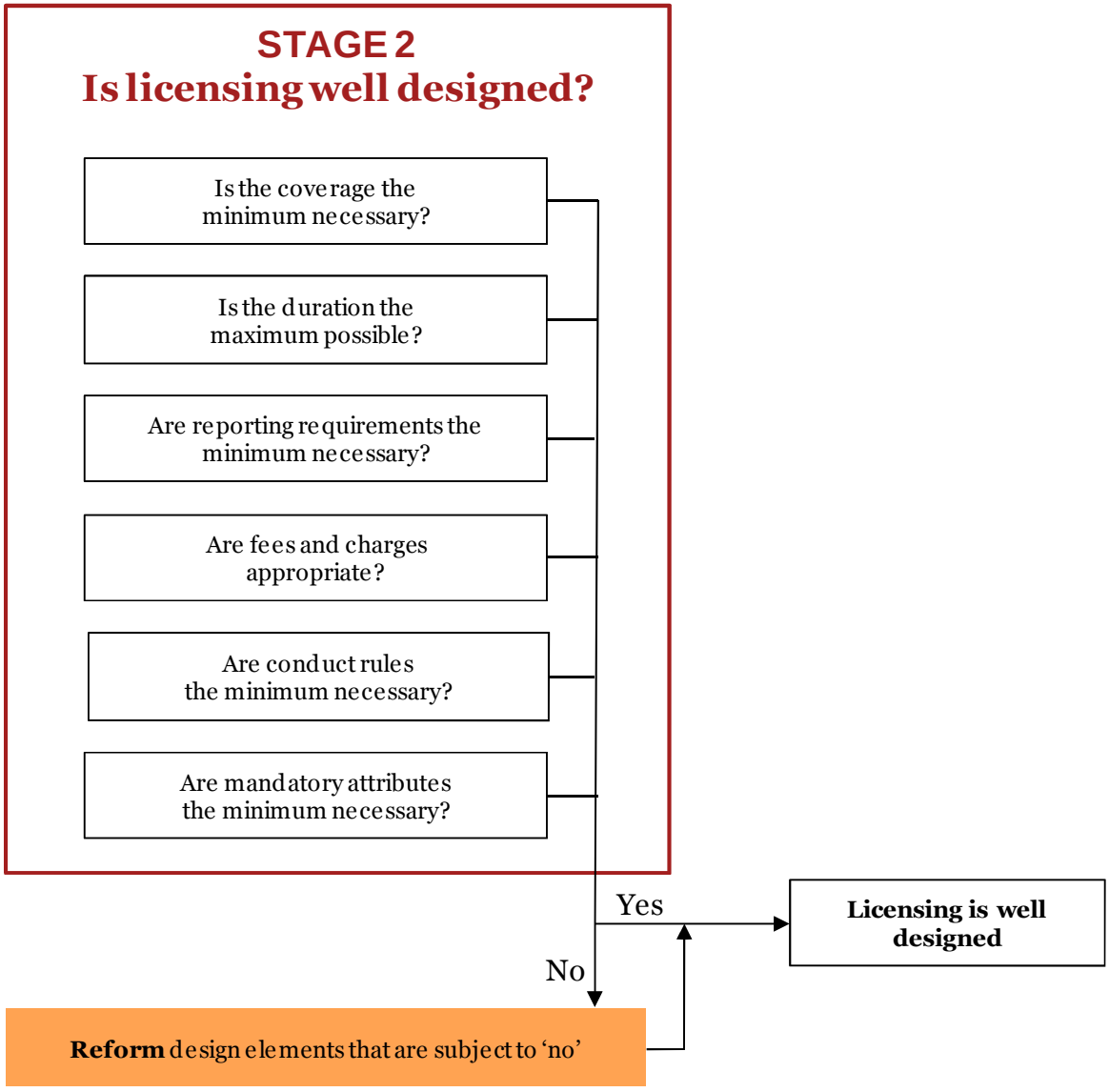


Stage 2: Is licensing well designed?

The decision tree for Stage 2 is shown in Figure 8. In this stage, the outcome from a 'no' answer is similar across each of the steps. When the answer to one of the questions is 'no', it suggests that the particular element considered in that question is not well designed. As such, that element should be reformed so that it is well designed before progressing onto the next stage of the framework.

For example, for the question "Is the coverage the minimum necessary?", based on the tests relevant to this step, if the answer is 'no' it suggest that the coverage is not the minimum necessary. Hence, the coverage should be reformed so that the coverage is only the minimum necessary. This will represent a well designed licensing scheme.

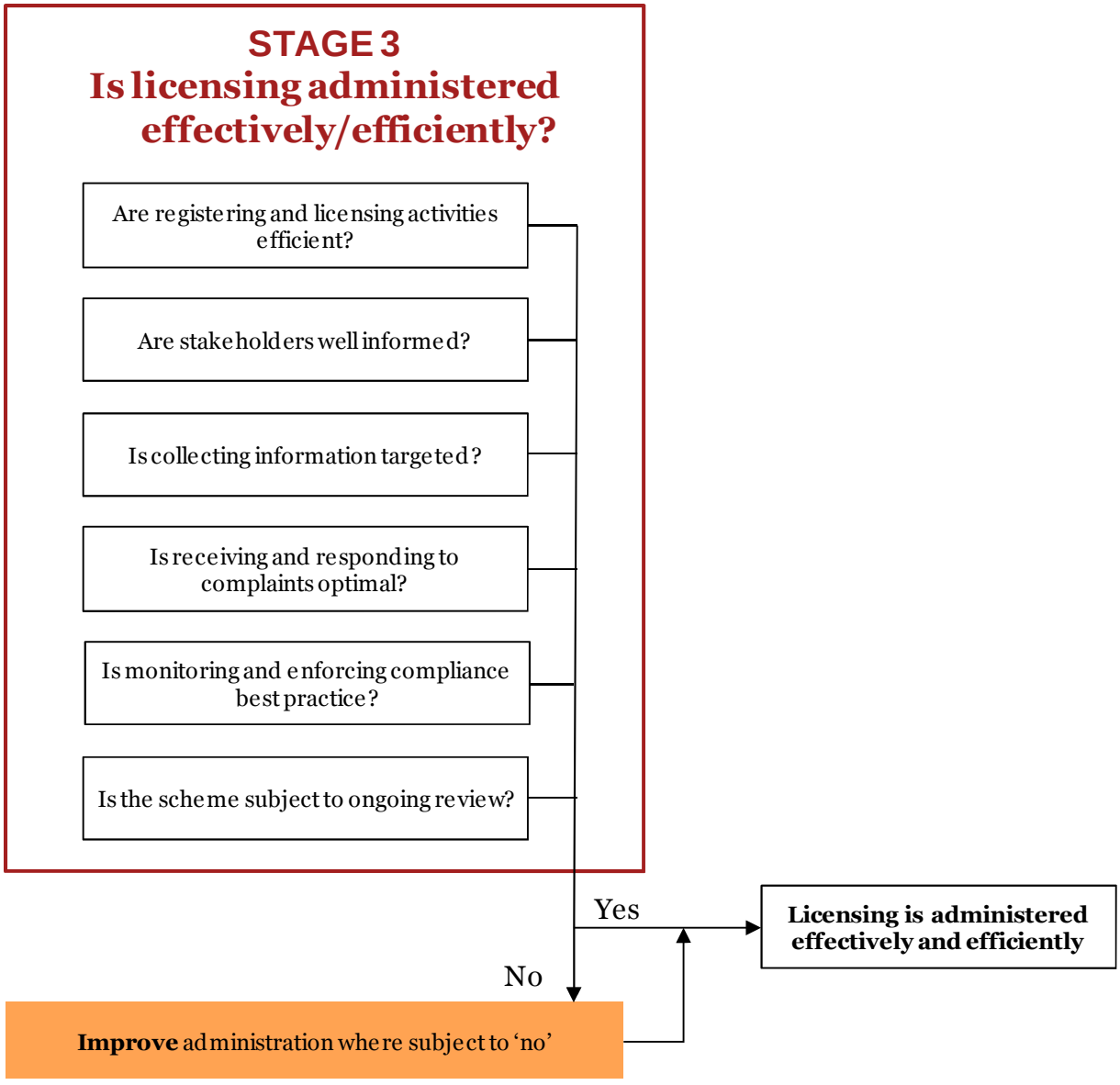
Figure 8: Decision tree for Stage 2 of the licensing framework



Stage 3: Is licensing administered effectively/efficiently?

The decision tree for Stage 3 is shown in Figure 9. In this stage, the outcome from a 'no' answer is similar across each of the steps. When the answer to one of the questions is 'no', it suggests that the particular element considered in that question is not well administered. As such, administration for that element should be improved before progressing through the framework.

Figure 9: Decision tree for Stage 3 of the licensing framework



Stage 4: Is the licensing scheme the best response?

There is no specific decision tree for this stage. At the conclusion of this stage, the outcome should be to choose the response that is identified as 'best'.

Progression through this stage will depend on the outcome of the preliminary assessment (the first step). The final two steps in the framework are relevant and progression through the framework should continue if:

- an existing licensing scheme is being considered and the preliminary assessment indicates it is leading to net costs, or the net impact is unclear
- a proposed licensing scheme is being considered and the preliminary assessment indicates there are likely to be net benefits from the scheme, or the net impact is unclear.

If these scenarios are not present, the final two steps in the framework may not be required. If an existing licensing scheme is being considered, this would mean that licensing should remain, with the existing scheme being updated with any design or administrative reforms identified through the framework.

Appendix B
Case study: Property valuers

Licence:	Property valuers licence
NSW Government responsible agency:	Fair Trading

Purpose of the case study

This case study of the NSW property valuers licence was prepared to test and apply the licensing framework during its development, and to demonstrate the framework through its application to a sample of licences. To develop the case study, PwC undertook research and reviewed publicly available literature and information, and met with representatives of Fair Trading.

As it was concluded in stage 1 of the framework that industry specific regulation may not be necessary, stages 2, 3 and 4 were not applied.

Given the limited timeframe available, this case study does not represent a complete assessment of the property valuers licence. For illustrative purposes, the case study highlights areas for consideration by Fair Trading. Further detailed analysis of the licence by Fair Trading is recommended to meet the requirements of the framework, including further analysis applying the framework to areas recommended for potential reform/review.

Background to the licence

Property valuers licence

In NSW, property valuers are regulated under the NSW *Valuers Act 2003 (*'the 2003 Act') and *Valuers Regulation 2010* ('the regulations').[2] The 2003 Act requires that any person who practices or advertisers as a valuer must be registered with Fair Trading.

The 2003 Act defines a valuer as 'a person who values property for a fee or reward that is paid or payable to the person or to a person',[3] and covers the valuation of land and rights to land, buildings or part of a building.[4] The 2003 Act exempts architects, engineers, surveyors or quantity surveyors that perform valuations incidentally with their other services.[5] The regulations set out the licence fees, the process for disqualification and the rules of conduct.

---

[2] Fair Trading NSW, 2013. *Property Valuers*. Available at: http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Property_valuers

[3] The Valuers Act 2003 No 4. Available at: http://www.legislation.nsw.gov.au/fullhtml/inforce/act+4+2003+FIRST+0+N

[4] Fair trading, 2013. *Scope of valuers work*. Available at: http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Property_valuers/Laws_and_registration.html#Scope_of_valuers_work

[5] http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Property_valuers/Laws_and_registration.html

A property valuer licence is valid for three years. To gain a licence a person must have educational qualifications determined by the Director General of Department of Finance and Services as 'appropriate', be a fit and proper person, be over 18 years of age, and not be disqualified person.

The property valuing industry

In March 2011, there were 3,381 registered valuers in NSW. While this represents a 3.8 per cent increase from April 2010 when there were 3,256 registered valuers, this is lower than in 2000 when there were 4,132 valuers registered in NSW.[6] Fair Trading suggest that this decrease in the number of valuers could be due to a range of reasons including a decline in the market for the services of property valuers.

There were approximately three million valuations undertaken in NSW in 2010.[7] The majority (approximately 2.3 million or 77 per cent of valuations) were land valuations undertaken by the NSW Valuer General, who is exempt from the licensing requirements. The remaining 700,000 valuations undertaken in NSW were by private valuers subject to the licensing system.[8]

The largest client group of private valuers is the finance industry, largely for valuations undertaken when a bank is assessing a home mortgage application.[9] Fair Trading suggests that members of the public do not usually directly access valuation services. When they do access property valuing services, consumers are usually assisted by an intermediary such as a legal practitioner. As part of the NSW National Competition Policy Review of the Valuers legislation in 2000-01, consultations with the NSW real estate valuers industry suggested that individual consumers directly employing valuers' services comprised 5 to 20 per cent of all NSW private valuations (between 35,000 and 140,000), an increase from under 5 per cent in the mid-1990s.[10] However, there is a lack of data to understand definitively the size of this client base.

Future of property valuing regulation

The Council of Australian Governments (COAG) is currently establishing the National Occupational Licensing System (NOLS) which will allow licence holders to use their national licence to work anywhere in Australia.[11] Property valuers licensing will be subject to testing as to whether there remains a need to retain this licence as part of the second tranche of NOLS licence reviews, anticipated to occur in 2014.[12]

---

[6] Department of Fair Trading, 2000. *Review of the Valuers Registration Act 1975: Final Report,* p. viii

[7] Fair Trading, 2010. *Review of the NSW Valuers Act 2003: Report*, p. 2

[8] *Ibid.*

[9] Fair Trading, 2010. *Review of the NSW Valuers Act 2003: Report*, p. 3

[10] Fair Trading, 2009. *Review of the Valuers Act 2003: Position Paper,* p.5

[11] National Occupational Licensing Authority, 2012. *The National Occupational Licensing System*. Available at: http://nola.gov.au/

[12] COAG National Licensing Steering Committee, 2012. *Consultation Regulation Impact Statement: Proposal for National Licensing for Property Occupations.*

Applying the framework

Is licensing appropriate?

Is there an ongoing need for the **government to intervene**? | Does **something else** address the problem? | Is there an ongoing need for specific **regulation** in this area? | Is **licensing** still required to address the policy objectives?

Is there an ongoing need for the government to intervene?

There may not be a strong case for ongoing government intervention in the property valuers industry. Since the introduction of regulation of property valuers in 1975, there have been a number of changes to the industry that mitigate the need for government to intervene including the emergence of professional associations and the significant amount of information available via the internet. The nature of the client base of property valuers also mitigates the need for government intervention.

Fair Trading should consider whether there is an ongoing need to intervene in the property valuers market.

Regulation of property valuers was first introduced in NSW in the *Valuers Registration Act 1975* ('the 1975 Act'). The regulation was intended to protect 'the public' from 'the work of unscrupulous, untrained or inexperienced laymen and as a measure to control and regulate the standards and conduct of the profession'.[13] According to Fair Trading's review of the *NSW Valuers Act 2003* (which replaced the initial 1975 Act), the objectives of the 2003 Act are to ensure that:

- Consumers have access to information about the person or corporation providing property valuation services
- Property valuations services provided on a commercial basis are conducted by qualified valuers in accordance with accepted standards
- An effective disciplinary framework is in place to deal with complaints and investigation regarding valuers.[14]

The rationale for licensing at the time of the 1975 Act was that there was an information asymmetry where consumers did not have the necessary knowledge to determine the quality of services provided by property valuers. Furthermore, as property valuer assessments can underpin investment decisions of companies and individuals; poor valuations can have adverse consequences for consumers of valuation services and have the potential to create consumer detriment.[15] Licensing of valuers in NSW provides a 'registration system and provides consumers with the protection of knowing that a valuer possesses the necessary qualification to practice and has not been disqualified'.[16]

However, since the introduction of the 1975 Act and the following 2003 Act, a number of factors has arisen that may mitigate the need for government action resulting from information asymmetry. As the Fair Trading review of the NSW Valuers Act 2003 highlighted 'since the commencement of the 2003 Act, the nature of the valuing industry has

[13] Fair Trading, 2009. *Review of the Valuers Act 2003: Position Paper,* p. 3

[14] Fair Trading, 2010. *Review of the NSW Valuers Act 2003: Report*, p. 5

[15] http://www.licence.nsw.gov.au/new/categories/property-real-estate. vi

[16] Fair Trading, 2009. *Review of the Valuers Act 2003: Position Paper,* p. 6

change markedly'.[17] The industry has witnessed the establishment and acceptance of professional standards through professional associations such as the Australian Property Institute, [18] the Real Estate Institute and the Royal Institute of Chartered Surveyors. A professional association membership acts as a signal to consumers that a valuer is appropriately qualified. Property valuers are not required to be members of a professional association, though many chose to be. Currently, over 3,000 NSW property valuers (89 per cent) are members of the Australian Property Institute of NSW.[19] A number of other industry associations such as the Real Estate Institute and the Royal Institute of Chartered Surveyors also have property valuers' divisions.

The Australian Property Institute has its own code of conduct that is arguably more prescriptive than the conduct requirements in the *Valuers Regulation 2010*. Therefore, the high proportion of valuers who are members of professional associations may play a 'considerable role' in meeting the objectives of the 2003 Act by providing an information signal to consumers that a valuer is appropriately qualified and by imposing conduct requirements.[20]

In 2009, around 80 to 95 per cent of private valuers' clients were thought by industry to be large corporates such as major banks, legal practitioners, finance companies and other financial intermediaries who seek valuation as part of, for example, loan assessment processes.[21] These clients are likely to have sufficient knowledge to determine the quality of the service, and therefore do not require the level of consumer protection described in the objectives of the Act. These large businesses often select providers from panels of valuers whose performance and qualification are monitored continually. Furthermore, these financial corporation's often engage property valuers on an almost continuous basis, repeatedly engaging property valuers as part of, for example, loan assessment processes. Financial corporations are well placed to assess the quality of the service provided and would not continue to engage a property valuer who they doubted the competency of.

Individual consumers may be more susceptible to detriment. However, this client group make up a small proportion of the client base of property valuers. Of the approximately 700,000 private valuations that are undertaken in NSW each year, between 35,000 and 140,000 may be undertaken for individual consumers.

The internet has led to a significant increase in the availability of information regarding property valuation. There are significant amounts of data available regarding historical sale prices of properties and the average property values in specific areas. This may not only reduce the need for individual consumers to directly access valuing services, but also allows consumers to have access to information which would better enable them to assess the quality of the valuation service.

These factors combined have contributed to an 'extremely low' incidence of complaints against valuers in NSW.[22] For example, between 1 January 2006 and 16 March 2009 Fair Trading received only 11 complaints against property valuers. As there were over 3,000 registered property valuers, this means there were complaints against less than 0.5 per cent of the industry. By comparison, in 2010-2011 Fair Trading licensed 178,000 building and construction entities and of the 42,000 complaints received, 9,000 related to

---

[17] Fair Trading, 2010. *Review of the NSW Valuers Act 2003: Report*, p. 5

[18] Fair Trading, 2009. *Review of the Valuers Act 2003: Position Paper,* p. 3

[19] Australian Property Institute NSW, 2012. *Who is the API*. Available at: http://www.nsw.api.org.au/menuitem/about-api-new-south-wales/who-is-the-api

[20] Fair Trading, 2010. *Review of the NSW Valuers Act 2003: Report*, p. 7

[21] Fair Trading, 2009. *Review of the Valuers Act 2003: Position Paper,* p.4

[22] Department of Fair Trading, 2000. *Review of the Valuers Registration Act 1975: Final Report,* p. viii

residential building work.[23] This means that there were complaints against approximately 5 per cent of the residential building industry within one year.

Does something else address the problem?

The Australian Consumer Law may be sufficient to protect consumers from property valuer services. In lights of this, Fair Trading should consider whether the property valuers licence is still necessary.

In some cases, industry specific laws will not be required and generic remedies could address the market failure. Since the introduction of regulation of valuers, the Australian Consumer Law (ACL) commenced on 1 January 2011. The ACL provides nationally consistent rights and protections to consumers and creates a national enforcement regime.[24] It provides the following guarantees in respect of the supply of services:

- A guarantee that the services are carried out with due care and skill
- A guarantee that services are fit for purpose made known to the supplier
- A guarantee that services are provided within a reasonable time
- Misleading and deceptive conduct and unfair contract terms are prohibited.[25]

The ACL also sets out remedies available to consumers when a service fails to meet these customer guarantees. The provisions allow for a range of remedies including, but not limited to:

- Injunctions to restrain conduct or require something to be done
- Damages to redress low or damage caused by a breach
- Compensatory orders to allow compensation for breaches of the ACL
- Public warning notices for regulators to warn the public about conduct.

The ACL provides measures to prevent consumer harm and remedies for when harm has occurred. In comparison the valuers licence does not include any remedies for consumers after harm has occurred. Additionally, consumers can access the low-cost Consumer Trader and Tenancy Tribunal to resolve disputes about the supply of services and therefore avoid the need for legal action.[26] Therefore, there may be sufficient protection for the consumers of property valuers industry outside of the licence. This may mitigate the need for industry specific regulation because generic remedies may be sufficient.

Decisions have been taken in the travel agency industry and in the regulation of property valuers in Victoria on a similar basis; that there has been a change in the risk profile and there are generic remedies.

---

[23] Review of Home Building Legislation Discussion Paper http://www.fairtrading.nsw.gov.au/About_us/Have_your_say.html?DCSext.ref=HomePageClick:Haveyoursay

[24] Australian Consumer Law, 2012. *Why have a new law?* Available at: http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/why_have_a_new_law.htm

[25] The Parliament of the Commonwealth of Australia, 2010. *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010: Explanatory Memorandum,* Available at; http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf

[26] Consumer, Trader and Tenancy Tribunal, 2012. *About us.* Available at: http://www.cttt.nsw.gov.au/About_us.html

- *Travel agents:* A plan has been recently agreed for the deregulation of travel agency industry in Australia based on the change in risk profile of the travel agency industry and the availability of generic remedies through the ACL.[27]

- *Property valuers in Victoria:* Victoria follows a deregulated approach whereby the government advises consumers to use a certified property valuer. Valuers must meet educational requirements in order to be a member of the Australian Property Institute (API), have two years experience and adhere to the conduct requirements of the API.[28] Membership in the API signals consumers that a property valuer is appropriately qualified. Consumer Affairs Victoria has not reported any significant adverse impact since property valuation was deregulated in 1994.[29] Deregulation occurred prior to the additional consumer protection of the ACL and yet there have not been significant problems reported.

A recent survey undertaken by IPART indicated that the industry is divided on whether the valuers licence should continue. Of the survey respondents who indicated whether they think licensing should continue, five respondents were in favour of abolishing licensing and 11 were in favour of continuing some form licensing. Property valuers who were in favour of the continuation of licensing argued that without licensing 'persons without training or experience could act as valuers' which could result in 'client losses'.

Is there an ongoing need for specific regulation in this area?

Considering the protection provided by the ACL and the changes to the property valuers' market, it does not appear that there is a need for specific regulation of the property valuers' industry.

Even if there is a role for government intervention, it does not automatically follow that licensing is the most effective form of regulation. Due to the protection provided by the ACL and changes to the property valuers' market noted above, it is considered that licensing is no longer required to achieve the objectives of the 2003 Act.

Is licensing still required to address the policy objectives?

Though it appears that licensing of property valuers is likely to achieve the policy objective of consumer protection, the ACL can achieve this objective without the need for industry specific regulation, while also offering opportunity for consumer redress. Therefore, it appears that licensing may not be *necessary* to achieve the policy objectives.

The policy objective, understood to be to protect consumers and remedy the information asymmetry, may be addressed through licensing. To identify if licensing is likely to achieve the objectives involves a three-step process, as detailed below.

---

[27] COAG Legislative and Governance Forum on Consumer Affairs, 2012. *Travel Industry Transition Plan,* p. 14

[28] Department of Sustainability and Environment, 2012. Become a valuer. Available at: http://www.dse.vic.gov.au/property-titles-and-maps/valuation-home-page/the-valuation-profession/become-a-valuer

[29] Fair Trading, 2010. *Review of the NSW Valuers Act 2003: Report*, p. 7

Objectives

For licensing to be appropriate, one of a number of objectives that are outlined in the framework must be being sought to be addressed. This includes:

- Addressing the risk of misconduct
- Promoting competency, quality and safety.

Addressing the risk of misconduct

The property valuers licences aims to address the risk of misconduct by imposing conduct requirements and providing a complaints and disciplinary process. However, as already discussed, the ACL imposes a range of requirements for businesses and individuals providing services. Additionally the ACL can provide remedies for consumers for when harm occurs, whereas licensing cannot.

Promoting competency, quality and safety

By imposing education qualification requirements, the licence promotes competency and quality. However, the availability of information on the internet and the information signal provided by membership of a professional association may also achieve this objective.

Functions

Functions are the broad activities or types of regulatory action imposed on regulated entities. Each policy objective has a series of functions that could be achieved through licensing.

To address the risks of misconduct, a licence may impose conduct rules, mandate business attributes, enable enforcement or provide avenues for redress. The commercial property valuers licence provides all these actions except avenues for redress. Though the licence can be cancelled, no redress can be provided for the consumer.

To promote competency, quality and safety, a licence may ensure minimum competency, impose conduct requirements and mandate business attributes. By requiring education qualifications and imposing conduct rules the property valuers licence fulfils these functions.

Licensing type

The property valuers licence is a permission licence with specific conditions. A permission licence with specific conditions may be necessary when:

- There is a policy driven function that needs to be imposed on the licensed entity, and
- This needs to be supported by licensing to enable policy-making, enforcement or the collection of fees.

It does not appear that the policy driven function needs to be supported by licensing to enable policy making, enforcement and collection of fees. The ACL provides a framework through which policies regulating the provision of services to consumers can be made. Therefore, without licensing there would still be a policy framework for the provision of property valuing services. If the ACL was used as a generic remedy, Fair Trading would not need to continue their property valuing specific enforcement activities and therefore would not need to collect fees to fund this.

Therefore, it appears that the policy objectives may be addressed through licensing. However, these objectives and functions may also be able to be addressed through generic remedies.

Prima facie it appears that the property valuers licence is unnecessary as the core customers are large corporations that can use their market power and knowledge to engage competent property valuers and individual consumers are provided with significant consumer protection through the ACL. Therefore, the framework has not been subject to the subsequent stages of the framework.

Concluding remarks

This high-level assessment suggests that the property valuers licence may not be necessary. Fair Trading should consider if licensing is necessary considering that:

- Approximately 80-95 per cent of property valuers clients are large corporations that repeatedly and frequently engage property valuers, meaning they are well placed to assess the quality of a service
- Individual consumers do not often directly access property valuing services and when they do:
  - the ACL provides consumer protections and remedies for harm after it has occurred
  - consumers can use membership of one of the professional associations as a signal of qualifications
  - the internet provides access to significant information regarding property values that may assist consumers in identifying if they are being provided with a high quality service.

Appendix C
Case study: Commercial fishing

Licence:	Commercial fishing licence
NSW Government responsible agency:	Department of Primary Industries (Fisheries NSW)

Purpose of the case study

This case study of the NSW commercial fishing licence was prepared to test and apply the licensing framework during its development, and to demonstrate the framework through its application to a sample of licences. To develop the case study, PwC undertook research and reviewed publicly available literature and information, and also met with representatives of Fisheries NSW.

Given the limited timeframe available, this case study does not represent a complete assessment of the commercial fishing licence. For illustrative purposes, the case study highlights areas for consideration by the Department of Primary Industries (DPI) and Fisheries NSW. Further detailed analysis of the licence by the agency responsible is recommended to meet the requirements of the framework, including further analysis applying the framework to areas recommended for potential reform/review.

The NSW commercial fishing arrangements are complex and this case study attempts to provide an overview of the arrangements that may in some cases appear simplifying, and should only be considered with reference to public documents and more detailed guidance issued by Fisheries NSW.

Background to the licence

Commercial fishing activity in NSW is regulated under the *Fisheries Management Act 1994* (NSW) ('the Act') and subordinate legislation administered by the DPI. The purpose of Act is to 'conserve, develop and share the fishery resources of the State for the benefit of present and future generations'.[30]

The DPI and Fisheries NSW uses a number of licence and endorsement mechanisms, including the commercial fishing licence, to control commercial fishing activity in NSW under the requirements of the Act and related legislation. There are currently three points in the fishing supply chain where a licence and/or endorsement may apply:

- *Fishery businesses*: NSW fisheries businesses are issued either (i) shares in a share management fishery or (ii) entitlement to an endorsement in a restricted fishery that

[30] Fisheries Management Act 1994 Part 1, section 3.

provide each business with a right to commercially fish in NSW waters. The shareholding or entitlement to an endorsement are considered 'privilege' licences (i.e. licences which give a limited number of licensees the right to undertake an activity to the exclusion of others) and essentially provide a property right that allows ongoing access. As part of being issued a shareholding or entitlement to an endorsement, each fishery has specific conduct requirements, such as quotas or activity restrictions that have the purpose of restricting use of the State's fishery resources. We refer to both shareholdings and entitlements to endorsements as 'endorsements' throughout the remainder of this case study. There are currently an estimated 1,304 fishery businesses and 4,483 endorsements in NSW (note that many commercial fishing businesses will hold multiple endorsements).

- *Commercial fisher:* An endorsement does not by actually allow the fishery business to take fish from NSW waters and sell them commercially. The business that holds the endorsements must also nominate a person who holds a commercial fishing licence to be their 'nominated fisher'. The commercial fishing licence grants permission for a person to engage in commercial fishing activities (i.e. to take fish for sale). The commercial fishing licence is a 'permission' licence (i.e. a license that gives the licensee permission to undertake an activity, but the number of licences is not limited meaning that any applicant that satisfies the requirements can hold a licence). The primary purpose of the commercial fishing licence is to allow monitoring and enforcement of the endorsement conditions in situ. The commercial fishing licence identifies a point of association for fishing businesses that hold endorsements. Therefore, it identifies a person who is authorised to fish an endorsement, which allows compliance officers to identify that someone taking fish from the waters of NSW is authorised to do so. There are 1,274 commercial fishing licences in NSW[31].

- *Vessel:* The *NSW Fisheries Management Act 1994* also requires that all commercial fishing vessels be licensed. Commercial fishing boat licences can be issued to an individual, partnership or company and must be carried at all times whilst a boat is undertaking commercial fishing activities. Like the commercial fishing licence, the commercial fishing boat licence lists conditions on the plastic card that is issued. Commercial fishing vessels must also be registered with NSW Roads and Maritime Services. There are 1,964 commercial fishing vessel licences in NSW.

This case study focuses specifically on the commercial fishing licence held by commercial fishers, but at times refers to the other two licences as they are both relevant in considering the total licensing requirements in the commercial fishing supply chain.

Commercial fishing licences are available to individuals (not corporations) and an individual can only obtain a commercial fishing licence if:

- The individual is a shareholder in a share management fishery (i.e. the owner of a business that holds shares in a share management fishery) or is duly nominated by the shareholder to take fish on behalf of the shareholder (i.e. a person who works for a business that holds shares in a share management fishery)[32]
- An individual who is the owner of a fishing business that has been allocated an endorsement that authorises the taking of fish for sale in a restricted fishery (i.e. the owner of a business that holds an endorsement in a restricted fishery) or who is duly

[31] 2011-12 data provided to PwC by IPART in the 'List of NSW Government Department-Agency Licences 19 February 2013.

[32] section 103 Fisheries Management Act 1994

nominated to take fish on behalf of the owner of such a fishing business (i.e. a person who works for a business that holds endorsements in a restricted fishery)[33]

- An individual who satisfies the Minister that he or she requires a commercial fishing licence in order to work as a crew member for a person who holds a commercial fishing licence that authorises the person to take fish in a share management fishery or restricted fishery .[34]

The commercial fishing licence allows for efficient structuring of the sector. An owner of an endorsement who wishes to fish their endorsement themselves can obtain a commercial fishing licence and be the 'nominated' fisher for their endorsement. The owner of an endorsement who wishes to have someone else fish their endorsement can hire a person holding a commercial fishing licence and have this person operate as the nominated fisher. Therefore, the fishery business and the commercial fisher may be different people. Importantly, the commercial fisher must be the person conducting the fishing, while the endorsement holder may be a company.

The commercial fishing licence is issued in the form of a plastic card which lists the personal details of the commercial fisher (including name, address and data of birth), the unique registration number identifying the licence holder, the expiry date and the list of conditions applicable to the licence holder.[35] The conditions appear on the licences in abbreviated form followed by a 'condition code'.

If a commercial fishing licence holder contravenes the Act, subordinate legislation or a condition of the licence, the licence can be suspended or cancelled.

Recent reforms

In 2012, the Minister for Primary Industries commissioned an *Independent Review of NSW Commercial Fisheries Policies*. The Review was undertaken by Richard Stevens OAM to examine the 'shortcomings of commercial fisheries policy, management and administration in NSW and secondly what needs to be done to fix them'.[36] In March 2012, the NSW Government responded to the review by proposing a range of reforms intended to 'create a more viable and sustainable sector' involving 'new management, consultation and governance structures'.[37] The reforms include, but are not limited to:

- Establishing a Ministerial Fisheries Advisory Council, a peak industry body and a number of other arrangements for improved consultation
- A fee increase from July 2013 and a move towards fees based on resource access in order to achieve a higher level of cost recovery of enforcement and compliance costs (currently approximately 20 per cent)
- A structural adjustment package of $16 million to provide a way for businesses to exit and enter the industry.[38]

---

[33] clause 125 of the Fisheries Management (General) Regulation 2010

[34] clause 125 of the Fisheries Management (General) Regulation 2010

[35] Department of Primary Industries, 2012. *NSW Commercial Fisheries Administration Guide,* p. 9

[36] Stevens, Richard; Cartwright, Ian; Neville, Peter, 2012. *Independent Review of NSW Commercial Fisheries Policy, Management and Administration*.

[37] Department of Primary Industries, 2012. *Fact Sheet: Commercial Fisheries Reform*. Available at: http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/448186/Fact-sheet-Commercial-Fishing-Reforms.pdf

[38] Hourigan, Adam 2012. 'Reforms of NSW commercial fishing industry announced'. *Rural weekly*. Available at: http://www.ruralweekly.com.au/news/reforms-nsw-commercial-fishing-industry-announced/1623291/

The reforms are being introduced incrementally through to January 2015, with some reforms already in the process of being introduced, such as establishment of the Ministerial Fisheries Advisory Council, development of an exit grant scheme, commencement of legislative amendments, and consultation with industry regarding formation of a peak industry body.[39]

Applying the framework

Is there an ongoing need for government to intervene?

There appears to be an ongoing need for government to protect the fish stocks of NSW because there is a significant risk of overfishing without government intervention and this would be difficult, if not impossible, to remedy if it occurred. In addition, it is considered that there is an ongoing need to enforce the endorsements to assist in mitigating the risk of overfishing (currently facilitated by the commercial fishing licence).

The commercial fishing licence allows for the enforcement of conduct requirements that seek to meet the objective of protecting the fishery stocks of NSW. As set out in the *Fisheries Management Act 1994*, the purpose of the fishery management framework is to 'conserve, develop and share the fishery resources of the State for the benefit of present and future generations'.[40] Secondary objectives of the Act include to 'promote viable commercial fishing … industries' and to 'appropriately share fisheries resources between the users of those resources'.

Some form of government action is required because the NSW fish stock is a common resource that fishers may overexploit in the absence of regulation. Once overfishing has occurred it is expected to be difficult, if not impossible, to remedy. The risk of detriment is high and the ability to remedy is poor.

The commercial fishing licence is one of two licences that seek to address the risk of overfishing. The commercial fishing licence allows fisheries officers to identify a person undertaking fishing activity as associated with a given fishing business. Information on the plastic licence card allows enforcement officers to identify an individual taking fish from NSW waters to sell commercially. Information such as contact details is required on licence applications, facilitating action against commercial fishers who breach requirements.

However, whether a separate commercial fishing licence is the most appropriate and efficient way of linking a person to a fishing business and enforcing the endorsements may warrant further consideration. We consider this question later in the case study (Stage 2).

Does something else address the problem?

Outside of the *Fisheries Management Act 1994,* there are no Australian/NSW laws that attach property rights to fisheries in NSW. Therefore, it is considered that there are no generic remedies that can address and monitor the risk of overfishing of NSW fish stocks.

---

[39] Department of Primary Industries, 2012. *Fact Sheet: Commercial Fisheries Reform*. Available at: http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/448186/Fact-sheet-Commercial-Fishing-Reforms.pdf

[40] Fisheries Management Act 1994 Part 1, section 3.

In some cases, industry specific laws are not required as generic remedies can address the market failure. It does not appear that generic remedies would be appropriate in the case of managing commercial fishing and conserving NSW fish stocks. There are no laws outside of the *Fisheries Management Act 1994* that provide for sustainable management of the State's fisheries resources.

Is there an ongoing need for specific regulation in this area?

There is a need for specific regulation in this area as there are no generic remedies to address the risk of overfishing of NSW fish stocks. The commercial fishing licence is intended to identify and match an individual to the endorsements and provide a mechanism for enforcement of endorsement conditions. As discussed further in Stage 2, there may be merit in DPI and Fisheries NSW considering whether this could be achieved through a more targeted approach. For example, DPI and Fisheries NSW could examine incorporating the requirements of the commercial fishing licence into the endorsements and abolishing the commercial fishing licence.

Beyond the *NSW Fisheries Management Act 1994* and subordinate legislation, other legislation affects commercial fishing activity. This includes legislation administered by the Food Authority related to food safety, and matters related to the operations of commercial fishing boats, administered by Roads and Maritime Services. It does not appear that there is opportunity to leverage this regulation for the purpose of conserving, developing and sharing the fisheries resources of NSW, nor for enforcement and oversight of the use of fishing resources.

The Act and subordinate legislation set out commercial fishing requirements, for example controls on taking protected fish, defining protected waters and specifying allowed fishing gear, and also defines administrative sanctions to ensure compliance and enforcement of such rules. It does not appear that there are generic remedies or legislations that impose conduct requirements on commercial fishing licences.

The commercial fishing licence is intended to connect an individual to an endorsement and to provide for enforcement of conditions under the endorsement. As discussed in the question below, there may be merit in exploring other options for identifying an individual and facilitating enforcement and monitoring utilising the existing endorsement framework.

Is licensing still required to address the policy objectives?

Some licensing is required to monitor and enforce conduct requirements relating to the exercise of the endorsements, and therefore prevent potential overfishing. However, in Stage 2 we pose the question whether it is appropriate and efficient to impose this licensing on the commercial fisher as opposed to the fishery business or commercial fishing vessel – other supply chain elements, subject to another form of licensing concurrently.

The commercial fishing licence allows enforcement officers to identify an individual as being authorised to take fish from NSW waters under an endorsement. It appears from the three steps below that the commercial fishing licence meets all the requirements of the framework in that the licence addresses the risk of misconduct and enforces conduct requirements.

What are the objectives of the licensing scheme?

It appears that the objective of the commercial fishing licence is to address the risk of misconduct (i.e. enforcing restrictions). In turn it is useful to consider that the objective of the fishing endorsements is to manage and protect common resources (i.e. placing

restrictions on commercial fishing activity). These are both objectives identified in the framework as relevant to licensing.

Address the risks of misconduct

The rules associated with endorsements and legislative provisions must be enforceable to address the risk of misconduct. Commercial fishing licences play a role in identifying those authorised to fish commercially in NSW, which supports measures to address misconduct.

Information collected in the licence application and renewal process allows consideration of any concerns associated with a particular individual having access to the fisheries resource and provides contact details should the need arise to investigate fishing activities. The prescribed rules allow for the refusal to issue or renew a commercial fishing licence in certain circumstances, including where a person has committed offences related to the fisheries resource. If offences are detected post harvest, details recorded related to the licence holder provide an avenue to pursue investigations. Action related to a commercial fisher breaching requirements includes formal cautions, issuing of infringement notices, or court action against that person. The licensing provisions also provide an option to suspend or cancel an issued licence. This is an important extension to action allowing the removal of access to fishing for a period. In some circumstances the fishing business owner may also be subject to compliance action. The commercial fishing licence addresses the risks of misconduct in two key ways. It provides a point of association for every commercial fishing business in NSW and it collects necessary information on operators.

Manage or protect a common resource

The endorsements held by a fishing business authorise the holder to take fish from the waters of NSW. They are a privilege licence in that they grant holders a property right. In order for the endorsements to operate properly, they must be enforceable. The commercial fishing licence supports the monitoring and enforcement of the endorsement.

Are the licence functions necessary to achieve the objectives?

It is considered that the function of the commercial fishing licence is to impose specific conduct requirements and enable enforcement, while the fishing endorsements have the function of restricting the quantities of activities undertaken. In addition, it appears that these functions are needed to achieve the overarching policy objective of conserving, developing and sharing the fisheries resources of NSW.

Enabling enforcement, imposing specific conduct requirements and restricting the quantities of activities undertaken

As a common resource, it can be understood that fish stocks must be regulated to conserve the stocks in NSW waters. While the commercial fishing licence does not in itself restrict the quantities of fish taken, the commercial fishing licence facilitates the enforcement of endorsements and shares, which restrict the quantity of fishing activity that can be undertaken (in some cases by imposing quotas and in some cases by restricting the activities). Additionally, the commercial fishing licence and endorsements impose conduct requirements that are necessary for the enforcement of the restrictions on commercial fishing licences.

Is licensing necessary to achieve those functions?

Considering the functions outlined above, licensing is considered necessary as it enables the enforcement of endorsements. However, the role of the commercial fishing licence in conserving the fisheries resource is particular to enforcement and monitoring requirements, and there may be alternative methods of achieving this objective within the broader fisheries management framework. We address this point in further detail below.

Is the coverage the minimum necessary?

There are currently a number of points of licensing in the NSW commercial fisheries management framework: fishery businesses require endorsements, commercial fishers require a commercial fishing licence, and commercial fishing vessels require a commercial fishing vessel licence and to be registered with the NSW Roads and Maritime Services.

There are currently 1,304 fishing businesses, 1,274 commercial fishing licences, and 1,964 commercial fishing vessel licences in NSW. This indicates there is an opportunity to minimise coverage to one or two, as opposed to three, sets of participants so that the compliance and administrative burden could be more targeted.

The Stage 1 application of the framework suggests that is a need for government intervention and that for enforcement reasons, it is necessary to have a point of association for each commercial fishing business that holds endorsements. It is suggested that DPI and Fisheries NSW could consider streamlining how the endorsements are linked to a point of association. This could include consideration of linking commercial fishers to an endorsement by requiring businesses to provide a list of nominated fishers as part of the endorsement (rather than requiring a separate commercial fishing licence).

Determining the appropriate coverage for licensing involves examining the point of coverage (product, people or place) and the coverage base (i.e. who the licence applies to).

Identifying potential points of coverage

There are a number of options for the point of coverage of a licence: the product, the person or the place of business. It would be difficult, if not impossible, to licence the product (fish stock) or place of business. Therefore, one possible point of coverage of the licence is the person undertaking commercial fishing activity on behalf of the business. However, there may be other options other than the commercial fishing licence for covering that individual. For example, endorsement holders could potentially be required to provide Fisheries NSW with a list of people who are authorised by them to fish the endorsement. This could include themselves, people they are leasing their endorsement to or fishers employed by them to act as a commercial fisher. Therefore, fishing businesses would still have the flexibility to operate in a number of different ways and enforcement officers would be able to identify if an individual is indeed authorised to fish a particular businesses endorsement.

In other jurisdictions, mechanisms are used to link the person taking fish from the waters to an endorsement, but this is not necessarily through a commercial fishing licence. For example, in Queensland, to operate a commercial fishing business a person must hold an authority (essentially the access right to fish a certain species). The authorities are then linked to the commercial fishing boat licence. The commercial fishing boat licence authorises the holder to use the boat identified on the licence to fish commercially within the fisheries endorsed by fishery symbols on the licence. In Queensland, virtually no new commercial fishing boat licences have been issued since a policy of limited entry – essentially a cap on the number of each type of fishery symbols and licences – was introduced in 1984.[41] Therefore, it appears that the fishing vessel that provides a point of association for the authority. It should be noted that in Queensland there is also a commercial fishing licence, which is required to take fish from the

41 Department of Agriculture, Fisheries and Forestry, 2013. *Commercial Fishing Boat Licence.* Available at: http://www.daff.qld.gov.au/28_15421.htm

waters to sell commercially. However, the requirements for the commercial fishing licence are predominately around skills requirements.

Developing coverage based on risk

The appropriate coverage base (i.e. who the licence applies to) is likely to be based on risk. If there are different levels of risk for different commercial fishers, this may justify having exemptions from licensing requirements and coverage could be reduced to those parts of the fishing industry most at risk of engaging in overfishing. For example, commercial fishers operating in areas where there are high levels of fish stocks could be exempt from requiring licensing. However, there are problems with such an approach:

- It is understood to be difficult to measure fish stocks and therefore difficult to ascertain if overfishing has occurred or if species of fish are at risk.[42]
- If certain species or areas were deregulated, this may lead to a significant number of operators fishing in the area or fishing the species. Deregulating certain parts of the industry could cause overfishing.

Therefore, it is appropriate that the commercial fishing licence covers all commercial fishers. However, as noted, whether the commercial fishing licence is required to achieve this coverage should be reviewed.

Is the duration the maximum possible?

The current duration is one year and may not be the maximum possible. The reporting requirements of the commercial fishing licence could be 'unbundled' from the licence duration, which could allow for the duration of the licence extended. It is suggested that further review of the licence be conducted to determine the maximum possible licence duration.

Commercial fishing licences have a common expiry date of 30 June each year (the commercial fishing vessel licences also have a common expiry date of 30 June each year and the endorsements do not expire). A new commercial fishing licence application can be made at anytime during the year; but the common expiry date still applies. At the time of renewal, commercial fishing licence holders must provide up-to-date information. The annual renewal imposes an administrative burden on commercial fishing businesses that a longer duration could reduce.

It is understood that an objective of the commercial fishing licence is to collect information for enforcement and monitoring purposes. If this is considered challenging under a longer duration fishing licence, it may be possible to 'unbundle' requirements from the licence. For example, DPI and Fisheries NSW could collect information by having longer licence duration and a requirement that commercial fishers inform DPI if their details change (a continuous disclosure requirement).

In some other areas IPART is examining under the licensing framework, a duration of 10 years is being considered. However, as detailed in the framework, the licensing duration should be determined with consideration of how frequently the licensing requirements change. It does not appear that the requirements for holding a commercial fishing licence frequently change. However, the fisheries management framework is subject to review on a regular basis and the duration of 10 years may be too long. Fisheries NSW should undertake further review to determine the maximum possible licence duration.

---

[42] Stevens, Richard; Cartwright, Ian; Neville, Peter, 2012. *Independent Review of NSW Commercial Fisheries Policy, Management and Administration,*

It is noted that there are currently a range of reforms to commercial fishing licences and the management of fisheries in NSW that are in the process of being introduced. These reforms may include longer durations of licences. It is also noted that the Fish Online system is currently being introduced, which will allow commercial fishers to renew licences online.

Are reporting requirements the minimum necessary?

The commercial fishing licence imposes a reporting requirement to provide up-to-date information, including the endorsement the fisher is linked to and their contact details, at the time of application and renewal of the licence. This appears to be the minimum necessary, but may warrant further consideration – for example, whether the overarching intention is to identify the fishing business in addition to the commercial fisher.

Commercial fishing licences do not have any reporting requirements outside of the information that the licence holder must provide in the annual renewals. The information provided in the annual renewal includes contact details and the business that the commercial fisher is operating for. This information is required so that if a commercial fisher is breaching requirements, action such as formal cautions, issuing of infringement notices or court action can be pursued against that person and, in some circumstances, the fishing business owner. Therefore, the information collected appears to be necessary for enforcement and therefore may be the minimum necessary.

Are fees and charges appropriate?

The Stevens Inquiry found that the total fees and charges levied on commercial fishing in NSW are not currently recovering administration and enforcement costs and identified that there is currently no formal cost recovery policy in place to guide fisheries management and encourage the efficient delivery of services. Therefore, it is suggested that DPI and Fisheries NSW review the fees associated with commercial fishing (including the commercial fishing licence) in consideration of the licensing framework.

The commercial fishing licence in NSW has an application fee of $562.[43] The application fee is prorated when an application is received after July (as the duration of the licence is 1 July to 30 June). There is also an annual renewal fee of $291. The total revenue from the commercial fishing license fees was $358,715 in 2010-11.[44]

The commercial fishing licence is one of a number of licence fees a commercial fishing business must pay. For example, an application fee for a boat licence (three metres or less) is $196 and the renewal fee is $55. Fishing businesses with shares or restricted fishery endorsements are subject to management charges or annual contributions, respectively. For example, a fishing business owner holding shares in the Estuary Prawn Trawl fishery is presently subject to an annual share management charge of $1,352.

Fees collected though the licenses and charges are used for a range of administrative, compliance and enforcement activities carried out by DPI and Fisheries NSW. Additionally, fees and changes paid by commercial fishers provide a substantial amount of revenue to finance fisheries research, habitat and management programs.[45]

---

[43] Department of Primary Industries, 2012. *Schedule of Commercial Fishing Fees and Charges*. Available at: http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0018/350055/SCHEDULE-OF-COMMERCIAL-FISHING-FEES-AND-CHARGES-2012-2013.pdf

[44] Data provided to PwC by IPART in the 'List of NSW Government Department-Agency Licences 19 February 2013.

[45] NSW DPI, 2012. *Commercial Fishing in NSW*. Available at: http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0010/241966/Commercial-fishing-in-New-South-Wales.pdf

The framework notes that fees and charges should recover efficient costs. The Stevens Inquiry found that the total fees and charges levied on commercial fishing in NSW are not currently recovering administration and enforcement costs. The report concluded that: 'Currently, industry contributions toward the costs of fisheries management, compliance and research are very low, with the exception of the Abalone and Lobster fisheries. There is currently no formal cost recovery policy in place to guide fisheries management and encourage the efficient delivery of services. It will be necessary to recover a higher proportion of such costs to ensure the continued delivery of necessary services and change the current settings, which promote the persistence of latent effort.[46] In their response to the Stevens Inquiry, the Government supported a change to the fee structures that will double the revenue from fees resulting in 40 per cent cost recovery.[47]

The Stevens Inquiry did not include data on whether the fees for the commercial fishing licence were achieving cost recovery; only on total fees and charges levied on commercial fishing. This case study could not determine whether the fees and charges for a commercial fishing licence are appropriate. DPI should review the fees associated with the commercial fishing licence as part of the review under the Licensing Framework.

Are conduct rules the minimum necessary?

Conduct rules imposed by the commercial fishing licence include following any endorsement conditions (e.g. the number of hours fishing can occur and the equipment that can be used), not committing offenses such as stealing fishing gear and only employing crew members who are appropriately capable, skilled and experienced.

The conduct rules appear to be the minimum necessary because they prevent detriment before the problem occurs, can address the risk, are focused on outcomes and do not duplicate other obligations. This being said, there may be merit in DPI and Fisheries NSW considering whether the conduct rules in the commercial fishing licence could be removed and incorporated into the endorsements.

There are a range of conduct rules in the Act and the subordinate legislation that govern commercial fishing activity. The conduct requirements that govern all commercial fishing licence holders in NSW are set out in Clause 29 of the *Fisheries Management (General) Regulation 2010*. The conduct requirements of the commercial fishing licence include, but are not limited to:

- The holder must not engage any person in their crew that they are not satisfied has the necessary skills, experience or capacity
- The holder must co-operate with and provide any reasonable assistance to fisheries officers
- The holder must not take any fish for sale in a restricted fishery or a share management fishery unless they have an endorsement for that particular fishery.

In addition to the conduct requirements of the commercial fishing licence, fishers must comply with any specific, additional conditions that are imposed on their licence. Specific, additional conditions can be imposed on a licence for disciplinary reasons. These conditions (for example, that the person cannot take fish from a certain area) are listed on a person's licence in the form of letter codes.

---

[46] Stevens, Richard; Cartwright, Ian; Neville, Peter, 2012. *Independent Review of NSW Commercial Fisheries Policy, Management and Administration,* p. ix

[47] NSW Government, 2012. *Response to the Independent Review of NSW Commercial Fisheries Policy, Management and Administration.* Available at: *Independent Review of NSW Commercial Fisheries Policy, Management and Administration*

Finally, commercial fishers must comply with any requirements of the endorsement they are entitled to fish. These conditions are set out in the *Fisheries Management (General) Regulation 2010* and in the regulations specific to the endorsement the commercial fisher holds. The conduct requirements for endorsements depend on the species that is being fished, and can include, restrictions on the equipment used to fish or quotas on the take.

Commercial fishing licences appear to meet the conditions for conduct requirements being the minimum necessary, as detailed below:

- *Preventing risk / determent before the problem occurs is necessary:* Once fish have been taken from NSW waters, they cannot be replaced. Therefore, it is necessary to prevent the detriment before the problem occurs. The commercial fishing licence allows enforcement officers to identify if a person is authorised to take fish from the waters of NSW and therefore assists in enforcement.
- *Conduct rules would address the risk:* Rules around proper conduct of commercial fishing businesses can address the risk of overfishing by imposing conduct requirements which do not allow commercial fishers to operate unregulated. In imposing conduct requirements (such as not being allowed to take fish that a commercial fishing does not hold an endorsement for), the commercial fishing licence imposes conduct rules that assist in addressing the risk of overfishing.
- *Conduct rules are focused on outcomes, do not duplicate other obligations and are enforceable:* As detailed in Step 1, there are not other pieces of legislation that impose restrictions on the conduct of commercial fishers outside of the Act and the subordinate legislation. Therefore, the conduct rules do not duplicate other outcomes and are enforceable by Fisheries Officers and Policy Officers.

This said, there may be merit in DPI and Fisheries NSW considering if the conduct rules are necessary for enforcement. As already detailed, the endorsements themselves are subject to a range of conduct requirements, which can include the type of equipment that can be used and the amount of catch that can be taken. It may be that the conduct requirements of the endorsement are sufficient to protect the fish stocks of NSW, or that the endorsements can be amended to contain the conditions of the commercial fishing licence.

Are the mandatory attributes the minimum necessary?

There are five mandatory attributes of the commercial fishing licence. The mandatory attributes appear to be the minimum necessary as they all relate to the effective operation of the endorsements, which assist to prevent overfishing of NSW fish stocks.

To hold a commercial fishing licence a person must have one of the following:

- be a shareholder in a Share Management Fishery, or
- own a fishing business with a restricted fishery endorsement, or
- have applied, or be in the process of applying, to be an ‘eligible / nominated fisher’ (i.e. when someone is employed by the business or has entered into some other arrangement to operate that business), or
- require a commercial fishing licence in order to work as a crew member for a commercial fishing business(i.e. a person fishing for a business that uses multiple vessels to fish an endorsement and therefore, requires multiple nominated fishers), or
- have applied, or in the process of applying, for a permit to undertake certain commercial fishing activities (generally in circumstances that are not ordinarily applicable).

As an endorsement allows a fisher to take fish from NSW waters, it is logical that someone must hold an endorsement or be employed by a business that holds an endorsement before being granted a commercial fishing licence. To have the permission licence (i.e. the commercial fishing licence) you must also hold the privilege licence (i.e. the endorsement).

Are registering and licensing activities efficient?

The *FishOnline* self-service portal that Fisheries NSW is currently planning will improve efficiency in registration and other licensing activities. The Stevens Inquiry also suggested a range of reforms to improve the efficiency of fishery management in NSW and the NSW Government has accepted many of these recommendations.

However, it is suggested that DPI and Fisheries NSW specifically review the efficiency of commercial fishing licensing activities considering the licensing framework.

There are currently a number of reforms being introduced to improve the efficiency of licensing activities. These include the introduction of *FishOnline,* a self-service online portal. FishOnline will:

- Enable and support streamlined administrative arrangements
- Implement more effective compliance arrangements
- Provide improved service delivery to the commercial fishing industry.[48]

Additionally, the Stevens Inquiry made a number of recommendations to improve the overall governance and administration of commercial fishing in NSW. The Government have accepted many of these recommendations including, but not limited to, introducing more extensive and timely utilisation of the NSW DPI website.[49]

Are stakeholders well informed?

It is understood that commercial fishers tend to be long serving in the industry. Therefore, they possess high levels of local knowledge and skill, and are well informed. However, additional information is required to conclude this definitively and may warrant DPI's and Fisheries NSW's review, taking into account the licensing framework.

There are over 1,000 commercial fishers in NSW and they are primarily small family businesses that rely on high levels of local knowledge and skill.[50] The high level of experience

[48] http://www.dpi.nsw.gov.au/fisheries/commercial/info/fishonline/project-overview

[49] NSW Government Response to the Recommendations of the Independent Review of NSW Commercial Fisheries Policy, Management and Administration. Available at: http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0005/448187/Govt-response-to-independent-comm-fisheries-review.pdf

[50] NSW Department of Primary Industries, 2012. *Commercial Fishing*. Available at: http://www.dpi.nsw.gov.au/fisheries/commercial

of operators[51] suggests that there is a high level of familiarity with the requirements for commercial fishing licences amongst stakeholders.

Although there is no legal obligation for a new commercial fishing licence applicant to do so, PwC understands from information provided by Fisheries NSW that most commercial fishing licence applicants meet with their local fisheries compliance officer prior to fishing for the first time. During the meeting, new fishers are often provided information on general rules and regulations and on rules and regulations specific to the endorsements / fisheries they will be operating in.[52]

The nature of the commercial fishing industry and the understanding that engagement with local fisheries compliance officers occurs, suggest that stakeholders are likely to be well informed about the requirements of the commercial fishing licence. However, additional information would be required to determine whether stakeholders are well informed.

Is collecting information targeted?

The commercial fishing licence appears to meet some of the best practice conditions for information collection (e.g. that the collection of data is necessary for achieving the licence functions). However, it may be possible for DPI and Fisheries NSW to collect information on the commercial fishers who are nominated to fish an endorsement without the commercial fishing licence (i.e. instead through continuous disclosure by fishing businesses holding an endorsement).

The commercial fishing licence appears to meet four conditions for best practice collection of information:

- *Collection of data is necessary for achieving the licence function:* The commercial fishing licence allows an individual to be identified as a point of association with a commercial fishing business. This is necessary for the enforcement of the Act and subordinate legislation.
- *The scope of data collected is appropriate:* The information collected is understood to be primarily basic details such as contact information.
- *Licences are only required to provide the information once:* Licensees do not need to provide information throughout the duration of the licence (other than advising of change of address and contact details). However, they must provide up-to-date information at the time of application and renewal.
- *There are convenient processes for annual reporting or information provision:* FishOnline is being introduced, which will provide an easy to use self-service portal.

The commercial fishing licence may not meet the condition for best practice that information cannot be collected elsewhere. It may be possible to require endorsement holders to provide the details of fishers who are authorised to fish their entitlement. This could allow an individual person to be tied to an endorsement and for enforcement activities to be undertaken, without the requirement of a commercial fishing licence. There may be merit in Fisheries NSW considering whether there are options that are more efficient to collect the information – for example through continuous disclosure by fishing businesses concerning their nominated fisher.

---

[51] NSW Department of Primary Industries, 2012. *Commercial Fishing*. Available at: http://www.dpi.nsw.gov.au/fisheries/commercial

[52] Discussions between PwC and NSW Fisheries.

Is receiving and responding to complaints optimal?

There was no publicly available data available on the response time to complaints or how appropriately DPI handled complaints. Therefore, additional information is required to assess the licence against this element of the framework.

The DPI website describes that complaints can be made to fisheries officers, and provides contact details and for online reporting of incidents. In 2010-11, the DPI received around 50,000 contacts and issued 3,000 field cautions, 2,400 penalty notices and successfully prosecuted 270 cases.

There was no publicly available data available on the response time to contacts or how appropriately complaints were handled.

Therefore, it cannot be concluded as part of this case study whether receiving and responding to complaints is optimal. There may be merit for DPI and NSW Fisheries to review the complaints mechanisms associated with the commercial fishing licence to determine whether they can improve the process.

Is monitoring and enforcing compliance best practice?

There appears to be a high number of contraventions of the commercial fishing licence (noting that data available does not indicate if it is a small number of parties responsible for a large number of contraventions or a large number of commercial fishers responsible). However, it is unclear from available public information whether monitoring and compliance of these contraventions and other requirements of the commercial fishing licence is best practice. Additional information is required to assess the licence against this element of the licensing framework.

Monitoring and enforcement of compliance with the commercial fishing licence is understood to take two forms:

- *Compliance officers who inspect commercial fishing activity* – fisheries officers inspect commercial fishers to ensure they are operating within their licensing conditions and that catches, equipment and vessels meet legal requirements.[53] For high value fisheries like abalone and lobster, fisheries officers regularly also work with NSW Police in compliance operations.[54]
- *Compliance officers who inspect complaints of illegal fishing* – effective fisheries management requires assistance from the industry and community.[55] NSW Fisheries received 2,913 calls to Fishers Watch, a hotline where the public can report suspected illegal fishing activity.[56]

[53] NSW DPI, 2012. *Fisheries Officer Information Package. Available at:* http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0008/355562/Fisheries-Officer-Information-Package-2010.pdf

[54] NSW DPI, 2012. *Commercial Fishing in NSW*. Available at: http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0010/241966/Commercial-fishing-in-New-South-Wales.pdf

[55] NSW DPI, 2012. *Commercial Fishing in NSW*. Available at: http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0010/241966/Commercial-fishing-in-New-South-Wales.pdf

[56] NSW DPI, 2013. *Fisheries Compliance Enforcement 2010/11*. Available at: http://www.dpi.nsw.gov.au/fisheries/compliance/enforcement-outcomes-2010-11

There are 94 fisheries officers across NSW targeting commercial and recreational fishers.[57] In 2011-12, fisheries officers who inspected commercial fishing activity and complaints of illegal fishing reported 425 contraventions by commercial fishing licence holders: [58]

- Verbal caution (very minor contraventions): 29
- Field/written caution – (relatively minor contraventions): 246
- Penalty notice (mid level contraventions): 94
- Prosecution action (contraventions at the more serious end of the scale): 56.

Some fishers may contravene more than one provision during the course of the year, and hence one individual may be represented more than once in the above figures.

Prior to any suspension or cancellation, the licence holder is provided an opportunity to show cause in writing as to why their licence should not be suspended. A person may apply to the NSW Administrative Decisions Tribunal for review of a decision.

Though there appears to be a significant volume of monitoring or compliance activities, it is beyond the scope of this case study to conclude if these activities are best practice. To conclude if the activities are best practice, there may be merit in DPI reviewing the compliance activities and examine whether:

- A risk based approach is used to determine monitoring and compliance activities
- Breaches are remediated in an appropriate manner.

Is the scheme subject to periodic review?

The management of fisheries in NSW was subject to a recent extensive review in the Stevens Inquiry. However, the Stevens Inquiry did not specifically consider the commercial fishing licence or consider all elements that would be examined under the licensing framework. DPI and Fisheries NSW may want to consider the merit of an ongoing system of review and evaluation or the role of the new Ministerial Fisheries Advisory Council in reviewing the licence.

There have been a number of reviews of the management of fisheries in NSW recently. The management of fisheries in NSW was subject to a recent extensive review in the Stevens Inquiry. However, the Stevens Inquiry did not consider the commercial fishing licence specifically or consider all elements that would be examined under the licensing framework. In addition, there are no publically available reviews of the commercial fishing licence and therefore it does not appear that it is subject to regular review.

Additionally, in the Government's response to the independent review they committed to establishing a Ministerial Fisheries Advisory Council to enhance the regular review of fisheries management policies. DPI and NSW Fisheries may want to consider the merit of an ongoing system of review and evaluation or the role of the new Ministerial Fisheries Advisory Council in reviewing the licence.

---

[57] NSW DPI, 2012. *Commercial Fishing in NSW*. Available at: http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0010/241966/Commercial-fishing-in-New-South-Wales.pdf

[58] Data provided to PwC from Fisheries NSW 1 February 2013.

Stage 4: Is the licensing scheme the best response?

Does a **preliminary assessment** suggest licensing will result in a net benefit? → Are there other **alternative options** that could deliver policy objectives? → Does a cost benefit analysis show licensing is the **optimal option**?

Does a preliminary assessment suggest licensing will result in a net benefit?

Further information is required to understand whether the commercial fishing licence results in a net benefit. The commercial fishing licence imposes costs on fishers and on the NSW Government in administering the licensing scheme. However, the scale of net benefit is linked to the value that the enforcement role of the licence plays in protecting the NSW fishing resources – something not easily quantified. Given the high number of licence contraventions relative to licence holders (with 13 per cent of these relating to contraventions at the more serious end of the scale), this suggests that the enforcement process is important to ensure breaches are not higher that may threaten NSW fishery resources.

Further assessment by DPI and Fisheries NSW as to whether this licence will result in a net benefit may be warranted.

Costs	**Incidence of cost**	**Potential scale of cost**
Administrative burden on commercial fishing operators	Commercial fishing operators	Medium – 1,274 operators who bear cost in NSW
Compliance burden on fishing operators	Commercial fishing operators	Medium – 1,274 operators who bear cost in NSW (Commercial fishing license fees totalled $358,715 in 2010-11)
Cost of administering licences for government	NSW Government	Significant– cost recovery is understood to be low and therefore this cost is potentially significant
Cost of enforcing licences for government	NSW Government	Significant– cost recovery is understood to be low and therefore this cost is potentially significant
Benefits	**Incidence of benefit**	**Potential scale of benefit**
Suitability and viability of commercial fishing industry	Commercial fishing operators	Medium – Ensures ongoing survival of industry
Protection of fish stocks in NSW	NSW Community	Significant – preserves fish stocks not just for the present generation but for generations to come

Are there other alternative options that could deliver policy objectives?

There may be alternative options that could deliver the policy objective, such as through alteration of the existing endorsement mechanisms. This might involve a requirement for endorsement holders to notify who will be fishing their endorsements, conduct requirements that apply through the endorsements or general regulation, and continuous disclosure requirements.

There are no generic remedies that could protect NSW fish stocks from overfishing. Alternative regulatory options such as co-regulation are unlikely to be effective. However, it may be possible to enforce the restrictions on commercial fishing without the commercial fishing licence, such as through the existing endorsement mechanisms. This might involve a requirement for endorsement holders to notify who will be fishing their endorsements, conduct requirements that apply through the endorsements or general regulation, and continuous disclosure requirements.

Does a cost benefit analysis show licensing is the optimal option?

It has not been possible to conduct a detailed cost benefit analysis in the timeframe of this case study. More detailed consideration of the costs and benefits of this licence, relative to viable alternatives, should be considered by DPI and NSW Fisheries when the licence is next reviewed.

The above analysis suggests that there is a need for government intervention and that alternative options such as generic remedies may not be effective. However, without a detailed cost benefit analysis, it is not possible to conclude if there would be a net benefit from the commercial fishing licence or whether licensing is the optimal option.

There is merit in DPI and NSW Fisheries conducting a cost-benefit analysis to assess the licence and to compare other potential options – e.g. applying conduct requirements through the endorsements and/or through continuous disclosure requirements – when the licence is next reviewed.

Concluding remarks

The NSW commercial fishing arrangements are complex, with three points in the fishing supply chain where a licence and/or endorsement may apply. Fishery businesses are issued shares in a share management fishery or entitlements to an endorsement in a restricted fishery that provide each business with an access right to commercially fish in NSW waters. The primary purpose of the commercial fishing licence (the focus of this case study) is to allow monitoring and enforcement of the endorsement conditions. All commercial fishing vessels are also licensed.

It appears that government intervention is required to protect NSW fisheries from overfishing. As part of this intervention, it is necessary to identify individual fishers as being authorised to fish an endorsement for monitoring and enforcement reasons (currently facilitated by the commercial fishing licence). It is considered that there are no generic remedies that can address and monitor the risk of overfishing of NSW fish stocks. The important role of enforcement is in part demonstrated by the high number of contraventions to the commercial fishing licence relative to the number of licence holders (with 13 per cent of these relating to contraventions at the more serious end of the scale).

However there may be merit exploring the following changes reflecting the licensing

framework:

- DPI and Fisheries NSW should consider whether it is appropriate and efficient to impose this licensing on the commercial fisher, as opposed to the fishing business or commercial fishing vessel. For example, they might require endorsement holders to notify who will be fishing their endorsements, develop conduct requirements that apply through the endorsements or general regulation, and implement continuous disclosure requirements.

- The current duration is one year and may not be the maximum possible. The reporting requirements of the commercial fishing licence could be 'unbundled' from the licence duration and the duration of the licence extended.

- It may be possible to collect information on the commercial fishers who are nominated to fish an endorsement without the commercial fishing licence.

- It does not appear that the licence has been recently reviewed (the Stevens Inquiry did not specifically consider the commercial fishing licence or the elements that would be considered from applying the licensing framework). Therefore, there may be merit introducing an ongoing system of review and evaluation (potentially as a role of the new Ministerial Fisheries Advisory Council).

Areas for further consideration that could not be explored in sufficient detail in this case study due to time constraints and/or lack of available information include:

- Whether reporting requirements are the minimum necessary – for example, whether the overarching intention is to identify the fishing business in addition to the commercial fisher and therefore if information on both is required from the commercial fisher

- Whether fees and charges are appropriate – The Stevens Inquiry found that the total fees and charges levied on commercial fishing in NSW are not currently recovering administration and enforcement costs. Therefore, a review of the fees associated with commercial fishing (including the commercial fishing licence) may be warranted, in the context of the licensing framework

- Whether conduct rules are the minimum necessary – for example whether the conduct rules are necessary for enforcement and whether they can be unbundled from the commercial fishing licence

- Whether registering and licensing activities are efficient – Fisheries NSW is currently planning the FishOnline self-service portal. Review of other licensing activities in the context of the licensing framework could be warranted

- Whether stakeholders are well informed – It is understood that commercial fishers tend to be long serving in the industry and therefore possess high levels of local knowledge and skill, which suggests that commercial fishers are well informed. However, additional information is required to conclude this and may warrant DPI's review, taking into account the licensing framework

- Whether receiving and responding to complaints optimal – There was no publicly available data available on the response time to complaints or how appropriately complaints were handled. Therefore additional information is required to conclude this definitively and may warrant DPI's review against the licensing framework

- Further information is required to confirm whether the commercial fishing licence results in a net benefit and is the best option, given its objectives.

Appendix D
Case study: Farm milk collectors

Licence:	Licence to collect raw milk (Farm milk collector)
NSW Government responsible agency:	NSW Food Authority

Purpose of the case study

This case study of the NSW farm milk collector licence was prepared to test and apply the licensing framework during its development, and to demonstrate the framework through its application to a sample of licences. To develop the case study, PwC undertook research and reviewed publicly available literature and information, and met with representatives of the NSW Food Authority (NSWFA).

Given the limited timeframe available, this case study does not represent a complete assessment of the farm milk collector licence. For illustrative purposes, the case study highlights areas for consideration by NSWFA. Further detailed analysis of the licence by the agency responsible is recommended to meet the requirements of the framework, including further analysis applying the framework to areas recommended for potential reform/review.

The NSW dairy and milk licensing arrangements are complex, and this case study attempts to provide an overview of the arrangements that may in some cases appear simplifying, and should only be considered with reference to public documents and more detailed guidance issued by NSWFA.

Background to the licence

The regulatory and licensing arrangements that affect the dairy and milk supply chain include national food standards and state based industry-specific regulations and licensing.

National food standards

The Australian Government develops and administers the Australia New Zealand Food Standards Code ('the ANZFS Code'), a collection of standards for individual food products, including dairy products. The ANZFS Code ensures food safety and quality systems are incorporated by food industry participants through the supply chain. Food Standards Australia New Zealand (FSANZ), an independent statutory agency, administers the ANZFS Code.

All businesses in the dairy and milk product supply chain in Australia are required to comply with the ANZFS Code, particularly Standard 4.2.4 - *The Primary Production and Processing Standards for Dairy Products*,[59] and are required to have an approved Food Safety Program

[59] See: http://www.dairyaustralia.com.au/Industry-overview/Food-safety-and-regulation/Regulatory-Framework/Regulatory-overview.aspx

developed and aligned with the requirements under *Standard 3.2.1 – Food Safety Programs*.[60]

The ANZFS Code sets standards that require State laws and regulations to be implemented.[61]

NSW dairy industry regulations and licensing

The Food Act 2003 (NSW) ('the Act') aims to ensure food sold to the public in NSW will be safe and suitable to eat. The objectives of the Act are to:

1. ensure food for sale is both safe and suitable for human consumption
2. prevent misleading conduct in connection with the sale of food
3. provide for the application in this State of the Food Standards Code.

Under the Act, a person must not handle food for sale in a manner that the person knows will render the food unsafe.[62]

The NSW Food Authority (NSWFA), created under the Act, is responsible for administering the Act. The Act allows NSWFA to develop 'Food Safety Schemes' for each industry. Food Safety Schemes are the mechanism by which NSWFA mandates food safety risk management interventions, such as licensing and Food Safety Programs, and seek compliance with the requirements of the ANZFS Code.

The Food Safety Schemes are contained in the *Food Regulation 2010* (NSW). Each Scheme provides detailed guidance to food service operators, sets minimum food safety requirements for higher risk food industry sectors and details food authority licence requirements, notification procedures and auditing procedures. Dairy processing businesses are classified as the highest risk ('P1'), while dairy production and transport are intermediate risk businesses ('P3').[63]

All dairy product factories, vehicle vendors, dairy produce stores, milk stores, milk collectors and dairy farmers in NSW are required to hold a licence to operate.[64] According to the NSWFA 2011-12 Annual Report, NSW had 1,791 dairy licences for operations from farm gate to the back door of the retail store. This includes 779 dairy farms, 147 dairy factories, 746 milk vendors and 119 milk collectors (transporters) in 2011-12.[65]

This case study focuses specifically on the farm milk collector licence, but at times refers to licensing at all stages of the dairy industry supply chain.

---

[60] Food Standards Code, Standard 4.2.4 – Primary Production and Processing Standard for Dairy Products

[61] Dairy Australia, Dairy Food Safety: The Australian Approach - National Dairy Food Safety System, 2010

[62] *Food Act 2003 (NSW),* Part 2, Division 1.13

[63] See: http://www.foodauthority.nsw.gov.au/_Documents/science/priority_classification_system.pdf

[64] See: http://www.foodauthority.nsw.gov.au/industry/industry-sector-requirements/dairy/

[65] Information supplied by IPART survey of licence holders

Applying the framework

Stage 1: Is licensing appropriate?

Is there an ongoing need for the **government to intervene**? > Does **something else** address the problem? > Is there an ongoing need for specific **regulation** in this area? > Is **licensing** still required to address the policy objectives?

Is there an ongoing need for the government to intervene?

Given the nature of milk and dairy products, improper handling along the milk and dairy supply chain can result in spoilage. Consuming an unsuitable milk or dairy product may lead to food poisoning, with potentially severe consequences for the public. As consumers are unable to monitor the quality of milk and dairy products prior to consumption, there appears to be a need for government to regulate milk or dairy products to ensure the product is suitable for consumption and to provide incentive for individuals and businesses in the supply chain to minimise the risk of product spoilage.

Given food safety risks, licensing is administered at multiple points across the milk and dairy supply chain, including licences to produce, transport and process dairy products. As discussed in later sections, there may be merit in NSWFA considering whether food safety outcomes could be achieved through a more targeted approach, such as through incorporating the responsibility for food safety into a single licence within the supply chain.

Government action in the food industry aims to ensure public health and minimise risks associated with providing food to the public. The ANZFS Code sets out the requirements for food and food businesses in Australia and seeks to ensure those involved in the industry are providing quality products to the community and mitigating risks related to public health.[66] The Code defines specific standards for *potentially hazardous foods* which are classified as those which:

- Might contain food-poisoning bacteria that need to multiply to cause food poisoning, and
- Allow the food poisoning bacteria to multiply.

As a *potentially hazardous food,* dairy products, including milk, must be cooled and stored at a temperature that prevents or reduces the growth of microbiological hazards in the milk.

Government intervention is needed because consumers are unable to monitor the production of dairy products across the supply chain and adequately assess the quality (safety) of dairy products prior to purchasing the product, and suppliers may not be sufficiently incentivised to maintain the required quality. Government intervention can overcome lack of information (or transparency) for consumers and avoid potentially serious detriment to consumers in the event of food poisoning. The risks associated with potentially hazardous foods are present for the entire community and cannot be remediated once an event occurs.

Government intervention in milk transport ensures those businesses who transport the potentially hazardous food comply with conduct requirements which aim to ensure food safety.

[66] Australia New Zealand Food Standards Code, http://www.foodstandards.gov.au/foodstandards/foodstandardscode.cfm; also http://www.foodauthority.nsw.gov.au/industry/food-standards-and-requirements/#.UPyLsCcp-8A

Does something else address the problem?

Outside of the ANZFS Code, *Food Act 2003* (NSW) and subordinate regulations, no other Australian or NSW laws are designed specifically to address food safety. In the absence of the Code and Act, consumers could rely on common law duties of care or general consumer law related to product quality and selling goods that are fit for purpose. However, generic consumer law provisions do not appear to provide remedies that can enforce monitoring of food standards across the supply chain or protect consumers from spoiled milk or dairy products before consumption.

The ANZFS Code is applied through State Acts and regulations. While each plays a potential role in ensuring food safety, the ANZFS Code, the *Food Act 2003* and various common law provisions would not individually ensure businesses transport milk in a manner that ensure food safety. Licensing allows Food Safety Programs, and hence conduct requirements for milk collectors, to be enforced.

A role for government intervention to ensure safety in the food industry does not automatically justify regulatory intervention. Alternative approaches for government intervention may be more appropriate, including generic remedies, non-regulatory approaches or co-regulatory approaches.

A non-regulatory and generic approach involves using existing law enforcement mechanisms to influence the conduct of dairy businesses. There are remedies for consumer protection available under Australian Consumer Law (ACL). The ACL obliges suppliers to report when they are aware of illness or death from consumer goods.[67] There are also provisions in section 19 of the *Sale of Goods Act* 1923, which require goods sold to be in a condition 'fit for purpose'. However, the ACL and *Sale of Goods Act 1923* provide a remedy after food poisoning occurs. This retrospective approach would not satisfy the objective of the Act, as consumers are not protected from spoiled milk or dairy products before consumption.

No Australian jurisdiction has moved to rely on generic provisions to meet its food safety requirements in the dairy industry. This might be considered evidence that the available generic remedies are insufficient to achieve the objectives contained in the Act.

The milk collector licence allows NSWFA to ensure businesses who collect milk comply with approved Food Safety Programs, which are not enforced by the ANZFS Code, the Act or any general common law provisions.

Is there an ongoing need for specific regulation in this area?

Specific regulation is necessary as there are no generic remedies that achieve the same degree of consumer protection from potentially hazardous milk or dairy products as does the existing regulatory approach. Ongoing, specific regulation of businesses that produce, transport and process potentially hazardous foods is needed. Regulation across the supply chain ensures all parties who are involved in producing food adequately manage food safety risk before consumption. Risks of food safety across the milk supply chain suggest licensing is required for businesses involved in collecting milk.

Generic remedies under consumer law may not achieve the objective of preventing food poisoning because the remedies are available after food poisoning has occurred. The NSW *Food Act 2003*, the *Food Regulation 2010* and the ANZFS Code prevent consumer harm by

[67] Allens, Litigation & Dispute Resolution, see: http://www.allens.com.au/pubs/ldr/foprodfeb11.htm

ensuring the safe handling of food products, including dairy, through the entire production-transport-processing process.

Specifically, the ANZFS Code requires those who are involved in receiving, storing, displaying and transporting dairy products to keep the product under temperature control and implement a Food Safety Program. The Food Safety Programs are assessed by NSWFA and help businesses identify and manage hazards to food safety.[68] For example, transport-specific Food Safety Programs ensure:[69]

- A system is in place to identify the supplier and the recipient
- Dairy products are transported using time and temperature controls that prevent or reduce growth of microbiological hazards
- Persons undertaking milk or dairy collection and transport activities have skills and knowledge of food safety and hygiene matters commensurate with their work activities.

It does not appear that there are generic remedies or legislation that impose conduct requirements that achieve the same degree of consumer protection as the existing regulatory approach.

The risks of spoilage are evident across the milk supply chain, from milk production to processing. Licensing of businesses across the supply chain, including milk collectors allows NSWFA to enforce Food Safety Programs. This ensures businesses handle milk during transport in a manner that minimises the risk of spoilage and provides dairy products safe for consumption.

Is licensing still required to address the policy objectives?

Licensing of dairy businesses is needed to ensure compliance with conduct requirements relating to the production, transport and processing of milk and dairy products. The licensing process ensures a business has developed and complies with an appropriate Food Safety Program. The enforcement mechanisms allow for NSWFA to sanction activities and ensure compliance under national frameworks such as the ANZFS Code.

Licensing also promotes competency in the dairy industry. The licensing process, which involves developing a Food Safety Program, ensures all parties are clear on their obligations related to production, transport and processing.

The risks of spoilage are evident across the milk supply chain, from milk production to processing. Licensing ensures businesses handle milk during transport in a manner that minimises the risk of spoilage and provides dairy products safe for consumption. However, as discussed further in Stage 2, there may be merit in NSWFA considering whether food safety could be achieved by targeting specific components of the milk and dairy supply chain, such as through incorporating the responsibility for food safety into a single licence within the supply chain.

---

[68] See: http://www.foodauthority.nsw.gov.au/industry/food-standards-and-requirements/food-safety-programs-haccp/#.UPzDiycp-8A

[69] Food Standards Australia New Zealand, Primary Production and Processing Standard for Dairy Products, A guide to Standard 4.2.4 Primary Production and Processing Standard for Dairy Products, Part 2: Dairy Collection and Transport Requirements, Chapter 4 of the Australia New Zealand Food Standards Code (Australia only), First edition, June 2009

Licensing allows NSWFA to ensure businesses involved in the dairy production-transport-processing chain implement and follow an approved Food Safety Program, which guides business conduct. It appears from the three steps below that NSWFA's approach to licensing meets the requirements of the framework in addressing the risk of misconduct and enforcing conduct requirements.

What are the objectives of the licensing scheme?

It appears that the objective of licensing in the dairy industry is to address the risk of misconduct by individuals or businesses handling milk and dairy products (i.e. enforcing conduct) and promote competency and safety within the industry. These objectives are identified in the framework as relevant to licensing.

Are the licence functions necessary to achieve the objectives?

The function of licensing within the dairy industry is to impose specific conduct requirements and enable enforcement of safe handling practices for milk and dairy products intended for consumption. This regulation aims to achieve two functions, which are related to specific policy objectives:

1. To address the risk of possible misconduct, it imposes specific conduct rules on businesses (a policy driven function)

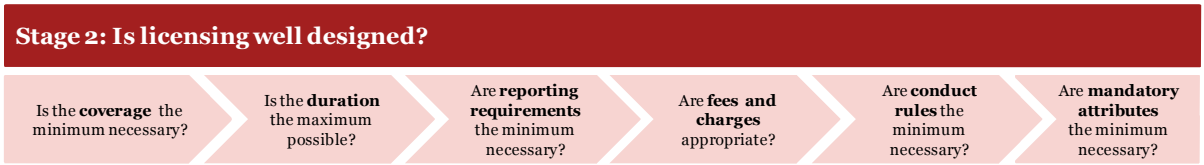
2. To promote competency and safety, enables the ANZFS Code and regulations to be enforced (an administrative function for both preventing and remedying consumer detriment).

These functions are incorporated into a 'permission licence', which grants an authorisation for a business or person to collect milk, with specific conduct rules for food safety. The licence conditions are outlined in the ANZFS Code and NSW regulations and implemented through each business's Food Safety Program.

Is licensing necessary to achieve those functions?

Considering the functions outlined above, a permission based licensing scheme is considered necessary as it enables conduct rules (outlined in each business' Food Safety Program) to be enforced. NSWFA is able to monitor and ensure compliance with ANZFS Code and regulations through regular audits. A combination of risk and compliance measures is currently used to determine the enforcement mechanism. Dairy businesses involved with higher risk milk or dairy products and those previously found to be non-compliant with their Food Safety Program are audited more frequently. Businesses are incentivised to comply in order to minimise their audit costs.

Every jurisdiction in Australia licences dairy businesses, with requires its dairy businesses to be licensed, with at least one of the dairy transport or storage stages licensed. In NSW, all businesses across the dairy supply chain are licensed. Similarly, all participants in the Victorian dairy industry are licensed.[70]



[70] Dairy Food Safety Victoria, Licensing, http://www.dairysafe.vic.gov.au/industry/dairy-manufacturers/licensing/licensing-faqs

Is the coverage the minimum necessary?

Dairy businesses are licensed to undertake specific work at prescribed locations and using listed vehicles. Licensing all businesses across the supply chain allows NSWFA to tailor licence requirements at each supply chain stage. However, it may be possible to reduce the regulatory burden by incorporating a risk-based licensing approach by targeting those businesses most likely to impact on food safety (i.e. have the most risk) or closest to the end user (i.e. retailers who sell to consumers). Risk based licensing may reduce the number of licences required across the dairy industry supply chain.

Licences currently apply to each vehicle operated by a business. While this allows NSWFA to monitor compliance with a Food Safety Program, it increases the information burden at each annual renewal period. A possible alternative would be to licence at the business level only and incorporate sanitation as a condition of licence. This approach may also facilitate a move to longer licence duration.

Licensing appears suitable to achieve the policy objective of ensuring dairy products are safe and suitable to consume. Determining the appropriate licence coverage involves examining the point of coverage (i.e. product, people or place) and the coverage base (i.e. who the licence applies to).

There are several stages involved between initial milk production to processing the dairy product and the point of sale to consumers:

1. Milk primary production (farming)
2. Milk collection and transport
3. Receiving milk and processing of dairy product
4. Businesses involved in selling dairy or milk products.

Dairy farmers, factories, milk vendors, produce stores and milk collectors are required to hold a NSWFA licence.[71] The broad application of licensing across the supply chain reflects the requirement that all dairy businesses have an approved Food Safety Program developed in line with the requirements under *Standard 3.2.1 – Food Safety Programs* of the ANZFS Code.[72]

Identifying potential points of coverage

A person must not carry on a food business in NSW unless they hold the required authorising licence administered by NSWFA.[73] Food businesses in the dairy industry that NSWFA requires to be licensed include those who undertake work related to the production, transport, processing or storing of dairy products.[74] These businesses must complete a licence application form found on NSWFA website and provide information related to the premises where the business is undertaken and/or vehicles that transport the products.

At first instance, the prima facie rationale for licensing a business is to ensure they minimise the risk of food poisoning by complying with a Food Safety Program, including appropriate

---

[71] NSW Food Authority, Dairy, http://www.foodauthority.nsw.gov.au/industry/industry-sector-requirements/dairy/#.UUZqhhzfCSo

[72] Food Standards Code, Standard 4.2.4 – Primary Production and Processing Standard for Dairy Products

[73] *Food Regulation 2010*, Section 22 (4)

[74] *Food Regulation 2010*, Section 42

sanitation of vehicles and processing facilities. Licence application forms require businesses to provide details of the facilities and vehicle registration. There does not seem to be a clear rationale related to food safety for NSWFA to request this information. It is possible that the regulatory burden associated with updating vehicle details would be high, considering the anecdotally high turnover of milk collection vehicles.

It is possible for NSWFA to explore more efficient collection of information by licensing businesses and incorporating vehicle and facility sanitation as a licence condition. In this way, dairy businesses would ensure vehicles and facilities are safe to handle milk, thereby reducing the regulatory obligations of NSWFA. Moving to a 'self-monitoring' mechanism would reduce the obligation to register vehicles annually and potentially facilitate a move to longer duration licences.

NSWFA should consider the *Food Regulation* when deciding if it is possible to reduce the information required in licence applications and renewals. The *Food Regulation* states that the food authority must issue the licence in a form that sets out the premises or vehicles in which activities are conducted. [75]

Developing coverage based on risk

It may be possible to reduce the regulatory burden associated with licensing by targeting those businesses most likely to impact on food safety (i.e. have the most risk) or closest to the end user (i.e. retailers who sell to consumers). Targeting licensing would place the risks and burden of food safety on those who hold the licence.

It is appropriate to set the coverage base (i.e. who the licence applies to) based on the level of risk. If there are different levels of risk for different businesses in the diary supply chain, NSWFA could limit licensing coverage to those most at risk of creating unsafe food. NSWFA uses the national risk profiling tool, called the Food Safety Risk Priority Classification Framework, to classify NSW food businesses based on risk. Businesses involved in dairy processing are regarded as the highest food safety risk ('P1'), while dairy transporters have a lower risk of food safety ('P3').[76] Given the ability to distinguish business risk based on the activities they perform, NSWFA is able to regulate each stage independently and suggests separate licence arrangements may be warranted.

The current approach involves licensing each stage of the supply chain independently, reflecting the different activities and food safety risks involved. In 2008-09, NSWFA reviewed the risk assessment for each food safety scheme, including dairy. This review showed that the use of systematic, reliable and preventative procedures to control hazards across the supply chain is vital in minimising risks and delivering safe food to consumers.

The scope of licensing across the individual stages in the dairy supply chain suggests each licence has the minimum coverage necessary. However, NSWFA should consider whether it is necessary to licence each stage in the supply chain. The core objective of licensing dairy businesses is to ensure milk and dairy products are safe for consumption. It is important for all businesses to have some degree of responsibility related to food safety and therefore some obligations on each stage would seem appropriate. The question is whether a licence is necessary to achieve safe food outcomes.

A simplistic assessment might conclude that consumer protection could be achieved by licensing at the point closest to end consumption (i.e. retailers). But there are challenges with this approach because dairy products would arrive at retailers already packaged. Product testing would be expensive and may increase costs for the industry as a whole. Licensing the

---

[75] *Food Regulation 2010*, Section 22 (4)

[76] NSW Food Authority, Priority Classification System, Version 4: 27 April 2010; See: http://www.foodauthority.nsw.gov.au/_Documents/science/priority_classification_system.pdf

retailer also removes the obligation from businesses that can test for food safety at the lowest cost.

It may be warranted to licence milk and dairy processing businesses that are able to test for product safety at the lowest cost. However, this approach may not reduce the burden on business as processors are likely to require similar documentation and proof of safe handling from milk transporters and producers as under the current approach.

Overall, NSWFA should consider the whether it is necessary to licence all businesses across the milk and dairy supply chain to achieve the objectives related to food safety. In doing this, NSWFA should seek to identify approaches that will reduce the regulatory burden.

Licence to collect and transport milk from a dairy production business to a dairy processing business

Note: the remainder of this case study focuses on the farm milk collector licence only.

There are currently 109 licensed milk transporters in NSW who:[77]

> *"Collect and transport milk and liquid milk products from a dairy primary production business to a dairy processing business."*

The milk collector licence gives a business the ability to transport milk products in a specified vehicle, between milk producers and milk processors. Current licensing arrangements require businesses to implement a Food Safety Program. NSWFA publishes a code of practice that guides businesses to prepare a Food Safety Program that would be compliant with the regulations. This code of practice is not legally enforceable.[78]

Similar to NSW, milk carriers in Victoria are also licensed. A dairy food carrier is defined in the *Dairy Act 2000 (Vic)*, to mean the owner of any business engaged in the transport of dairy food in a bulk container.[79] In June 2012, there were 38 milk carriers licensed in the State.[80]

Is the duration the maximum possible?

The farm milk collector licence is valid for one year, which does not necessarily reflect the risks of activities covered by the licence. It may be possible for NSWFA to licence businesses only, rather than tying the licence to vehicles and facilities, thereby reducing the need to collect information annually. Initial analysis suggests licence validity in the range of three to five years is appropriate for farm milk collector businesses.

Further review of the licence using the licence framework is suggested to determine the maximum possible licence duration.

A milk collector licence is valid for a period of one year, with a rolling expiry.

Compared to other industries, where skills need to be continually developed or the regulatory environment is changing, the dairy industry is not subject to significant change. Over a period of one year, it is unlikely that the regulatory environment, business information or

77 NSW Food Authority, Application for a license for a food transport business for dairy/ meat/ plant products/seafood/ eggs & egg related products, LIC007, Tax invoice, date issued 1 July 2012

78 Information supplied in discussion with NSW Food Authority

79 See: http://www.dairysafe.vic.gov.au/industry/dairy-carriers/licensing/licensing-requirements

80 DFSV, Annual Report 2011-12

knowledge of people involved will change. However, NSWFA suggests there is a high turnover of trucks within the industry.

Appropriate licence duration can be considered along with licence fee and frequency of compliance audits. Decoupling the licence fee from licence duration and frequency of audits can allow licence design to match the activity risks. For example, milk collector licence renewal and fees are currently administered on an annual basis, but this period may be extended to reflect low rates of change in the industry.

Given licence fees for milk collectors are based on cost-recovery, it is likely fees can be collected on a biennial (or less frequent) basis – see information in subsequent fee section. The high turnover in milk trucks (as suggested by NSWFA) may be a trigger for renewing licences to ensure vehicles are in a satisfactory condition to transport milk. Given the risk of detriment from non-compliance with Food Safety Programs, compliance audits may be conducted annually (or more frequently), in line with the current approach (i.e. annually, with non-compliance triggering more frequent audits). NSWFA's information needs may also be met through compulsory notification requirements.

Similar to NSW, milk carrier licences in Victoria are renewed annually, with an annual licence fee paid to the DFSV.[81]

Are reporting requirements the minimum necessary?

The ANZFS Code requires businesses involved in the dairy industry to conduct regular product checks and maintain records of these checks. Regular checks across the supply chain allow for quick identification of potentially hazardous product and consumer protection. This appears to be the minimum reporting necessary, but may warrant further consideration. For example, whether the overarching intention is to ensure the safety of the product only before consumption (this would mean only processors need to conduct checks related to product quality) or to identify sources of food safety concern when issues arise (this would support the current approach, where checks are undertaken at various points in the supply chain).

Dairy collectors are required by the ANZFS Code and regulations to undertake several actions when collecting milk: [82]

1. Record the volume of milk taken
2. Grade the milk by sight, smell and/or taste
3. Read the milk temperature (milk with a temperature greater than 4°C is not to be collected unless specifically authorised by NSWFA)
4. Take sediment, microbiological and chemical samples.

These checks ensure businesses can quickly identify products that may pose food safety risks, hold from sale and, if required, recall a product from consumers. NSW is the only major dairy producing jurisdiction that does not have record keeping requirements additional to those outlined in the ANZFS Code.

The Food Standards Code Standard 4.2.4 for dairy production and processing requires the farm, transport and manufacturing sectors to have systems in place to ensure traceability of

[81] Dairy Farm Safety Victoria, Annual Report 2011-12

[82] NSW Food Authority, General Circular 03/2011; see also NSWFA, COP Collection of Milk from Dairy Farms, Issued 5th April 2004; see also NSW Food Regulations 2010, Part 5 Div 3

key components.[83] These records are part of the businesses Food Safety Program because the Food Safety Program must effectively 'control its potential food safety hazards'.

Similarly, in Victoria, milk carriers are required by the DFSV Code of Practice to maintain records relating to cleaning and sanitation to demonstrate that the Food Safety Program is complied with.[84]

Are fees and charges appropriate?

Licence and audit fees established by NSWFA were reviewed in 2009 and are aimed at cost recovery. NSWFA has implemented a policy allowing commercial auditors to conduct compliance audits. Audit fees are charged by the hour and exclude travel costs. Considering annual licence renewal fees are designed for cost recovery, there may be scope to reduce licence burden if the duration of the licence is extended.

The fee for a milk collector licence is $308 for each transport vehicle from 1 July 2012. A $50 administration fee is added to each application (an application can include more than one vehicle).[85] The total revenue from licensing fees was $35,581 in 2011-12.[86] The licence term is for one year.

The licensing framework suggests fees and charges should recover efficient costs. The licence and audit fee approach adopted by NSWFA was reviewed in 2009. All fees and charges for licences administered by NSWFA are targeted at full cost recovery unless there is a policy rationale to set fees below cost recovery. While licences for dairy production and processing businesses are based on the business size (number of full time equivalent food handlers), the licence fee for dairy transport is based on the number of transport vehicles.

Fee revenue obtained by NSWFA contributes to the costs of providing business support services. These services aim to reduce the amount of time food businesses spend researching and resolving food safety issues and reduce the need for food businesses to engage consultants.

NSWFA has also recently reviewed its audit fee structure in 2009, which coincided with the decision to allow commercial auditors to conduct regulatory food safety audits for some licensed food businesses.

Audit fees are currently $250 per hour excluding travel costs and are based on a cost recovery approach. Businesses are able to use commercial audit providers, with NSWFA acting to verify audits. Audit frequency is determined on food safety risk and previous business compliance with food safety programs. Compliant businesses are audited every 24 months, with non-compliant businesses audited more regularly.[87]

---

[83] Dairy Australia, Traceability of Product across the supply chain, http://www.dairyaustralia.com.au/~/media/Documents/Industry%20overview/Food%20safety/Traceability%20of%20product%20across%20the%20supply%20chain.pdf

[84] DFSV, Code of Practice for dairy food safety, September 2002

[85] NSW Food Authority, Application for a licence for a food transport business for dairy/ meat/ plant products/seafood/ eggs & egg related products, LIC007, Tax invoice, date issued 1 July 2012

[86] Data provided to PwC by IPART in the 'List of NSW Government Department-Agency Licences 19 February 2013

[87] NSW Food Authority, Consultation paper on the proposed changes to the NSW Food Authority's license/audit fees and audit frequencies, November 2009

Licence and audit fees are generally higher in NSW than other jurisdictions. Furthermore, both Victoria[88] and South Australia reduce licence fees for additional vehicles licensed by a single business.

Are conduct rules the minimum necessary?

Conduct rules imposed by the farm milk collector licence include developing and complying with an approved food safety program, conducting specific tests and recording information obtained through testing.

The conduct rules appear to be the minimum necessary because they prevent detriment before the problem occurs, can address the risk, are focused on outcomes and do not duplicate other obligations. However, there may be merit in transferring the management of risk and enforcement of Food Safety Program to other parts of the dairy supply chain.

Any business that holds a licence to store milk must:

- comply with:
  - Food Regulation 2010 (NSW)
  - Food Act 2003 (NSW)
  - ANZFS Code
- implement, maintain and comply with a Food Safety Program.[89]

A Food Safety Program is required for businesses under the regulation,[90] with failure to have a Food Safety Program available at a compliance audit potentially resulting in the NSWFA not issuing a licence or conducting audits more frequently.[91] Although not directly related to milk collectors, the Productivity Commission (PC) found the annual cost of meeting both licensing and compliance audit requirements for a medium-sized milk processor were highest in NSW and Victoria.

NSW has more stringent requirements than other jurisdictions for the temperature at which milk is stored on dairy farms, which may affect dairy farm compliance costs.[92] Farm vats in NSW are required to have temperature of milk at to 4°C or less within 3.5 hours from the start of milking. However, following a review commissioned in 2009 by Dairy Australia, milk collection in NSW is permitted on occasions where the temperature is more than 4°C but less than 10°C. [93]

In Victoria, milk carriers are required to implement a food safety program and transport milk at a temperature below 5°C.[94] Dairy transport businesses in South Australia are also

---

88 Dairy Farm Safety Victoria, License fees and charges 2012–2013, 2012

89 certified by NSWFA and which complies with Standard 3.2.1 of the ANZFS Code

90 *Food Regulation 2004 (NSW),* Reg. 6 and Reg 18

91 NSW Food Authority, Application for a license for a food transport business for dairy/ meat/ plant products/seafood/ eggs & egg related products, LIC007, Tax invoice, date issued 1 July 2012

92 Productivity Commission, Performance Benchmarking of Australian and New Zealand Business Regulation: Food Safety, Chapter 11, 2009, http://www.pc.gov.au/projects/study/regulation-benchmarking/food-safety/report

93 The study looked at the impact of different raw milk temperature practices on product safety and found the Australian requirements are more stringent than those in New Zealand. It also found that alternative practices would not compromise safety or quality milk products. It is now acceptable to have raw milk cooled to 8°C within two hours after the completion of milking. See NSWFA, General Circular 03/2011; See also NSWFA, COP Collection of Milk from Dairy Farms, Issued 5th April 2004

94 DFSV, Code of Practice for dairy food safety, September 2002

required to implement food safety programs that comply with Standard 4.2.4 of the Food Standards Code. The South Australian Dairy Authority carries out audits of dairy transport businesses and some milk tankers, and encourages the industry to train its own internal auditors.[95]

Farm milk collector licences appear to meet the conditions for conduct requirements being the minimum necessary, as detailed below:

- *Preventing risk / determent before the problem occurs is necessary:* A consumer of dairy products is unable to identify an unsafe dairy product prior to consumption. Food safety programs and similar conduct requirements aim to reduce the information asymmetry faced by consumers. The conduct requirements outlined in the Food Safety Program ensure individuals and businesses act in a manner that reduces the risks of potentially hazardous dairy foods.

- *Conduct rules would address the risk:* NSWFA approves Food Safety Programs, which govern conduct by individuals and businesses when handling dairy foods, as part of the licensing process. In imposing conduct requirements through the Food Safety Program, the farm milk collector licence imposes conduct rules that assist in addressing the risk of consumer detriment.

- *Conduct rules are focused on outcomes, do not duplicate other obligations and are enforceable:* As detailed in Step 1, no other pieces of legislation impose restrictions on the conduct of milk collectors outside of the ANZFS Code, Food Act and the subordinate legislation. Therefore, the conduct rules do not duplicate other outcomes and are enforceable by commercial auditors and the NSWFA.

Are the mandatory attributes the minimum necessary?

There are no qualifications or certificates required for a business to obtain a milk collector licence. However, an inspection is carried out prior to approval to ensure compliance with a Food Safety Program, the ANZFS Code and *Food Regulation 2010*. The mandatory attributes therefore appear to be the minimum necessary.

There are no qualifications or certificates required for a business to obtain a milk collector licence. However, an inspection is carried out prior to approval to ensure compliance with a Food Safety Program, the ANZFS Code and *Food Regulation 2010*. Raw milk transport vehicles are required to meet basic hygiene requirements (e.g. must be clean) and structural requirements (e.g. must be easily cleaned). In addition, milk collectors must keep records of who they collected the milk from, the time they collected the milk, the grade of the milk and the temperature of the product. If audit or inspection results are unacceptable, NSWFA may reject the licence application.[96]

95 Dairy Authority of South Australia, Annual Report 2010-2011

96 NSW Food Authority, Application for a license for a food transport business for dairy/ meat/ plant products/seafood/ eggs & egg related products, LIC007, Tax invoice, date issued 1 July 2012

Are registering and licensing activities efficient?

While NSWFA has developed an online site to access information, licensing forms and regulations; dairy businesses are not able to apply for a milk collector licence online. NSWFA is aware of the potential to allow for online applications, and NSWFA should implement this.

In addition, licence applicants and holders use the same form for the initial licence application and subsequent renewal of the licence. There may be scope to reduce the burden from re-entering information when renewing the licence if no significant changes occurred between the time of the initial application and subsequent renewal.

NSWFA should review the efficiency of farm milk collector licences considering the licensing framework. Given the licensing process is the same across the agency, there is also scope to consider the efficiency of registration related to other food transport licences.

Administering licences efficiently involves delivering timely, reliable and accurate services. Licence application forms can be can be downloaded from NSWFA's website, but the application for a farm milk collector licence must be mailed in hard copy to NSWFA. NSWFA is working towards allowing online submission of applications.

In addition, the same form is used for both initial licence application and subsequent renewal of the licence. There may be scope to reduce the burden from re-entering information when renewing the licence if no significant changes occurred between the time of the initial application and subsequent renewal. For example, there may be scope to amend application forms so business are required to inform the agency if any changes occur, rather than filling in all information.

While there is no legally binding time frame for processing applications, NSWFA aims to process licence applications within 10 days and renewals within five days.[97] However, there is potential for significant delays in processing if application forms are completed incorrectly or are incomplete. The licence application form states applicants 'must not commence operations until the above steps have been completed and [you] are informed that [your] licence application has been processed'.[98] Any unreliability or delays in processing may affect businesses and other components of the dairy supply chain, potentially disrupting delivery of dairy products to markets.

Are stakeholders well informed?

While there are no educational requirements to obtain a licence, the development and enforced compliance with an approved Food Safety Program suggests farm milk collectors are aware of the requirements deemed necessary to ensure food safety. The availability of information on NSWFA website and publication of *Foodwise* allows licence holders to improve knowledge of the industry. However, additional information is required to ascertain the effectiveness of Food Safety Program in reducing scenarios of detriment to consumers and may warrant NSWFA review using the licensing framework.

97 Information supplied by IPART survey of licence holders

98 NSW Food Authority, Application for a license for a food transport business for dairy/ meat/ plant products/seafood/ eggs & egg related products, LIC007, Tax invoice, date issued 1 July 2012

At the end of June 2012, there were 119 licensed farm milk collector licences issued in NSW. These businesses interact with other businesses involved in the dairy industry, including the 142 licensed businesses that produce, process or store milk or dairy products.[99]

There are no requirements or minimum levels of education required to obtain a milk collector licence. Instead, during the licence application process, NSWFA approves the Food Safety Program developed by licence applicants, who must demonstrate compliance with their Food Safety Program. The Food Safety Program outlines specific activities that must be undertaken at each collection, including grading, measuring and identifying components in the milk. By approving the Food Safety Program, it appears NSWFA achieves food safety outcomes by regulating milk collection, not by regulating the skills of people who perform Food Safety Program activities. Compliance with a Food Safety Program is assumed to illustrate sufficient skill and knowledge to safely transport milk. Continued compliance with the Food Safety Program and food standards is achieved through auditing food safety programs.

Approximately every three months, NSWFA publishes *Foodwise*, which contains news for food businesses in industries that are required to hold a licence from the Authority. It is publicly available online.[100]

Given the nature of the dairy industry is not likely to change significantly over several years and online availability of data, licence holders are likely to be well informed about compliance measures and general licensing obligations.

Is collecting information targeted?

The farm milk collector licence appears to meet some of the best practice conditions for information collection. However, not all information may be necessary. As discussed above, requesting information related to the business only (rather than premises and vehicle registration details) would result in more targeted information. If vehicle registration details are required, it may be possible for NSWFA to obtain the information from other agencies (such as the Roads and Maritime Services) or outside of the licensing process to reduce the administration burden on applicants.

Licence applicants are required to supply a range of information to NSWFA, including details of the business and people involved and a description of the vehicle used to transport milk.

	Information obtained through licence application form
Business and people details	• Business structure (i.e. sole trader, association, partnership, company, trust) • Full names of all applicants • Name of the registered company and ABN/ACN • Postal address of applicants • Email address and other contact details • Existing NSWFA licence (if applicable)
Vehicle details	• Type of food transport vehicle • Location of where vehicle is kept for inspection • Description of each vehicle

[99] Data provided to PwC by IPART in the 'List of NSW Government Department-Agency Licences 19 February 2013

[100] Access at http://www.foodauthority.nsw.gov.au/industry/news-publications-and-help/foodwise/

Some of this information would also be collected by other government agencies, such as business registration and motor vehicle registration.

Compliance and information costs may be reduced by sharing information across multiple government licensing agencies. For example, businesses are required to supply an address, ABN and contact details to the Roads and Maritime Service (RMS) to obtain a vehicle registration. All data would then be shared between agencies, with ad hoc information requirements collected in specific instances.

Is receiving and responding to complaints optimal

There was no publicly available data available on the time NSWFA took to respond to complaints, or how appropriately NSWFA handed complaints. Therefore, additional information is required to assess definitively the licence against this element of the framework.

NSWFA has a dedicated contact centre, with information on their website,[101] to handle food safety related concerns and complaints. In 2011-12, NSWFA handled 29,962 food safety enquiries and complaints. A majority (59 per cent) of telephone calls to the Authority's helpline were from regional NSW.[102]

NSWFA provides information on their website regarding:

- Which complaints can be investigated, compared to which complaints will not be investigated
- The complaint process, including how to make a complaint[103]
- The Compliance and Enforcement Policy[104]

Complaints to the agency are prioritised according to risk, with internal benchmarks set to guide the investigative process. NSWFA suggests its compliance and enforcement policy aligns with the Australia New Zealand Enforcement Guideline. In some cases, complaints/incidents are managed through national frameworks, such as Implementation Sub-Committee of the Food Regulatory Secretariat.

Is monitoring and enforcing compliance best practice?

NSWFA has worked towards best practice by allowing industry participation in monitoring and enforcing compliance with farm milk collector Food Safety Programs. Furthermore, compliance with Food Safety Programs is audited on a risk-based approach, with non-compliance and more risky businesses audited more frequently.

NSWFA has moved towards a best practice approach to compliance and auditing by developing a Regulatory Food Safety Auditor System to allow licensees to use an auditor who

---

[101] NSW Food Authority, Complaints about food and business, http://www.foodauthority.nsw.gov.au/industry/complaints-about-food-and-businesses/#.UUEICRzfCSo

[102] Information from NSW Food Authority

[103] NSW Food Authority, Complaints about food and business http://www.foodauthority.nsw.gov.au/industry/complaints-about-food-and-businesses

[104] NSW Food Authority, Compliance and Enforcement Policy, http://www.foodauthority.nsw.gov.au/_Documents/industry_pdf/compliance-enforcement-policy.pdf

is not employed by NSWFA to conduct their compliance audits. Dairy transport businesses are one of several licence holder categories that can conduct compliance audits under the new system.[105]

Monitoring and enforcement undertaken by NSWFA uses a risk-based framework to ensure more risky businesses are audited more frequently. NSWFA uses the national risk-profiling tool, called the Food Safety Risk Priority Classification Framework, to priority classify NSW food businesses based on risk. Dairy transporters are classified P3, which is considered lower risk than other components of the dairy product supply chain (produces and processors are classified as P1).[106] Each Food Safety Program developed by licence holders includes activities to reduce risk and reflect industry standards to identify and manage food safety risks related to:

- Contamination from poor hygiene practices
- Contamination from unsuitable equipment
- Deterioration due to temperature abuse
- Unsuitable product (antimicrobial contamination).

Businesses who are non-compliant with their Food Safety Program or do not manage food safety appropriately are audited more frequently. More frequent audits increase costs for businesses, incentivising those involved in the dairy supply chain to maintain appropriate standards to ensure food safety.

Is the scheme subject to periodic review?

NSWFA aims to review the Dairy Food Safety Scheme every five years. The most recent review of the Scheme in 2009 suggested existing practices are contributing to high standards of public health and safety. The slow rate of industry change and the potential to achieve safety at lower costs does not necessarily reduce the need for regulation of food safety. However, this could imply a longer period between Scheme reviews.

Under the *Food Act 2003*, NSWFA is required to conduct a risk assessment prior to introducing a new food safety scheme. The Authority aims to evaluate the Dairy Food Safety Scheme on a five-year cycle.

Between 2005 and 2008, NSWFA researched, developed and piloted a framework for evaluating the efficiency, effectiveness and appropriateness of its risk management programs (including regulations). A review of the Dairy Food Safety Scheme using the framework was undertaken in 2009, which found existing management practices along the primary production chain are helping to maintain a high standard of public health and safety[107] and that:

> *"The adoption of industry codes of practice and the extensive implementation of food safety programs in the dairy industry has helped to underpin these regulatory control measures."* (p.35)

[105] NSW Food Authority, Foodwise, Volume 22, Autumn 2011

[106] NSW Food Authority, Priority Classification System, Version 4: 27 April 2010, http://www.foodauthority.nsw.gov.au/_Documents/science/priority_classification_system.pdf

[107] NSW Food Authority, Food Safety Scheme Risk Assessment,

Food safety risks do not change over time. Instead, technological innovation and improved practices may allow for greater safety related to milk products and the costs of monitoring and achieving milk and dairy food safety may decline over time. This does not necessarily reduce the need for regulation of food safety. However, it could imply a longer period between Scheme reviews.

Stage 4: Is the licensing scheme the best response?

Does a **preliminary assessment** suggest licensing will result in a net benefit? → Are there other **alternative options** that could deliver policy objectives? → Does a cost benefit analysis show licensing is the **optimal option**?

Does a preliminary assessment suggest licensing delivers net benefits?

The 2009 review of the Dairy Food Safety Scheme, which underpins the activities required in a Food Safety Program, suggested there are demonstrated benefits from regulation related to food safety. However, further information is required to understand whether the farm milk collector licence results in a net benefit. Key costs related to the licence are the licence application, developing and complying with a Food Safety Program, data recording and auditing costs. Licence application fees are wholly attributed to the licence; a majority of the other costs can be attributed to requirements under the Act, regulation and ANZFS Code. However, the benefits from ensuring food safety and ability to enforce Food Safety Programs may be significant.

NSWFA should consider whether the benefits of regulation are specific to the milk collector licence. It may be possible to target licensing at a single point along the supply chain to minimise licence application costs. Further assessment by NSWFA, considering the licensing framework may be warranted.

In 2009, the Authority reviewed the risk assessment of each food safety scheme, including the Dairy Food Safety Scheme, to underpin the development of *Food Regulation 2010*. This review showed that the use of systematic, reliable and preventative procedures to control hazards across the supply chain can minimise risks and deliver safe food to consumers. The review suggested dairy products in NSW have a good food safety track record, which can be attributed to the combination of several factors:

- Good quality raw materials
- Correct formulation
- Effective processing (such as heat pasteurisation)
- Prevention of contamination after pasteurisation
- Maintaining temperature throughout the cold chain.

Between 1995 and 2008, 14 Australian food poisoning outbreaks were attributed to dairy products, with most associated with the consumption of unpasteurised (raw) milk.[108] The factors (above), which have reduced the number of possible food-related illnesses, are outcomes of Food Safety Programs that NSWFA enforces through licensing.

108 NSW Food Authority, Food Safety Risk Assessment of NSW Food Safety Schemes – Summary, March 2009, http://www.foodauthority.nsw.gov.au/_Documents/science/Food_Saferty_Scheme_Risk_Assessment_Summary.pdf

NSWFA should consider whether the benefits of regulation are specific to the milk collector licence. It may be possible to target licensing at a single point along the supply chain to minimise licence application costs. Under this approach, the licensed business would need to ensure milk products supplied by other businesses are of a suitable quality and safe for consumption. Further assessment by NSWFA, considering the licensing framework may be warranted.

Are there alternative options to deliver policy options?

There may be alternative options to the farm milk collector licence that could deliver the policy objective of maintaining food safety along the dairy and milk production supply chain. For example, there may be merit in NSWFA considering whether food safety could be achieved by targeting specific components of the milk and dairy supply chain, such as through incorporating the responsibility for food safety into a single licence within the supply chain.

Licensing seeks to minimise the risk of food poisoning from consuming dairy food products. All those who participate in the industry are required to comply with the food standards and legislation. Licensing offers government the ability to obtain information on those who are involved; and mandate compliance with the ANZFS Code (i.e. cleanliness of vehicles used to transport milk). Alternative mechanisms could involve placing the requirement on dairy farmers and processors to ensure any business transporting their product complies with the relevant standards.

Does a cost benefit analysis show licensing is the optimal option?

It has not been possible to conduct a detailed cost benefit analysis in the timeframe of this case study. NSWFA should consider the costs and benefits of this licence, relative to viable alternatives, when NSWFA next reviews the licence.

A regulatory impact statement (RIS) was prepared in 2009 to assess the economic and social costs and benefits of the *Food Regulation 2010*, including the Dairy Food Safety Scheme. The RIS sets out matters required by the *Food Act 2003* for a regulation to establish a food safety scheme. Analysis suggests that an approach using regulation of food industries provides 4.5 times greater net benefits than an approach using industry education (the next best option).[109] However, the net benefit for the regulation is not specific to the Dairy Food Safety Scheme or the milk collector's licence.

[109] NSW Food Authority, RIS: Food Regulation 2009 – A proposed regulation under the *Food Act 2003*, January 2009

Concluding remarks

Consumers rely on producers to prepare and provide food that is safe to consume. Government intervention through regulation is warranted because of concerns related to food poisoning and the inability of consumers to detect if a food product is safe and of an appropriate standard, prior to consumption. Milk and dairy products are classified as *potentially hazardous*. Given the nature of milk products, improper handling along the production-processing supply chain can result in spoilage. Consuming an unsuitable milk or dairy product may lead to food poisoning, with potentially severe consequences for the public.

To reduce the risk of spoilage, regulatory checks and balances are required along the supply chain to ensure the product is maintained as suitable for consumption. It does not appear that generic remedies or legislation could achieve the same degree of consumer protection as the existing regulatory approach.

The farm milk collector licence gives a business the ability to transport milk products in a specified vehicle, between milk producers and milk processors. Current licensing arrangements require businesses to implement and comply with an approved Food Safety Program. A licence to transport milk addresses the risk of misconduct and promotes competency by enforcing the ANZFS Code and regulations.

However there may be merit exploring the following changes reflecting the licensing framework:

- The current approach to licensing all businesses across the dairy supply chain allows NSWFA to tailor licence requirements. However, it may be possible to reduce the regulatory burden by incorporating a risk-based licensing approach. This would involve targeting those businesses that are most likely to have an impact on food safety, or are the closest to the end user. Risk based licensing has the potential to reduce the number of licences required across the dairy industry supply chain.

- Licences currently apply to each vehicle operated by a business. It may be possible to licence at the business level only and incorporate vehicle sanitation standards as a condition of licence. This approach may also facilitate a move to longer licence duration.

- The current milk collector licence duration of one year may not be the maximum possible. Applying the licence to businesses rather than vehicles will reduce the need to collect information annually. Assuming NSWFA maintains an accurate list of milk transport businesses (which would be the case since all are licensed), then it may be possible to have the licence valid for a longer period.

- A longer licence period would allow licence fees to be charged separately from licence renewal. Separating licence fees from renewal has the potential to allow for more flexibility in auditing compliance with Food Safety Programs, thereby matching licence design with activity risk. Initial analysis suggests licence validity in the range of three to five years may be appropriate for farm milk collector businesses, but further review is needed to determine the optimal licence period.

- While NSWFA has developed an online site to access information, application forms must be submitted in hard copy to NSWFA. NSWFA is aware of the potential to allow for online application, but this should be implemented by the agency.

- The same form is used for both initial licence application and subsequent renewal of the licence. There may be scope to reduce the burden from re-entering information when renewing the licence if no significant changes occurred between the time of

application and subsequent renewal.

NSWFA should review the efficiency of farm milk collector licences using the Licensing Framework. In this review, NSWFA should consider the effectiveness of licensing all dairy supply chain businesses, and whether NSWFA can target licensing to specific stages. Given NSWFA follows similar processes in administering multiple licences, there is also scope to consider the efficiency of registration related to other food transport licences such as meat, seafood and eggs.

Appendix E
Case study: Travel agents

License:	Travel agent licence
NSW Government responsible agency:	NSW Fair Trading

Purpose of the case study

This case study of the NSW travel agent licence was prepared to test and apply the licensing framework during its development, and to demonstrate the framework through its application to a sample of licences.

Given the limited timeframe available, this case study does not represent a complete assessment of travel agent licence.

Background to the licence

In NSW, any individual or corporation who carries on business as a travel agent must be licensed. Licensing is required for those who:[110]

- Sell tickets allowing another person to travel, or arrange approval for another person to travel.
- Sell, arrange or make available the right for another person to travel to a place and be accommodated at that place.
- Purchase for the purpose of reselling the right of passage on a conveyance.

Providers of these services are otherwise known as 'intermediaries'; they facilitate transactions between the consumer and travel service suppliers, in exchange for commission or profit.

Approach to regulate travel agents

In the past, travel agents acted as a gateway to the travel industry, with consumers unable to access travel information. Consumers utilised the services and knowledge provided by travel agents, and relied on regulatory measures to protect their safety.

The *Participation Agreement for the Co-operative Scheme for the Uniform Regulation of Travel Agents* ('the National Scheme') provides the national framework for the regulation of travel agents.[111] The National Scheme required member jurisdictions to enact legislation containing uniform provisions, which was achieved through the passage of State and Territory *Travel Agents' Acts*[112] and associated Regulations.[113] Travel agents in NSW are

---

110 See: http://www.fairtrading.nsw.gov.au/Businesses/Specific_industries_and_businesses/Travel_agent_licensing_requirements.html

111 COAG, Travel industry transition plan, COAG Legislative and Governance Forum on Consumer Affairs, December 2012

112 Travel Agents Act 1986 (Vic), Travel agents Act 1986 (NSW), Travel Agents act 1985 (WA), Travel Agents Act 1988 (QLD), Travel Agents Act 1986 (SA), Travel Agents Act 1987 (TAS), Agents Act 2003 (ACT)

bound by conduct requirements outlined in the *Travel Agents Act 1986* ('the Act'), which involve: [114]

1. a compulsory licensing scheme, mandatory training, initial application fees and membership renewal fees

2. compulsory participation in the Australian Government administered Travel Compensation Fund, to be paid out to consumers who lose prepayment as a result of agent insolvency or misconduct.

Review of licensing arrangements

Since the implementation of the National Scheme and passage of the *Travel Agents Act*, improvements in technology and the internet have changed the nature of the travel industry. Consumers have more access to information, reducing the need for travel agents to act as 'gate-keepers' to travel service providers. Increasingly, consumer transactions are outside the scope of the existing regulatory scheme, as its coverage is limited to agents. Online and international agents have also entered the market, bypassing licensing controls.

PwC reviewed consumer protection in the travel and travel related services market in 2010 for the Standing Committee on Consumer Affairs. The review found that competitive markets underpinned by generic consumer protection rules, voluntary accreditation and private measures provided an adequate and appropriate level of consumer protection in the industry. Industry-specific consumer protection regulations were found to be no longer fit for purpose.[115]

In response to the findings of the PwC report, the Standing Committee on Consumer Affairs and Australian governments participated in a broad ranging review.[116] Following this review, the COAG Legislative and Governance Forum on Consumer Affairs released a transition plan for the travel industry in December 2012,[117] which proposes to move to self-regulation of the travel industry and to:[118]

1. Repeal the travel agent legislation, to reduce the burden associated with travel regulation and move towards a deregulated industry

2. Increase reliance on generic consumer protection legislation, corporations laws, industry-specific remedies and oversight mechanisms, such as the Australian Consumer Law

3. Phase out the Travel Compensation Fund and associated auditing, licensing and annual fee requirements.

Most state and territory consumer affairs ministers, including the NSW Minister, approved the transition plan on 7 December 2012. Under the plan, financial supervision provided by

---

113 Travel Agents Regulations 2007 (VIC), Travel Agents Regulation 2006 (NSW), Travel Agents Regulations 1986 (WA), Travel Agents Regulations 1998 (QLD), Travel Agents Regulations 1996 (SA), Travel Agents Regulations 2003 (TAS), Agents Regulation 2003 (ACT)

114 Travel Agents Act (NSW), http://www.austlii.edu.au/au/legis/nsw/consol_act/taa1986153/

115 PwC, Review of consumer protection in the travel and travel related services market, prepared for the Department of the Treasury on behalf of the Standing Committee of Officials of Consumer Affairs, November 2010

116 COAG, Travel industry transition plan, COAG Legislative and Governance Forum on Consumer Affairs, December 2012

117 COAG Legislative and Governance Forum on Consumer Affairs, 2012. *Travel Industry Transition Plan,* p. 14

118 COAG, Travel industry transition plan, COAG Legislative and Governance Forum on Consumer Affairs, December 2012

the Travel Compensation Fund will be removed in mid-2013 and travel agent legislation repealed by mid-2014. [119]

Applying the framework

This case study builds upon the findings of the previous PwC review of the travel and travel services industry. It appears that the trends highlighted in the review remain relevant, including the uptake of technology and the use of internet, the growth of electronic payments, and consolidation of the industry.

Is there an ongoing need for the government to intervene?

There is not a strong case for ongoing government intervention in the travel agent industry. Since the introduction of travel agent regulations in 1986, the degree of information asymmetry between travel agents and customers has reduced. The role of travel agents as intermediaries has also reduced, through consumers purchasing directly from travel service suppliers and through increasing levels of direct payment to travel service providers even where travel agents are used.

Information asymmetry may exist between the users and providers of professional services, including services provided by travel agents. There is likely to be information known by the travel agent that the consumer does not know, which can potentially lead to misunderstandings and/or unethical behaviour. Further, the difficulty of accurately specifying quality means that not all aspects of the travel agent service can be contracted, and hence an implicit contract exists between the travel agent and their client.

The diversity of services and consumers in the market for travel agent services may exacerbate problems arising from information asymmetry. Consumers have differing levels of sophistication and knowledge of available services. While some consumers use travel agents frequently and therefore have a detailed understanding of the services, other consumers with less frequent interaction are likely to have limited knowledge. Some consumers will be able to choose a travel agent with suitable skills and experience to provide the services without reliance on statutory regulation, while others will be less able to do so.

For many consumers, international travel is a significant outlay. The potential financial harm arising from incompetent or improper services by a travel agent is significant. The risk of loss of funds from incompetent services is high, particularly with the small, less established agencies that were predominant in the industry when regulatory measures were implemented. [120] Travel agent regulation was introduced in the 1980s following the collapse of some travel agencies and the associated financial losses suffered by consumers. In many cases, failure was attributed to businesses having an unsound financial base; in other cases

---

[119] See: http://www.fairtrading.nsw.gov.au/Businesses/Specific_industries_and_businesses/Travel_agent_licensing_requirements.html

120 Centre for International Economics, National Competition Policy Review of the National Scheme for the Regulation of Travel Agents, Canberra: 2000, p 12

the people involved were not fit and proper persons to be entrusted with large amounts of money.[121]

The emergence of the internet and other digital technologies has bridged the gap between the suppliers and consumers that travel agents previously linked. In some cases, whilst travel agents are utilised in the transaction process, the travel service provider is paid directly in the transaction rather than relying on an agent to 'pass on' the prepayment.[122] An example is credit card transactions straight to the supplier, which means that funds are not 'at risk' with the intermediary – removing the necessity for the Travel Compensation Fund protection guarantee in respect of the travel agent.[123]

The popularity of online booking facilities means that consumers increasingly bypass travel agents altogether by purchasing directly from the service provider.[124] For example, overseas travellers increasingly purchase tickets directly from airlines rather than via an agent, making the rationale for regulation obsolete in these cases.[125]

Does something else address the problem?

The Australian Consumer Law may be sufficient to protect the consumers of travel agent services.

In some cases, industry specific laws will not be required and generic remedies can address the market failure. Since the introduction of regulation of travel agents, the Australian Consumer Law (ACL) commenced on 1 January 2011. The ACL provides nationally consistent rights and protections to consumers and creates a national enforcement regime.[126]

The ACL provides the following guarantees in respect of supplies of services:

- A guarantee that the services are carried out with due care and skill
- A guarantee that services are fit for purpose made known to the supplier
- A guarantee that services are provided within a reasonable time
- Misleading and deceptive conduct and unfair contract terms are prohibited.

The ACL also sets out remedies available to consumers when a service fails to meet these customer guarantees. The provisions allow for a range of remedies including, but not limited to:

- Injunctions to restrain conduct or require something to be done
- Damages to redress low or damage caused by a breach

---

121 See: http://www.commerce.wa.gov.au/consumerprotection/content/Consumers/Travel/Travel_Agents.html

122 IBIS World, 'Industry Outlook', Australia Industry Reports: Travel Agency Services I6641

123 Australian Federation of Travel Agents, Review of consumer protection measures in the travel and travel related services market in Australia including the role of the Travel Compensation Fund, submission, April 2010

124 Business Insider, Travel Agents Could Go The Way Of The Dodo By 2016, http://www.businessinsider.com/travel-agents-could-become-obsolete-2012-10, Accessed 20 December 2012

125 IBIS World, 'Industry Outlook', Australia Industry Reports: Travel Agency Services I6641

126 Australian Consumer Law, 2012. *Why have a new law?* Available at: http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/why_have_a_new_law.htm

- Compensatory orders to allow compensation for breaches of the ACL
- Public warning notices for regulators to warn the public about conduct.[127]

Additionally, consumers can access the low-cost Consumer Trader and Tenancy Tribunal to resolve disputes about the supply of services and therefore avoid the need for legal action.[128]

The ACL is limited in its ability to remedy detriment where the travel agent is bankrupt, in administration or in liquidation, as there may not be funds available to compensate the consumer.[129] In most cases, however, the ACL provides measures to prevent consumer harm and remedies for when harm has occurred. There is some overlap on the remedies provided by the ACL and those provided by the Travel Compensation Fund, as consumers who have paid for travel arrangements to a licensed travel agent may lodge a claim if the agent has:[130]

- ceased trading or suffered a financial collapse, and
- failed to pass on their money to the travel principal (airlines, hotels, etc.).

Consumer protection is also provided by measures such as the National Tourism Accreditation Framework, which was adopted in April 2011[131]. The National Tourism Accreditation Framework is a national accreditation for businesses involved in the travel industry. Consumers can use the T-QUAL Tick to identify businesses that meet the quality standards of T-QUAL Accreditation. [132]

These developments since the implementation of the National Scheme suggests there is a reduced justification for industry-specific consumer protection regulations through licensing travel agents in NSW.

Concluding remarks

The application of this case study to the Licensing Framework highlights the reduced justification for existing travel agents licensing schemes in NSW. Continued developments in the industry, including consumer use of technology, electronic payment and consolidation of the market, reinforce the findings of the previous PwC review. Licensing is no longer justified for services provided in the travel agent industry.

[127] The Parliament of the Commonwealth of Australia, 2010. *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010: Explanatory Memorandum,* Available at; http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf

[128] Consumer, Trader and Tenancy Tribunal, 2012. *About us*. Available at: http://www.cttt.nsw.gov.au/About_us.html

[129] Travel Compensation Fund, response to COAG Legislative and Government Travel Industry Transition Plan, October 2012

[130] See: http://www.tcf.org.au/Consumer_Claims.asp?Page=Claims

[131] See: http://www.ret.gov.au/tourism/policies/nltts/workinggrps/tqca/Pages/default.aspx

[132] See: http://www.ret.gov.au/tourism/business/tq/tqual-accred/Pages/T-QUALAccreditation.aspx

pwc.com.au