Regulation and the war on red tape

A review of the international academic literature

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Regulation and the war on red tape: A review of the international academic literature

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Abstract

Since the 1970s, Australian governments have sought to reduce regulatory burdens, particularly on business, subject regulation to rigorous cost-benefit analysis, and constrain both the stock and flow of new regulation. Yet however measured, regulation continues to grow, frequently in response to community demand. In this article we interrogate both the more extreme claims of the anti-regulation advocates and the alleged successes of anti-red tape initiatives, identifying a critical clash of values over the role of the state and the appropriate relationship between government, business and the community. We conclude by arguing that to deliver desirable societal, economic and democratic outcomes, we need to acknowledge regulation as an asset, professionalise its workforce and more actively assert its public value.

Contents

1 Introduction

Regulation is so ubiquitous in advanced societies their citizens can, and should, take it for granted. Virtually every aspect of life is regulated—from the air we breathe to the time we live by, from the food we eat to the money or credit cards we use to buy it (Drahos & Kryger, 2017). The means by which contemporary life is regulated are manifold and diverse, going well beyond laws and rules. Regulation includes the deliberate use of taxes, levies and subsidies, incentives, contracts and grants, licences, registration, permits and accreditation, informational tools such as disclosures, structural interventions (including physical barriers and technological controls), choice architecture, and others, all in the pursuit of public policy objectives (Freiberg, 2017).

Regulation is typically introduced by governments (often in collaboration with non-government organisations, and frequently in response to demands from citizens) to solve collective action problems that cannot be solved through contracts or other 'private' governance arrangements. When it works seamlessly and invisibly, as is generally the case, regulation promotes trust, predictability and stability and is as essential as the redistributive and spending functions of government in enabling citizens to live their lives and businesses and markets to operate (Van der Heijden, 2021b). In essence, regulation exists to create public value (Balleisen & Moss, 2020; Browne, 2020).

Because regulation brings tremendous value it is not surprising that demands for regulation come from citizens affected by unfair trading, monopolies, externalities and market failures (Colander & Kupers, 2014; Scott, 2012); and from businesses who gain from regulation in the form of market protection, subsidies, and title protection—those who want regulation to create the certainty they need to go about their business decisions (Decker, 2015; Windholz, 2018). There is indeed a robust body of evidence that regulation is valued and expected by a range of stakeholders—the evidence can be found throughout the academic literature (Coglianese, 2017; Russell & Hodges, 2019; Selznick, 1985); in 'at the coalface' inquiries by Royal Commissions (McAllister, 2014; Wishart & Wardrop, 2018); and even in reports and think-pieces by the world's largest consultancy firms (Dellioitte, 2019; KMPG, 2019).

The value of regulation is so widely accepted that it is standard opening fare *even* in government policy documents that call for fundamental regulatory reform. To illustrate, when launching Australia's latest deregulation agenda in 2020, the responsible Minister argued that "Good regulation is critical to making Australia one of the best countries in the world to live, and ensuring Australia has a well-functioning economy, society, environment and democracy."[1] Strikingly, he continued by stating that "as you know my long-held view is that our starting position should always be not to regulate". This love-hate relationship with regulation is not unique to the Minister cited here. It is a central character of many regulatory reforms since the 1970s—in Australia and beyond (Jordana & Levi-Faur, 2004; Peltzman, 1976; Stigler, 1971; Wilson, 1980).

Unfortunately, it is difficult to assess when and why regulation does or does not achieve its desired goals (Baldwin, Cave, & Lodge, 2012). While there is general and bipartisan agreement (in Australia and elsewhere) that regulation should be effective, parsimonious, and fair, there is less agreement about when regulation reaches a point of being unnecessary, excessive or unjustifiable . That

[1] Morton https://ministers.pmc.gov.au/morton/2020/morrison-governments-deregulation-agenda, accessed 28/9/2021).

assessment is often a political rather than a technical exercise (Browne, 2020). In regulatory reviews and in the public debate about regulation, the term 'red tape' may be used interchangeably with 'regulation'—the former being a term used to describe regulatory requirements that exceed "the minimum amount of intervention necessary to tackle an identified social or economic problem" (Allen & Berg, 2018: 2).

However, regulation and red tape are not the same thing. Using the terms synonymously makes for a flawed argument when calling for regulatory reforms (Greiner, McCluskey, & Stewart-Weeks, 2017). We observe this flawed argument repeatedly when overviewing decades of calls for regulatory reform or assessments of regulatory performance in Australia (examples provided in what follows). In this article we seek, therefore, to understand why, despite the value that public regulation brings, Australia has experienced an apparently endless cycle of regulatory reform initiatives. Our central argument is that the 'forever war' waged by governments, business, and other duty holders, sometimes against red tape and sometimes overtly or covertly against the very idea of regulation, needs to be both critically analysed and effectively countered.

This forever war is essentially a political contest between fundamentally different views of what regulation means and what it represents. This political contest is, however, typically veiled by econometric and technocratic arguments involving statistics and differences regarding the best technical means of ensuring that regulation is effective, parsimonious, and fair, or the merit and performance of institutional arrangements for improving regulation and 'regulating regulators'. As we explain below, the economic analyses and page-counting initiatives that have dominated the regulatory reform initiatives have masked this political contest, which is characterised by a struggle over values, sidestepping of the reasons for the inevitability of growth in regulation and lack of engagement with the pro-regulatory sentiments of the broader Australian community. This goes some way to explaining why recurrent high-profile efforts to deregulate, or even more modestly to reduce regulatory burdens, have been unsuccessful on their own terms.

The following section looks at the warriors in the war against regulation, the leaders of the 'charge of the right brigade', and at the most extreme claims made against regulation, that it is the weaponry of an oppressive state and a killer of economic growth and innovation. From there, we provide an overview of the weapons of war (the numerous initiatives and strategies deployed, sometimes against red tape, sometimes against regulation) and interrogate the claimed success of some of the more prominent ones, also recognising the role which resistance from regulators may play in undermining reform intentions. Finally, we make some suggestions for ways a more balanced and stable approach to regulation and its improvement might be achieved.

2 The warriors against regulation

The neoliberal revolution of the 1970s and early 1980s, led by US President Ronald Reagan and UK Prime Minister Margaret Thatcher, identified the state as the major culprit for 'stagflation', the combination of high unemployment, high inflation, and low economic growth. Government's role, it was argued, should be steering not rowing. Governments were seen as costly, inefficient, ineffective, risk-averse, coercive, and captured by rent seekers and sectional interests. Driven by Chicago-school economics, regulation was framed as economically harmful and blocking efficient resource allocation, demonstrated by its costs to business and the community, its effect on investment, employment and innovation, and decreased productivity and declining government revenue (Osborne & Gaebler, 1992). Others regarded the problem as being far deeper than the economic harms readily identified. In the United States, a vein of "tyrannophobic rhetoric" conflates regulation and oppression. Growth in regulation and the emergence of the 'regulatory state'[2] were viewed as a threat to democracy and the foundations of tyranny (Short, 2012). Particularly on the right side of the political spectrum, the growth of regulation in response to ongoing technological development and globalization was seen as creeping paternalism that needed to be stopped (Coons & Weber, 2013).

In Australia organisations such as the Institute of Public Affairs (IPA)[3] have been echoing these sentiments, describing the growth of the 'regulatory state' as evidence of an attempt to undermine Australian democracy and a threat to democratic, judicial, parliamentary and administrative systems of control (Berg, 2008; Wild, 2018a). Increasing use of legislative instruments and quasi-legislation, referred to as 'regulatory dark matter', is viewed as an assault on democratic accountability (Wallace, 2019). Australia is claimed to have a 'red tape crisis' caused by an 'avalanche' of regulation (Allen & Berg, 2018). The growth of regulation since 2004-5 is said to be responsible for up to 398,000 businesses and approximately 894,000 jobs never being created, and to have put $65 billion of investment at risk through challenges under environmental laws (Wallace, 2020). This all has resulted, so claim IPA's associates, in a decline in small business and the undermining of opportunity, prosperity and community (Lesh, 2018). It has made families poorer (Wild, 2018b), contributed to Australia's economic malaise (Potter, 2018), reduced entrepreneurship, prevented Australian businesses from accessing world class technology, worsened the length and severity of economic downturns, reduced competition and created uncertainty (Wild, 2018a).

Other major economic players in the broader regulation/regulatory burden debates include the Australian Productivity Commission (and its state counterparts in Queensland, New South Wales, and Victoria), the New South Wales Independent Pricing and Regulatory Tribunal, and the Economic Regulation Authority of Western Australia, as well as the Business Council of Australia, the Australian Chamber of Commerce and Industry, and the Council of Small Business Organisations Australia (Allen,

[2] The concept of the 'regulatory state' describes the changes from public ownership to the regulation by the state of public services, the decentering of government, the growth of independent regulatory agencies, the separation of regulation from service delivery and the development of new modes of regulation. It is more benign than it appears (Levi-Faur, 2013).

[3] IPA describes itself as an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom and as supporting "the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy" (https://ipa.org.au/about).

Berg, Lane, & McLaughlin, 2021; Australian Chamber of Commerce and Industry, 2005; Business Council of Australia, 2005; Carroll, 2008b; Regulation Task Force Australia, 2006). Additional advocacy for economic deregulation and reducing the regulatory burden comes from influential business lobbies and the not-for-profit sector (Australian Council of Social Service, 2012; Ryan, Newton, & McGregor-Lowndes, 2008). It is notable that estimates of the costs of regulation are generally produced by those who have an interest in its outcome (Helm, 2006), and, that once produced, the cost numbers are uncritically repeated. For example, an initial IPA estimation that put the annual cost of regulation at $176 billion per year in lost economic output[4] (Novak, 2016) is quoted by the conservatively dominated Senate Red Tape Committee (Senate, 2018), the Queensland Productivity Commission (2021), and repeatedly cited by IPA in many of its publications (Hussey, 2020; Wallace, 2019; Wild & Allen, 2018). These staggering figures, expressed in large dollar amounts or as percentages of the gross domestic product (GDP) are intended to produce shock and awe, dismay, anger and ultimately, political resolution that action is required – in short, to delegitimise the idea that regulation delivers, and is essential to, public value.

Regulation and economic performance

A critical question is whether, and if so how, too much regulation hinders economic performance (OECD, 2005). One consistent criticism of regulation is the short and long term costs it imposes on business and the community—in term of compliance, as well as restrictions on competition, innovation, and flexibility (Queensland Productivity Commission, 2021). The Australian Productivity Commission estimated that compliance costs could amount to up to 4% of GDP or between $12 and $24 billion a year (as cited in Senate, 2018).[5] The Rethinking Regulation Task Force provided estimates that the total annual compliance costs to business ranged from $11-$86 billion in 1994-95, around 85% of which was borne by small to medium size enterprises (Regulation Task Force Australia, 2006). The Commonwealth government has estimated the cost of compliance with Commonwealth regulation at $64 billion per year, around 63% of which relates to complying with the tax system (Australian Government, 2015).

Two questions relating to the costs of regulation and its relationship to productivity and economic growth arise. First, citing total compliance costs is not the same as distinguishing between necessary and unnecessary costs. Compliance costs are necessary if they are required to achieve the objectives of the regulation (Productivity Commission, 2011). Given the varying estimates, the value of presenting these figures is questionable, especially as they do not estimate the net cost of regulation, serving only to inflame readers about the cost of regulation and failing to contribute to informed debate (Carroll, 2008b).

Second, the relationship between regulation, compliance costs, and productivity is unclear. In their literature review of the quantitative evidence regarding the economic impact of regulatory policy conducted for the OECD, Parker and Kirkpatrick concluded that (2012: 7-8)

[4] By accounting for efficiency costs which include barriers to entry, price distortions or effects on growth rates; it was said to be equivalent of 9.2% of GDP, effectively making red tape Australia's biggest industry (Hussey, 2020).

[5] Estimates in other countries range from around 1.6 to 3.6% of GDP: UK 1.6-3.2%; Netherlands 3.6%; Denmark and Belgium around 2% (Productivity Commission, 2011).

> [I]t is difficult, and sometimes impossible, to provide robust quantitative evidence of a causal relationship between a regulatory policy change and the impact on economic outcomes such as economic growth… *most quantitative studies deal with the costs of regulation and give little or no attention to quantifying the benefits of regulation* (emphasis added). For the policymaker, it is important to compare the estimated costs of regulation alongside the benefits of regulation, even if the latter are often not monetised

There is now little disagreement, including from bodies such as the Productivity Commission, the International Monetary Fund, and the OECD, that the fundamental reform of structures of economic regulation across most developed economies over the last 30-40 years has been instrumental in facilitating economic gains (for an in-depth discussion, see Deighton-Smith, 2008). Such reforms include the removal of regulated monopolies and oligopolies and the enabling of competitive markets in formerly highly regulated sectors like aviation, banking, telecommunications, gas, electrical and agricultural marketing, while at the same time restrictions on competition in a range of other markets, for example professional services, have been substantially reduced. But we should keep in mind that such reforms often result in *new* regulatory regimes and *new* regulators, for instance to deal with privatisation and contracting out, such as pricing tribunals, utilities regulators, telecommunication regulators, and various ombudsmen to protect consumers (Freiberg, 2017).

While reforms to economic regulation have greatly increased the freedom of businesses to operate and compete in various sectors, increasing social regulation (eg environmental protection, product safety and occupational health and safety) has, at the same time, created a new and extensive series of constraints and compliance costs. Deighton-Smith writes that (2008: 47)

> While the OECD's work on regulatory indicators identifies quite clearly the links between economic performance and the degree of restrictiveness of product market regulation, *no equivalent large-scale analysis is available that points to clear linkages between the scope and extent of social regulation and economic performance* [emphasis added]…reformers have tended to rely on stakeholder groups to identify priority areas for reform and to base their analyses and policy prescriptions largely at the micro level, and often using largely qualitative analysis.

The final sentence is a polite way to indicate the reform argument has moved from evidence to anecdote.

As the Queensland Productivity Commission reminds us, the potential for regulation to have a positive effect on productivity and economic output depends on how regulation is designed and administered (Queensland Productivity Commission, 2021). In other words, it is unhelpful to characterise 'regulation' in general as either beneficial or harmful to economic growth and innovation. Evaluations of whether benefits exceed costs are only technically feasible at the level of individual regulatory regimes and even then are heavily subject to value judgements including the salience of the precautionary principle (D. Vogel, 2012). Sweeping claims about the deleterious impact of 'regulation' without regard to technical nuance and countervailing social benefit suggest we are in the realm of ideology and not analysis.

3 The forever war against regulation

How much regulation do we have? How much is too much?

When and at what point does the quantum of regulation exceed what is reasonable and beneficial? In economic terms, there is too much regulation if the benefits outweigh the costs—accepting that the task of measuring aggregate costs and benefits is a fraught exercise beset with methodological problems (Windholz, 2018). Over the years, several proxy measures of regulatory burdens have been developed. These include the number of Acts and regulations passed in any one year, the number of pages or words, the number in force in any year, the number of regulatory agencies and their staff or budgets and, more recently, the number of regulatory restrictions (Allen et al., 2021).

For example, in its 2011 report, the Productivity Commission cited a 2008 survey of Australian regulators showing that at federal level there were 1,279 Acts generating 98,486 pages of legislation and 18,000 statutory rules generating over 90,000 pages of regulations; over all jurisdictions there were over 500,000 pages of legislation (Productivity Commission, 2011). In a similar vein, the Senate Red Tape Committee cited a Commonwealth stocktake which showed around 1,800 Acts, 12,200 subordinate instruments, and 71,000 pieces of quasi-legislation, all of which, it was stated, carried a staggering economic cost in terms of reduced economic output of $176 billion or 10% of GDP (Senate, 2018; note, the cost number was not calculated by the Committee but copied from the earlier mentioned IPA publication). Unpacking these numbers reveals a typical pattern starting early in the twentieth century and accelerating from the 1970s and ongoing (Douglas, 2014; Queensland Productivity Commission, 2021).

Likewise, the Rethinking Regulation Taskforce noted that in 2003 Australian governments administered 24,000 business and occupational licences between them (Regulation Task Force Australia, 2006). In 2019, the Economic Regulation Authority of Western Australia reported there were about 700 different state government business licensing schemes, involving around 2 million current licences regulated by 43 state government agencies (Economic Regulation Authority, 2019). Non-business licences, permits and accreditations such as drivers' licences, firearms licences, building permits, fishing licences, pet licences and occupational licences were found to number in their millions (IPART, 2014).

A more recent attempt to measure regulatory burdens is to measure 'regulatory restrictions', a methodology developed by the conservative Mercatus Center at the George Mason University in the US through a computer-based tool entitled RegData. The approach has been adopted and promoted in Australia by academics and others associated with the IPA (Al-Ubaydli & McLaughlin, 2017; Allen et al., 2021). Rather than measuring pages or words in legislation, it measures words associated with restriction, such as 'shall', 'must', 'may not', 'prohibited' and 'required'. It was briefly used and then discontinued in Queensland by the former Office of Best Practice Regulation which found in 2012 there were 265,189 regulatory requirements (Office of Best Practice Regulation, 2013)—another measure frequently cited in Australian (anti-)regulation debates (Senate, 2018).

While all these measures are reminders of the ubiquity of regulation in contemporary life, they are not an answer to the question of how much regulation is 'too much'. There are major problems with these approaches—even if we accept enumeration is an appropriate method for assessing the scale of regulation to which citizens and businesses are subject. Measuring regulation by the number of Acts or regulations passed each year, is different from the net number of such legislative instruments in force, as a number may also be repealed each year. Counting the stock of regulation

(including licences and permits) is equally problematic because it lumps all categories together and fully ignores the huge qualitative and quantitative differences between them—for example, getting a fishing licence is a considerably smaller burden than getting a building permit for a multi-million office building in central Brisbane, but they both receive a count of 'one' in a stock taking exercise. Likewise, mechanistic approaches such as counting restrictive words, as per the RegData approach, lumps together all sorts of restrictions—broad restrictions and narrow restrictions; those that fall on individuals or corporations in the community *and* those that fall on regulators or government bodies as to how to act in certain circumstances; and so on. Such approaches are unable to distinguish between costly or burdensome constraints and their converse, given that some may lessen the costs or burdens on regulated entities by setting restrictions on government regulators.

In sum, whatever these measures purport to show, counting the flow of Acts of Parliament or subordinate instruments, counting the stock of licences and permits, or counting restrictive words in legislation are crude ways of measuring the amount or burden of regulation. They are a poor starting point for evaluating the success of regulatory reforms more generally. However, publishing the numbers is a guaranteed way of drawing attention to the overwhelming amount of regulation, with the implication that whatever the total, it is far too high. The limitations of these measurements raise the question of whether the measurement exercise itself is more harmful than beneficial, or indeed more suited to generating heat than light—given they are often used to make the political point that regulation is out of control and in need of restraint. We agree with Short who argues that there are three reasons to stop counting: first, that it undermines the achievement of statutory goals, second, that it is costly and wasteful and third, and in our view most importantly, that it "crowds out meaningful dialogue and research about the real and difficult problems of regulation" (Short, 2018: 145).

The challenge of regulatory reform

The Queensland Productivity Commission, recently tasked with providing a research paper on improving regulation as a contribution to economic recovery post-COVID, poses the question of why the 'regulatory challenge' has proved so intractable; why despite so many efforts, "these initiatives do not appear to have produced widespread or sustained improvements in the quality and quantity of regulation" (Queensland Productivity Commission, 2021: 18). Likewise, the IPA conceded that the attempts to reduce red tape have 'fallen short' (Potter, 2018; Wild & Allen, 2018). Some of the reasons identified were that the regulatory system is too large and complex, that governments have incomplete information, that the complexity of regulation makes it hard to identify specific problems, and that there is no central oversight of the regulatory reform process (Queensland Productivity Commission, 2021), while the IPA argued that it was because the attempts were "too narrow in scope and lacked ambition" (Wild & Allen, 2018: 3).[6]

Conservative commentators have also argued that the red tape initiatives dating back to the 1970s have failed because the structure of the federation has resulted in substantial regulatory overlap, because there has been a culture of complacency brought about by decades of economic growth, because the deregulatory reforms were, at best, window dressing; and, that both major parties in fact supported regulation, particularly in relation to the regulation of privatised industries, because

[6] For the IPA, an 'ambitious' regulatory regime would eliminate the need for approvals, embrace market-based solutions, harness the benefits of economic competition, decentralise regulatory authority and minimise interaction with government (Wild and Allen 2018: 3).

of a high aversion to risk, and finally, because of a complex and inefficient tax system which created high compliance costs (Wild, 2018a).

In contrast, we suggest three answers to the question of why so many efforts, over so many years, have failed to reduce regulatory burdens, red tape, or both. First, the 'weapons of war' tend to become less effective and more subject to resistance from regulators over time, a claim that we test against five of the more popular initiatives (below). Second, the short attention span and volatility of the political and bureaucratic structures and personnel dedicated to both regulatory reform and red tape reduction are inimical to the consistent, persistent and non-partisan effort required for significant and enduring change (see also Majone, 1990). Finally, we argue that although business and its lobbyists are perennially antagonistic towards regulation and will always claim there is too much, business influence over governments at the big picture level is continuously being overwhelmed both by public support for *more* and *more effective* rather than less regulation in many domains, and the constant emergence of new risks and harms for which regulation is required (see also S. Vogel, 1996). The technocratic solutions offered to date and the values that they represent do not reflect the public interest or the views of the broader Australian society that privileges security above profit and well-being above wealth. We expand on these themes in the next section.

4 The weapons in the war against regulation

In Australia the beginnings of the assault on regulation through the terminology of red tape can be traced back to the late 1970s—Figure 1 below charts some of the successive deregulatory and regulatory burden reduction initiatives and task forces since that time (Greiner et al 2017: 20; see also ANAO 2016: 15; Douglas 2014: 59).

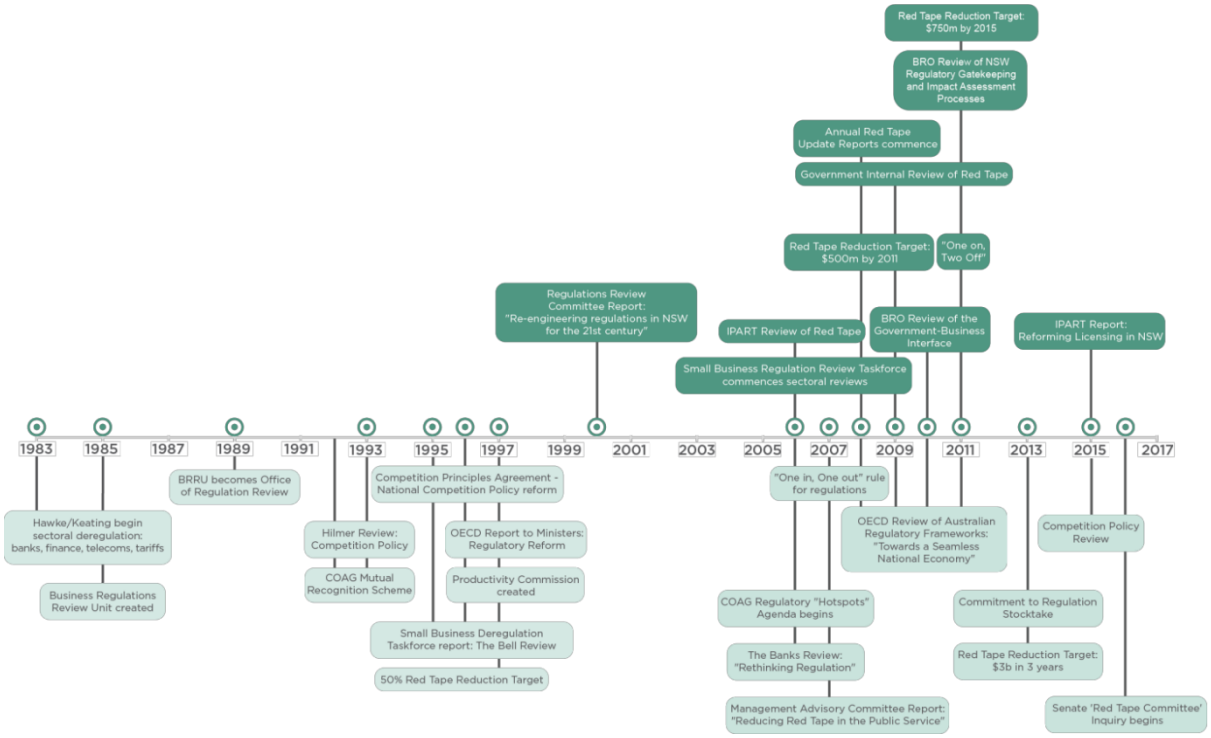

Figure 1 – Deregulatory and regulatory burden reduction initiatives and task forces in Australia (1983-2017)

As will be seen from what follows, it is little wonder that experienced regulators frequently reference the Bill Murray film *Groundhog Day* when another deregulation or red tape reduction initiative is announced. Or, as Voermans (2008: 131) more elegantly labels it, this is the 'Sisyphus paradox'.

The usual starting point for a new round of deregulation is the establishment of an ad hoc task force or committee. Their origin in Australia can be traced back to the Lynch *Inquiry into Unnecessary Paperwork* in 1979, followed by successors across all jurisdictions, the latest being the Greiner et al report (2017) and reports by the Queensland Productivity Commission (2017), the Senate (2018) and the Economic Regulation Authority of Western Australia (2019). At national level, the latest iteration began in July 2021 when the current Australian Government announced a Deregulation Taskforce, with a "focus on ensuring that, where regulation is required, it is implemented with the lightest touch – that regulation is designed and applied in the most efficient and timely way, with the least cost on businesses, making it easier for businesses to invest, create jobs and grow the economy."[7]

[7] https://www.pmc.gov.au/domestic-policy/deregulation-taskforce/terms-reference.

Over the years, governments have employed an impressive array of mechanisms to reduce regulation and regulatory burdens. Some approaches focus on the stock of regulation. They include programmed reviews such as sunset clauses, embedded statutory reviews and post-implementation reviews (see the various examples we have provided in the previous section). They also include ad hoc reviews such as public stocktakes, principles-based reviews, benchmarking and in-depth reviews or specific area analyses, management approaches, which include parliamentary legislation oversight committees, legislative guides, the establishment of better regulation offices, red-tape commissioners, productivity commissions or commissioners, portfolio deregulation units, regulatory impact statements or assessments, guides or handbooks about regulation, costing manuals, regulator performance frameworks, statements of expectations for regulators, key performance indicators, regulator audit reports red tape reduction targets, and red-tape reduction days (see further Freiberg, 2017; Kirkpatrick & Parker, 2007; Office of Best Practice Regulation, 2013).

Other approaches include moving from industry specific regulation to general regulation of the type that establishes rights or obligations that apply across industries, harmonisation of laws and other regulatory requirements between jurisdictions to reduce inconsistency, duplication and overlap of those requirements, mutual recognition laws which allow the regulation of goods and services regulated in one jurisdiction to be recognised in another without any additional requirements and reducing the number of licences or registrations required, mutual recognition of licences, extending the periods required for licence renewals and the number and quantity of reporting requirements and digital streamlining, which involves reducing the number of applications required by different regulatory authorities (see further Economic Regulation Authority, 2019).

In 2011, the Productivity Commission published a comprehensive review of these schemes, demonstrating that evaluating regulatory regimes and systems is a more complex exercise than simply measuring the reduction in the number of legislative instruments or the notional costs of regulation (Productivity Commission, 2011). What follows is not a repeat exercise in evaluation but an attempt to understand why some of the more prominent schemes have failed to fulfil their promise of achieving both less and better regulation.

Regulatory impact statements

Regulatory impact statements (RIS) were introduced in Australia from the mid-1980s as a means of limiting or reducing the flow of new regulations. RISs provide a formal process for assessing the economic or social consequences of a regulatory decision (OECD, 2020). This has widespread appeal, including to those who see it as mechanism for reducing the flow of regulation as well as proponents of a sound technical approach to evaluating legislation (Radaelli, 2012). Although the process is ostensibly very rigorous as an example of cost-benefit analysis, it appears to have had limited effect on stemming the flow of regulation for two reasons, the first technical and bureaucratic, the second political.

Technically, RISs are problematic due to data limitations—it is, for example, much more difficult to quantify the benefits of regulation than its costs (Victorian Competition and Efficiency Commission, 2011). Indeed, reviews of RISs, in Australia and elsewhere, consistently conclude that the process is not achieving its stated objectives, due to insufficient coverage, lack of resources, low levels of compliance and a reluctance by departments to prepare RISs (Carroll, 2008a). For example, the New South Wales Auditor-General stated that the "[RIS] processes were ineffective, the claimed financial benefits were inaccurate and hard to quantify, and, despite some early achievements, the measures

taken had failed to spark sustained regulatory reform over the medium term" (cited in Allen et al., 2021: 120). Likewise, the Greiner report observed that in New South Wales their quality was inconsistent, the assessments were "far from the reality" and the process was little more than a tick the box exercise, if they were prepared at all; also, that RISs were used to justify rather than inform and overall the impression was that they were "little more than a perfunctory exercise and an administrative burden on those undertaking them" (Greiner et al., 2017: 42).

Politically, RISs are problematic because they preference cost-efficiency as a public value over other values such as transparency, accountability, and equity that are equally if not more important than efficiency (Van der Heijden & Hodge, 2021). A constant theme in reviews of RISs is that they continue to allow for strategic use. This accords with an observation of the Senate Red Tape Committee that "at the end of the day, the ministerial council, or whatever decision-maker it is, still has the ability to make a decision regardless of what is in a RIS and regardless of whether an adequate RIS has been prepared" (Senate, 2018: 19). Others have argued the RIS process was introduced in Australia for ideological rather than quality reasons, supported by peak business organisations as a means of reducing regulatory controls on markets. Like all regulatory policies, the RIS process is "an intensely political process and occurs in an arena in which regulation-making is determined as much by the relative power of the participants as by process and the quality of regulatory content" (Carroll, 2008a: 29). More problematically, perhaps, over the years regulators have learned to roll with the punches of the RIS process and have become expert in the technique described by UK public and private sector leadership educator Robin Ryde as 'consent and evade' (Ryde, 2012).

One-in, X out

Over the years, the slogan 'one in, one out' has gained popularity around the globe (Short, 2018), a shorthand way of describing a process requiring each new regulation to be offset by the repeal of an existing one (or more in some schemes). The underlying assumption is that the stock of regulation is excessive and requires reduction. Such processes were introduced in the United Kingdom in 2008, followed later in Australia (Wild, Fraser, & Husek, 2017; Wild & Hussey, 2019).

While appealing because of its "apparent attractions of simplicity and rigour" (Productivity Commission, 2011: xvii), O1XO, like RISs, comes with challenges and drawbacks. For example, New South Wales introduced a 'one in, two out' policy in 2012 (Allen et al., 2021). Yet in 2016 the NSW Auditor-General reported that over the life of the policy the number of pages of legislation increased by an average of 1.4% per year whereas in the ten years preceding the policy, the number of pages decreased by 1.1% per year (Audit Office of New South Wales, 2016: 3). Likewise, in its review of regulatory reforms, the Productivity Commission concluded that while the OIXO process had a "superficial appeal", its disadvantages appeared to outweigh the advantages (Productivity Commission, 2011: Finding 4.1). In 2017, the Greiner Panel advised that while OIXO-programs offered some benefits, they were "largely unsustainable after the initial round of reforms" (Greiner et al 2017:5).

The Productivity Commission recognised that while valuable in enforcing discipline on departments in considering their regulatory stock, OIXO is likely to lead to a focus on smaller, less costly regulations and may lead to 'gaming' by agencies waiting until they wish to introduce a new regulation before removing the old one. It may also have the perverse effect of removing a regulation with a low burden in favour of one with a high burden (Productivity Commission, 2011).

Regulatory targets

Percentage or dollar targets are another popular strategy for reducing compliance costs, if for no other reason than being readily understood by the community. Targets appeal to a range of constituencies, particularly those whose focus is on (financial) regulatory burdens rather than regulation itself (Lodge & Wedrich, 2009). Commonly used targets of 25% have been announced, based on the target first used by the Netherlands, pioneers of this approach. Saving targets expressed in dollars have been in the hundreds of millions of dollars. For example, in 2009 Victoria set a target of a $500 million reduction in compliance costs to business with New South Wales, South Australia and Queensland following suit. In 2018, the Australian Government announced a reduction of $1 billion in compliance costs per year (cited in Senate, 2018).

Although governments have announced that targets set were met or exceeded (Allen et al., 2021; Productivity Commission, 2011), targets themselves have proved to be problematic—in the first instance due to technical difficulties of measurement. While reports commissioned from accounting firms and others have found reductions, independent reviews by the Victorian and New South Wales Audit Offices have been critical of regulatory reduction targets on the ground. They conveyed a level of precision that was misleading, failed to reflect all administrative and regulatory costs to business, failed to account for the costs of implementation, and did not adequately consider the wider social costs and benefits of regulation (Audit Office of New South Wales, 2016; Victorian Auditor-General's Office, 2017). These Australian experiences mirror international ones (National Audit Office UK, 2016), and, in 2019, the OECD explicitly discarded the setting of reduction targets due to "data and methodological challenges" as well as the fact such targets focus on cost reductions without consideration of regulatory benefits, failing to distinguish between necessary and unnecessary costs (Renda, 2019: 23).

Repeal days

Another weapon that has gradually joined the armoury of the war on red tape is the 'red-tape guillotine' (also known as the 'regulatory guillotine'). The idea is to rapidly count and review large swathes of regulation, and eliminate those that are redundant and unnecessary (Brefort, 2011). In Australia in 2009, following a legislative stocktake, the Commonwealth Parliament passed the *Statute Stocktake (Regulatory and Other Laws) Act 2009* (Cth), whose aim was to repeal redundant provisions. Between 2013 and 2016 the Commonwealth passed several omnibus repeal Acts which removed over 3,500 Acts or sections of Acts, which, however, did not affect the day-to-day operations of businesses or organisations.[8]

For a brief period, the process of axing large amounts of regulation was known as 'repeal day' in Australia. Repeal days catch the imagination as governments announce the removal of thousands of redundant or outdated Acts or regulations. Originally floated in Western Australia in 2012, the first ever national Repeal Day was introduced by Prime Minister Tony Abbott in 2014 "to abolish regulation and legislation that's outlived its usefulness or is doing more harm than good" (cited in Bennett & Dudley, 2014). The ambition was to remove more than 9,500 regulations, 1,000 redundant acts of Parliament, and more than 50,000 pages from the statute books. Abbott had a grand ambition to have two repeal days annually, but the process was guillotined itself in 2016 because of a lack of impact. By then it had become clear that repeal days are "political stunts", as the opposition financial spokesman

[8] See eg *Amending Acts 1901 to 1969 Repeal Act 2014* (Cth); *Amending Acts 1970 to 1979 Repeal Act 2015* (Cth); *Amending Acts 1980 to 1999 Repeal Act 2015* (Cth); *Omnibus Repeal Day (Autumn 2014) Act 2014* (Cth).

Tony Burke stated, that are "unlikely to have an effect on the business environment" (cited in White, 2016). Indeed, a central problem of repeal days is that it allows for removing 'zombie regulation' (regulations that have been forgotten by governments and business and which have no impact, Lodge & Wedrich, 2015) while leaving intact the more complex and difficult provisions, regardless of their inefficiency or cost (Victorian Auditor-General's Office, 2017).

Sunset clauses

Sunsetting is a statutory mechanism requiring subordinate legislation, but not Acts, to expire after a predetermined period, commonly 5 or 10 years, unless remade. It aims to assure the quality of regulation while simultaneously reducing the stock (Ranchordas, 2015). While adding sunsetting clauses to subordinate legislation may show a willingness to cut red tape now, effectively the cutting (and the administrative burden that comes with it) is passed on to the future. Sunsetting is challenging because the stock of regulation is vast and significant effort is required to identify and review the expiring instruments. To date it appears that many such reviews are deferred or delayed and even where replacement occurs, the total effect on regulatory burdens is difficult to estimate (Sunsetting Review Committee, 2017).

In its report on sunsetting in Australia, the Sunsetting Review Committee (2017) noted that since the sunsetting framework commenced in 2003, 2,024 legislative instruments[9] appeared on the sunsetting lists, of which 60% were either allowed to sunset, were actively repealed, or were replaced. In 2011 there were over 40,000 current legislative instruments in force, of which some 40% were thought to be spent or redundant. Many are classified as 'solely commencing, amending or repealing instruments' which do not impose any regulatory burdens. Between 2013 and 2015, 18,045 instruments were repealed under s 48E of the *Legislation Act 2003* (Cth) which allows the Governor-General to make regulations to repeal legislative instruments or notifiable instruments in whole or in part (Sunsetting Review Committee, 2017: 54). Given that many instruments are purely formal, it is not clear whether this represents a reduction in regulatory burdens or just good regulatory housekeeping.

Ironically, sunset provisions face resistance because of the regulatory and administrative burdens imposed on the bureaucracy. These include the requirements for time consuming and expensive RISs, extra workloads on staff, diversion from other reform activities, and the possible harm that might arise from inappropriate repeals (Economic Regulation Authority, 2019; Productivity Commission, 2011; Victorian Competition and Efficiency Commission, 2011). In 2017, the Greiner Review Committee concluded that the current process was resource-intensive and ineffective in ensuring that regulation remained fit for purpose. They recommended that it be removed and replaced by a commitment to regulatory stewardship and other, more focused mechanisms (Greiner et al., 2017).

A sidenote: The cost of war

To sum up: RISs, OIXOs, regulatory targets, repeal days and sunsetting initiatives suffer from the same disadvantages as many of the other strategies deployed against red tape over the decades—in Australia and elsewhere (Claude & Chertman, 2009; Majone, 1993; S. Vogel, 1996). They are relatively

[9] Legislative instruments under Commonwealth law includes regulations, agreements, approvals, by-laws, codes of practice, commencements and proclamations, determinations, standards, guidelines, measures, orders, rulings, schemes, standards and others.

blunt instruments, with the potential to waste effort on unimportant victories as well as, or instead of, important ones; they are imposed centrally on regulators who may respond by foot-dragging or outright subverting; and they are susceptible to the ever-moving caravan of political and bureaucratic priority and fashion.

What is often not discussed is that just as regulation has its externalities in the form of costs to business and economic distortions, so do attempts to reduce regulatory burdens. Saving money costs money. Better regulation offices and departmental units have both a budgetary impact and an opportunity cost. Most recently, the Commonwealth Government's 2020 deregulation package provided for $92 million over four years including $13.4 million over two years for the Deregulation Task Force (Commonwealth of Australia, 2020). Where this money comes from remains unexplained, but we may assume it is (partly) taken from normal regulatory activities. In the UK, for example, it was found that departments considered that the regulatory burdens imposed by deregulation requirements diverted their resources from genuine regulatory activity, making it harder for them to deliver desirable outcomes (National Audit Office UK, 2016).

Put differently, the easily identified monetary costs of deregulation mask the hidden costs of the numerous working groups, reference groups, forums, community of practice events, stakeholder meetings, guides, costing tools, manuals, websites, preparation for repeal days, liaison with business and community groups and others.

5 Conclusion: In praise of regulatory reform

There is no question that regulatory reform is necessary. Society and the economy are dynamic, and regulatory requirements may be outdated, duplicated by other schemes, or be superseded by technological innovations. While poor regulation is indefensible, the conflation, intentional or otherwise, of the concepts of red tape, deregulation and regulatory burdens *and* the lack of clarity between necessary and unnecessary burdens has clouded an understanding of the role of the state in society and the appropriate relationship between government, business and the community. To respond to the forever war on regulation and red tape, we suggest a different starting point. The regulatory policy settings of governments should be founded on an acknowledgement that good regulation is essential to economic and social functioning, will keep expanding in response to demographic, economic, social and technological complexity, and is generally valued by the public. In other words, the starting point should be that regulation is an asset and not a liability.

This is a less naïve hope than may at first appear. Aotearoa-New Zealand's bi-partisan approach to 'regulatory stewardship', while still a work in progress (Van der Heijden, 2021c), focuses its attention on regulatory systems as an asset of value and on advancing its leadership, culture and capability, and not on red tape reduction. Reference to regulation as an asset and the role of government as the stewards of that asset are appearing more frequently. The Greiner Committee was explicit in adopting both the language and the intent of 'asset stewardship' and this is also evident in the observation of the Western Australian review of business licences that

> Licences are not just a cost on society. Licensing schemes are established to provide economic, social and environmental benefits and protections. Licensing schemes are assets, much like other government assets, such as public infrastructure. The total stock of licensing schemes can be thought of as a portfolio of assets, some providing greater benefits and protections than others (Economic Regulation Authority, 2019: 4).

The Australian Government is now utilising the language of stewardship in describing its recently released Regulator Performance Guide, although in this instance the focus appears to be on appropriateness and a move away from one-size-fits-all in the requirements on regulators, rather than an explicit acknowledgement of regulation's public value:

> The Australian Government has adopted a stewardship approach to regulation where Ministers, Secretaries and Agency Heads are ultimately responsible for ensuring the regulations and regulatory approaches under their authority are fit for purpose.[10]

While the asset-approach to regulation is a welcome starting point, it still falls short of the sea-change in framing required. For regulation to be more widely acknowledged as a public good in and of itself (see also Balleisen & Moss, 2020; Browne, 2020), it needs to be able to continuously demonstrate that it addresses important public policy problems and effectively and efficiently assists in solving them. Much of the criticism directed at particular examples of regulatory policy, its implementation, or both, is well founded. But given the long-standing inability, even by their own admission, of our current set of political and institutional arrangements for regulatory reform to effect improvement, clearly a new

[10] https://deregulation.pmc.gov.au/priorities/regulator-best-practice-and-performance/regulator-performance-guide

approach is required. Here it is also worth mentioning that both the process of regulation and the process of deregulation face an inherent irony: what is red tape to one, is protection, assurance of rights fairness, and probity to another. In short, some will keep fighting for regulation and others will keep battling against it.

Accordingly, our second suggestion is that the Ministers and central agencies responsible for regulation as well as the pundits calling for regulatory reforms stop thinking of regulation as just the end-point of the policy cycle and merely the 'on the ground' implementation of public policy that can, in principle, be done by everyone. During the second half of the 20th century, regulation has come out of the shadows of public policy and become a professional undertaking within government (and beyond)—just like economics and law in the 18th and 19th centuries. This calls for a professionalisation of the regulatory workforce (in government and beyond) with regulatory experts doing the regulatory work (Van der Heijden, 2021a). Acknowledging that it will take time to train an expert regulatory workforce, as it has a workforce of public policy economists and lawyers, an interim approach would be to subject new regulatory reform measures to independent assessment, for example, by audit offices. Their clear-eyed observations on the effectiveness or otherwise of these programs provide valuable insights into why the battle against red tape is being lost. Likewise, experienced regulators should play a greater role in identifying improvement processes both for existing and new regulations, not as gatekeepers but as regulatory 'centres of excellence'. These approaches will help counter the hyperbolic public claims about regulatory burdens, and will nurture the kinds of knowledgeable, enduring, collaborative and trusting relationships with on the ground regulators *and* those subject to regulation that are required if lasting reform is to be embraced rather than resisted.

The combination of commitment to regulation as a public good, professionalisation of the regulatory community, and regulator-led improvement initiatives would lend new impetus to well-intentioned jurisdictional efforts to improve regulatory performance and capability. These are currently not reaching their full potential due to the lack of clarity and consistency over what successful regulation looks like, as well as the negative impact of the 'regulation as burden' narrative on regulators' capacity to recruit and retain high calibre public managers. A body including experienced regulators would also be able to constructively receive and respond to the feedback of duty holders on how particular regulators and regulations are performing, protecting Ministers from the sectional and lobby group pressures which bedevil attempts at rigorous bureaucratic process. Again, Aotearoa-New Zealand provides an example of a jurisdiction which has set itself to design a longer-term, regulator led and essentially bi-partisan commitment to regulatory improvement (Ayto, 2014).

Finally, we need to change a dynamic in which opposition to regulation is vocal, focused, and well-organised, while support for (good) regulation is dispersed and frequently muted. At the same time as organisations such as IPA wage a relentless campaign against regulation in general, and business and its lobbyists against business regulation, regulatory scholars and public intellectuals with an interest in public policy are rarely heard in the public debate. Many scholars have made significant contributions to the public debate over particular regulatory reforms, for example by submissions to government reviews and Parliamentary inquiries, while influential think tanks like the Grattan Institute have recommended improvements to the regulation of a number of critical areas including lobbying, the peer-to-peer economy, pharmacy remuneration, and private health insurance. Institutions like the OECD and the Productivity Commission and the best of the regulatory review processes make well-evidenced and insightful contributions to our understanding of regulatory challenges and potential solutions.

But when it comes to loud voices, there is no equivalent on the pro-regulation side to the combined weight of the likes of the IPA and the business lobby. We conclude with a call to action: if we want to move the public conversation from rhetoric about red tape to real and meaningful dialogue about the challenging means and ends of regulation, we need to speak up, loudly and frequently, about its value. At the end of the day, the ongoing conflation of regulation with red tape, intentional or not, will not yield regulatory improvement—it will not get us any closer to, citing the Minister once more, making "Australia one of the best countries in the world to live in" and ensure it has a "well-functioning economy, society, environment and democracy".

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