Clause For Concern

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Counting restrictive clauses in legislation is a powerful tool to reduce red tape, argues Darcy Allen.

It is time for a new approach to red tape reduction. Governments seeking to systematically reduce red tape need a metric by which they can measure their success or failure.

In particular, we need to focus on ‘regulatory restrictions’ or ‘restrictiveness clauses’ in regulations—providing a nuanced and granulated approach which complements targeted reforms.

The commonwealth and state governments must address Australia’s over-regulation and red tape problem. Typically, governments reform particular sectors or regulations, but this can and should be complemented by a process which measures the regulatory burden and places institutional constraints on the regulatory process itself.

The former approach is characteristic of the first of three phases of regulatory reform in Australia, which were:

- Hawke-era reforms of the 1980s
- National Competition Policy framework in the 1990s
- Howard-era reforms, with COAG

The first was fundamentally backward-looking—aimed at the stock of existing regulations. It was reliant on political will and appetite for reform, and required subjectively-evaluated decisions by fallible policy makers. There is also the incentive problem: regulatory costs are dispersed but the benefits of political action are concentrated in the hands of the few, leading to interest group formation and rent-seeking.

Partly in response to this, a new complementary approach to regulatory reform emerged: red tape reduction policies and procedures. These institutionalised mechanisms include:

- dedicated parliamentary sitting days to repeal legislation
- implementation of regulatory budgets
- one-in-two-out policies.

Unlike the traditional reform approach, which relies on identifying and reforming specific regulations driven through political will, institutional red tape policies and procedures force the cutting of existing regulatory burden and preventing the future growth of burden by containing the actions of policymakers themselves.

This is achieved by shifting regulatory incentives—that is, changing the rules of the game within which regulators may regulate—and ultimately binding regulators to behave in certain ways.

In this way red tape policies and procedures can be understood as a set of constitutional rules that are implemented above the regulatory process.

Alongside this shift, governments and think tanks have sought to measure and quantify the regulatory burden through a range of measures including pages of legislation, complex calculations of the cost impact of regulation, the time needed to comply with regulation, and the file size of regulation. This focus on quantification enables reform success or failure to be benchmarked.

In the early 1980s Australian economic reform was characterised by specific sectoral reforms. Then, in the late 1980s and early 1990s, Australian policymakers shifted away from emphasising specific areas of reform to a more generalised focus on the introduction and management of the regulatory process itself. For instance, the first Commonwealth regulatory assessments were introduced in 1986—which were the first form of what are now called Regulation Impact Statements (RIS).

With the Howard government came a further push for regulatory oversight and reform of ministerial portfolios. This push was in part due to the influence of business groups, culminating in

the Banks Inquiry, which recommended more than 100 specific reforms to existing regulation and also recommended more effective processes for regulatory reform, including a cost-benefit approachto regulation and the strengthening of RIS processes.

From 2014 there was a greater focus on measurement and quantification of the regulatory burden. The process established a $65 billion baseline measurement of regulatory burden, which is likely to be a significant underestimate of the entire cost of the regulatory burden.

THE COMMONWEALTH AND STATE GOVERNMENTS MUST ADDRESS AUSTRALIA'S OVERREGULATION AND RED TAPE PROBLEM

This was coupled with red tape reduction mechanisms (such as biannual red tape repeal days) and commitments to reduce red tape (cutting the cost of regulation by $1 billion annually). These red tape repeal days were modelled on an earlier Western Australian approach, but were later abandoned in 2016. This red tape repeal push, while focusing more heavily on mechanisms of red tape reduction and claiming to have made decisions to cut red tape by over $4 billion, has since been criticised as only cutting the low hanging fruit of the regulatory burden.

What is clear from this evolution of regulatory reform is a movement away from specific sectoral reform to the rise of institutionalised mechanisms to cut red tape. Furthermore, with this rise in institutionalised red tape reduction policies and procedures has come the need for measurement of regulatory burden.

All measurements of regulatory burden, owing to the problem of subjective costs and an uncertain future, are necessarily proxy measures (that is, an indirect measure of the desired outcome which is itself strongly correlated to that outcome). Red tape costs are an indirect measure of the burden of regulation, and can never wholly take into account the entire opportunity cost, which is all of the social and economic benefits which could have occurred if the red tape had not been present.

Nevertheless, various government departments and other organisations such as think tanks have developed proxies for the regulatory burden as the first step in the red tape reduction process, establishing a baseline against which progress can be measured. To date the major focus has been on creating dollar cost estimates of red tape burden as the Regulatory Burden Measurement Framework.

Other proxies of regulatory burden include the number of pages of legislation, number of Acts passed, or the file sizes of regulatory instruments. Each of these measurements are useful, but face various shortcomings. For instance, a common proxy for regulatory burden is the number of pages of legislation. In Australia, the Commonwealth has more than 100,000 pages of federal legislation, with 4094 pages of legislation passed through the federal parliament in 2016 alone, continuing on a persistent upward trajectory. While the page count approach is (and verifiable by third parties), not all pages of legislation are equal. One page that introduces a carbon tax may be much more burdensome than a page of redundant legislation with no effect. Furthermore, this type of measure does not support sophisticated models of institutional red tape reform — such as

the one-in-two-out approach.

Recently, variations on a new type of baseline red tape measurement have emerged in Canada, the United States and briefly here in Queensland, Australia. This new measurement involves counting the number of ‘restrictive clauses’ found in legislation. These are clauses that restrict, prohibit or compel individuals and businesses from or to certain actions, with words such as ‘shall’, ‘must’ and ‘cannot’.

> FROM 2001 TO 2017 BRITISH COLUMBIA REDUCED THE NUMBER OF REGULATORY RESTRICTIVENESS CLAUSES FROM 330,812 TO 170,140, A 48 PER CENT REDUCTION

A new measurement of red tape burden must complement existing measures in some way. Developing a baseline of restrictive clauses overcomes many of the shortcomings of other forms of red tape measurement for several reasons. Restrictive clauses may be more representative of the effect of regulatory burden because they are directly associated with the impact a rule has on human decision making. Further, restrictive clauses may be more nuanced for political operationalisation because they enable regulators to operate at a lower level of reform than repealingentire Acts or pages of legislation. Creating and updating a baseline of restrictiveness clauses can also be undertaken by third parties and at a relatively reasonable cost. Perhaps most importantly, however, a restrictiveness clauses approach to red tape reform has been demonstrably successful over the long term in the Canadian province of British Columbia.

British Columbia’s efforts at institutionalised red tape reform began in 2001 when a newly elected government aimed to reduce the regulatory burden by a third. One of the tasks of the appointed minister of state for deregulation, Kevin Falcon, was to develop a new measurement of red tape off which the government could determine its success. Falcon decided to use ‘regulatory restrictions’ as a way to measure and benchmark regulatory reform. This unique form of measurement was defined as any ‘action or step that a citizen, business, or government must take to access government services or programs, carry out business or pursue legislated privileges’. Each ministry was required to count all of their regulatory requirements within their statutes, regulations and policies. This data was then fed into a database, and portfolios were given regulatory budgets of regulatory restrictions which they must cut.

These red tape reform efforts were remarkably successful. From 2001 to 2017 British Columbia reduced the number of regulatory restrictiveness clauses from 330,812 to 170,140—a 48 per cent reduction.

In approximately a decade, it went from being one of the worst-performing provinces to one of the best in Canada. Furthermore, this reform success has lasted across changes in government with policies such as one-in-two-out (which at one stage went up to one-in-five-out, but has since been decreased to one-in-one-out). Furthermore, the success of the red tape restrictiveness clauses in the province of British Columbia led to the Canadian government being the first country in the world to legislate a one-in-one-out policy in 2015, following the success of the policy from 2012 to

2014. These successes led to a similar approach to red tape reduction in Queensland.

For a short time, the Newman government (2012-2015) adopted a similar restrictiveness clauses approach. Its adoption followed a Queensland Competition Authority (QCA) issues paper and interim report in late 2012, which recommended the adoption of a British Columbia-style approach to counting obligations. The QCA saw the 'regulatory requirements' measure as supplementing existing red tape measures, such as page counts and in dollar terms, which would all be used together to reduce the regulatory burden. The new count approach for Queensland, however, was directly modelled off the British Columbia approach—with the calculation of baseline count of 'regulatory requirements'. The baseline count of 265,189 regulatory requirements in Queensland was first made on 23 March 2012. By 30 June 2013 that number has fallen by 4 per cent (9,404 fewer regulatory requirements). The Newman Government aimed to have a 20 per cent net reduction in regulatory burden over six years, but the approach was abandoned by the ALP Government when it took office in 2015, instead focusing on the compliance costs of regulation.

> ONE OF THE CRITICAL FEATURES OF A SUCCESSFUL RED TAPE REDUCTION STRATEGY IS THAT IT REMAINS IN PLACE OVER CHANGES IN GOVERNMENT

One of the critical features of a successful red tape reduction strategy is that it remains in place over changes in government. There are several potential ways to achieve this. As is the case in Canada, governments could legislate red tape reduction mechanisms rather than simply having a policy. In the absence of this, however, it is also useful to use measurements of red tape that can be effectively counted by third parties such as think tanks. The Mercatus Centre at George Mason University in the United States has recently automated a similar approach to counting regulatory restrictions called RegData 2.0.

A team of researchers has developed a panel of data of the restrictiveness of regulation through textual analysis of the Code of Federal Regulations (CFR). This approach seeks to create a time series to map the number of regulatory restrictions within US legislation as well as measuring industry-level regulatory burden using machine learning, known as RegData 2.2. This nuanced measurement approach combined with creating industry specific training documents, has enabled within and between-industry econometric analysis of the burden of regulation. Researchers at RMIT University and the Institute of Public Affairs are investigating means to apply the RegData methodology to Australian regulation. Applying this approach outside of the United States, however, requires a further step of first developing a database of existing Commonwealth legislation, given the lack of a real time equivalent of the comprehensive Code of Federal Regulation.

The benefit of such an automation is not only to provide context to the broader challenges of red tape expansion—that is, by providing restrictiveness clauses (or similar) counts across a longer time frame—but also to introduce a level of accountability and measurement that is cost effective and can be calculated even when political will for targeted economic reform is lacking.

With the increase in meta-regulation of the regulatory process through red tape policies and

procedures there have been many issues of measuring the regulatory burden. While more effective measurement and red tape reduction policies and procedures should not be seen as substitutes to targeted economic reform, they are a complementary institutional approach to traditional economic reform and hold a clear place in tackling Australia's red tape crisis.

This new approach to red tape measurement—through the counting of restrictiveness clauses—presents a fruitful path for the future red tape reduction mechanisms as a more granulated approach to the political economy challenges of red tape reduction.

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