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THE GROWTH OF RED TAPE

Causes and Solutions

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Executive Summary

At a time when Australia faces a broad range of economic challenges, red tape remains a significant barrier to economic recovery and opportunity.

- This report finds that the volume of regulatory restrictions in federal law is at its highest level in recorded history, with 371,514 regulatory restrictiveness clauses.
- The number of regulatory restrictions in federal law has increased by 88 per cent since 2005. It has grown by 18 per cent since 2014, the last period in which a federal government made a concerted effort to cut red tape.
- Red tape is now demonstrably undemocratic. Laws made by ministers and regulators, rather than those passed by the elected parliament, have accounted for almost 97 per cent of new regulatory restrictions since 2005. For every one regulatory restriction introduced in primary legislation at the federal level between 2005 and 2022, 28 regulatory restrictions were created in delegated legislation.

This report explores five ideas to reduce red tape which have been successfully adopted either in Australia or by governments abroad:

1. Scheduling **parliamentary repeal days** where parliament sets aside a sitting day to only remove legislation.
2. Implementing the **one-in-two-out rule** requiring ministers and regulators to remove at least two existing regulations when creating a new regulation.
3. Establishing **red tape e-hubs** as a communication channel for individuals, businesses, and regulatory bodies to identify and address excessive regulation.
4. Expanding the use of **regulatory sandboxes** whereby businesses can test ideas under relaxed regulatory conditions.
5. Mandate the **sunsetting of government agencies**, where government bodies are scheduled to be automatically abolished unless a review recommends otherwise.

This report also explores five ideas to reduce red tape which have not yet been implemented but could meaningfully address overregulation:

6. Requiring **parliament to approve all new rules** created by ministers and regulators prior to commencement.
7. Setting **a cap on regulation**, whereby limits are placed on the number of new rules regulators can make in a given period, such as a term of parliament.
8. **Incentivising regulators** to cut red tape, by either penalising the creation of excessive regulation or rewarding regulators who removed red tape.
9. **Incentivising agencies,** by either adding or reducing funding depending on whether the agency added or reduced red tape.
10. Inserting **sunset clauses** in all new legislation so that new laws are periodically re-approved by parliament to remain in force.

Introduction

At a time when Australia faces a broad range of economic challenges, red tape remains a significant barrier to economic recovery and opportunity. Research by the Institute of Public Affairs in 2016 estimated that red tape costs the Australian economy $176 billion each year in terms of foregone economic output, which at the time accounted for one-tenth of Australia's gross domestic product. This estimate is more than just a financial estimate, but captures the many social, economic, and humanitarian costs associated with the businesses which were never started, the jobs never created, and the ambitions stifled by bureaucratic interference.

These costs are imposed at a time when Australia's national debt level is expected to reach $1.17 trillion by 2026,[1] contributing to a historic inflationary economic environment and rising costs of borrowing. Business investment as a percentage of the economy is near a record low,[2] and the country is facing persistent worker shortages, with over 390,000 job vacancies and over a fifth of businesses unable to find the workers they need.[3]

Despite the economic challenges, government continues to intrude into the lives of Australians through excessive regulation and bureaucratic interference more and more each year. This research report measures that growth, by updating research by the Institute of Public Affairs published in the 2019 research report, *The Growth of Regulation in Australia*. In 2019, IPA researchers collaborated with researchers at the Mercatus Center at George Mason University in Virginia to localise and apply the RegData methodology to measure the volume of regulatory restrictions in Australian law.

'RegData' is a red tape measurement approach that captures the restrictive nature of red tape. It uses machine learning-based textual analysis of the register of legislation to measure the actual restrictive content of legislation and regulations through words such as 'shall', 'must', 'should', and 'prohibited'. The output of RegData is thus a count of 'regulatory restrictiveness clauses' within a jurisdiction.

1 Daniel Wild and Kevin You, *Australia's Debt Disaster: Estimating Interest Payments on Federal Government Debt by 2030* (Institute of Public Affairs Research Report, 2022).

2 Australian Bureau of Statistics (2023) 'Australian National Accounts: National Income, Expenditure and Product, March 2023' (7 June 2023): https://www.abs.gov.au/statistics/economy/national-accounts/australian-national-accounts-national-income-expenditure-and-product/latest-release.

3 Australian Bureau of Statistics (2023) 'Job Vacancies, Australia, August 2023' (28 September 2023): https://www.abs.gov.au/statistics/labour/jobs/job-vacancies-australia/latest-release.

Applying this to the Australian environment, our analysis can determine the raw number of regulatory restrictiveness clauses in Australian law, as well as the growth of such clauses over time. While it is possible to analyse the number of regulatory restrictiveness clauses in primary legislation going back to 1973, we can only analyse delegated legislation – or regulations – from 2005 due to limitations of public data.

The analysis finds that red tape in Australia, federally, as measured by the number of regulatory restrictiveness clauses, is at its highest in recorded history. The number of regulatory restrictions in federal legislation—primary and delegated combined—in 2022 was 371,514, a figure that is 88 per cent higher than 2005 levels.

Through this analysis we can observe the trends of regulatory growth over time, including the periods when regulatory activity accelerated. Despite its reputation for deregulation, the period from the mid-1980s to the mid-1990s was marked by high rates of regulatory activity through primary legislation. Since that period, restrictiveness has continued to trend upwards, with only a brief period in 2013 and 2014 when the number of regulatory restrictiveness clauses declined by 23,029 from 2012 levels, an 11 per cent decrease.

Many governments acknowledge the importance of removing unnecessary regulation, but often fail to follow through on regulatory reduction. A key reason for this is the difficulty faced in identifying where excessive regulation exists, and lacking the mechanisms or tools to then remove the red tape. But these tools have either existed in the past, or are currently being used in other countries with success. This report explores and analyses domestic and international case studies to find appropriate and effective deregulatory mechanisms that Australian governments should consider to tackle the red tape problem.

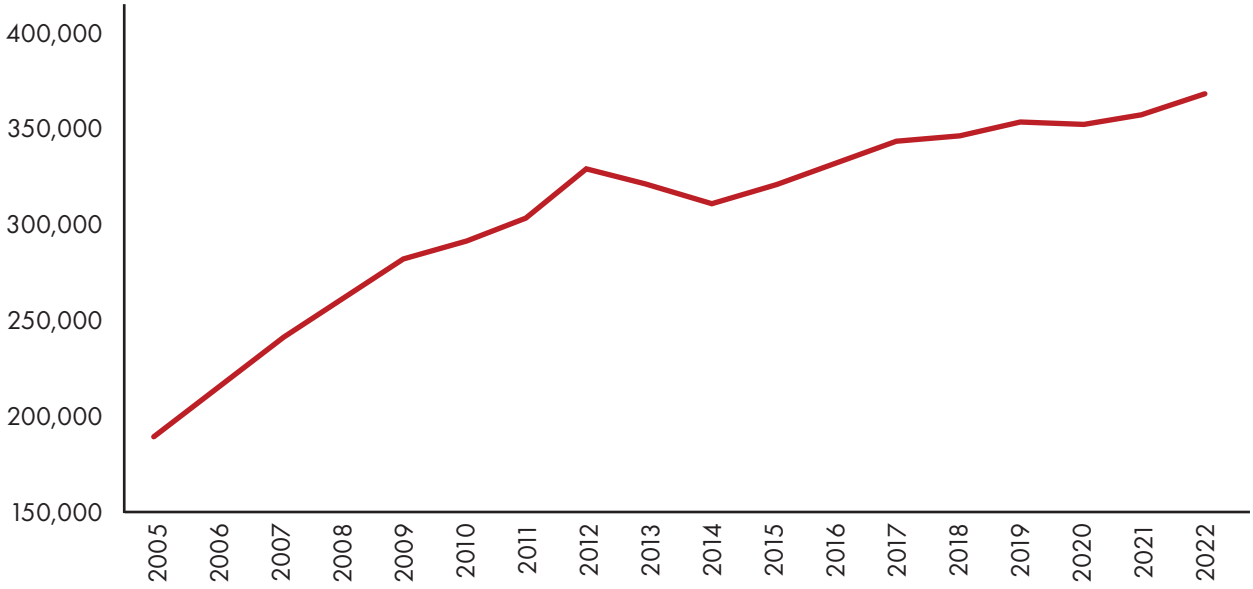
Analysis of federal regulatory restriction count

Australians are facing an unprecedented level of red tape, with the number of regulatory restrictiveness clauses in federal law increasing by approximately 88 per cent since 2005, the earliest point in time that RegData can conduct a complete analysis of federal legislation.

Legislation refers to both primary legislation (laws passed directly by parliament, also known as Acts of Parliament) and delegated legislation (rules and instruments created by ministers and regulators by virtue of an authority conferred on them by parliament, commonly known as regulations).

According to the RegData analysis, the number of clauses in federal primary legislation and federal delegated legislation imposing a regulatory restriction is currently 371,514, the highest in recorded history (Chart 1).

CHART 1: *Total number of regulatory restrictiveness clauses in federal law, 2005-2022*



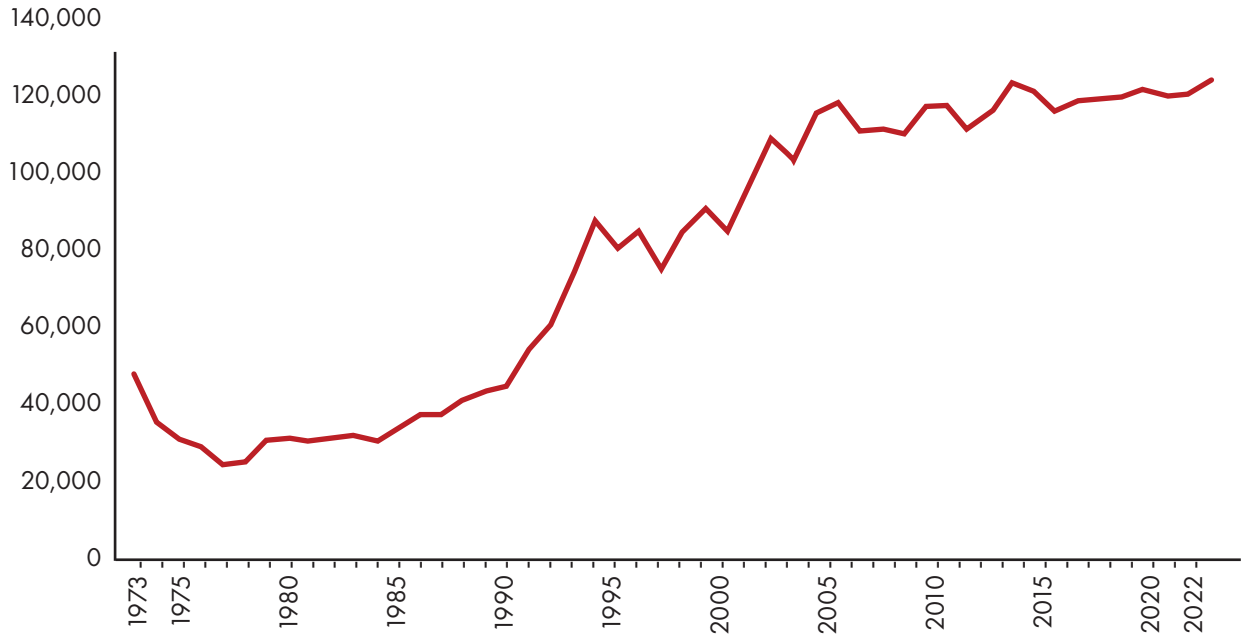
Source: RegData (2022)[4]

It is possible to analyse trends in primary legislation and delegated legislation separately.[5] It can be observed that the number of regulatory restrictiveness clauses in both primary legislation and delegated legislation are separately at their highest level in Australian history.

4 Patrick A. McLaughlin, Jonathan Nelson, and Stephen Strosko, 'RegData Australia (dataset)' (2022) *QuantGov* <https://www.reghub.ai/>. NOTE: Data is accurate as at 31 December of each year, with the exception 2022 which is accurate as of 15 September 2022 (the date the RegData dataset was released).

5 As noted in the introduction, RegData can analyse primary legislation dating back to 1973, whereas delegated legislation data only date back to 2005.

CHART 2: *Regulatory restrictiveness clauses in primary legislation, 1973-2022*



Source: RegData (2022)

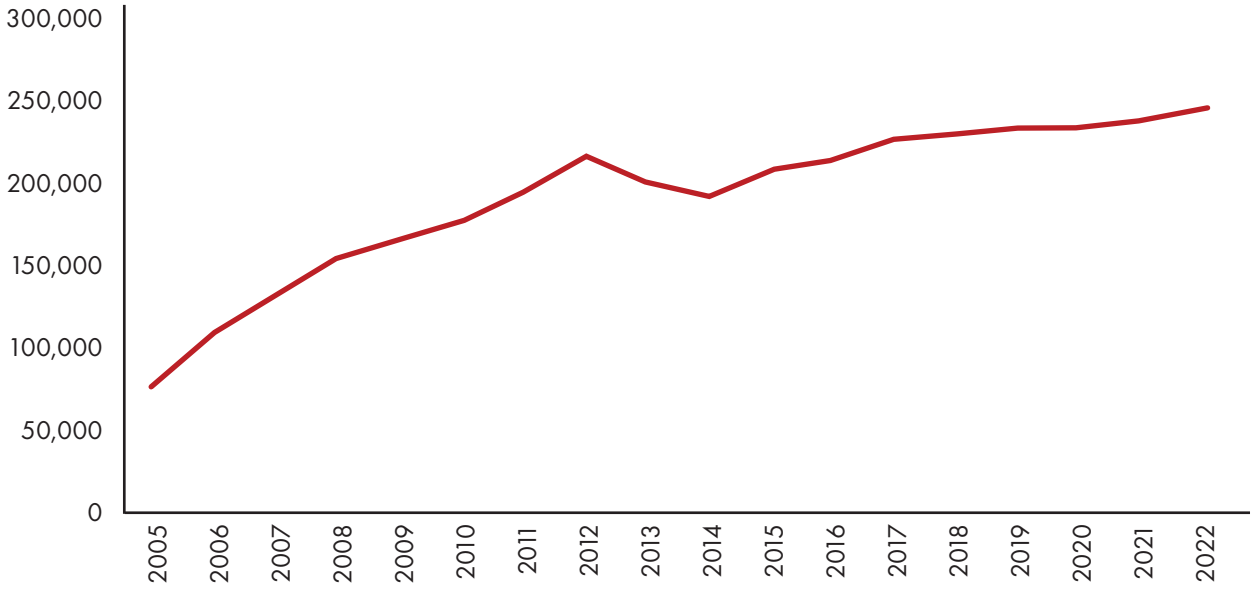
Regulatory growth in primary legislation has clearly trended upwards since the late 1970s. According to RegData, the number of regulatory restrictiveness clauses in primary legislation saw a decrease and subsequent stagnation in the mid to late 1970s, before a substantial expansion from the mid-1980s to the mid-1990s.

Regulatory growth has trended upwards over the past 25 years, off the back of substantial legislative activity such as the *Corporations Act 2001*, which as of 2022 is the Act containing the most frequent occurrences of restrictive clauses. Other restrictive acts of parliament passed over the past quarter century include the *Environment Protection and Biodiversity Conservation Act 1999*, the *Fair Work Act 2009*, the *Clean Energy Act 2011*, and the *Minerals Resources Rent Tax Act 2012*.

An additional observation arising from the data is the extent to which regulation—or deregulation—is now occurring in delegated legislation, rather than primary legislation. Indeed, the only period of significant regulatory reduction since 2005 occurred in 2013 and 2014, where overall the number of restrictive clauses decreased by 17,498, but the number of restrictive clauses in delegated legislation actually declined by 23,029.

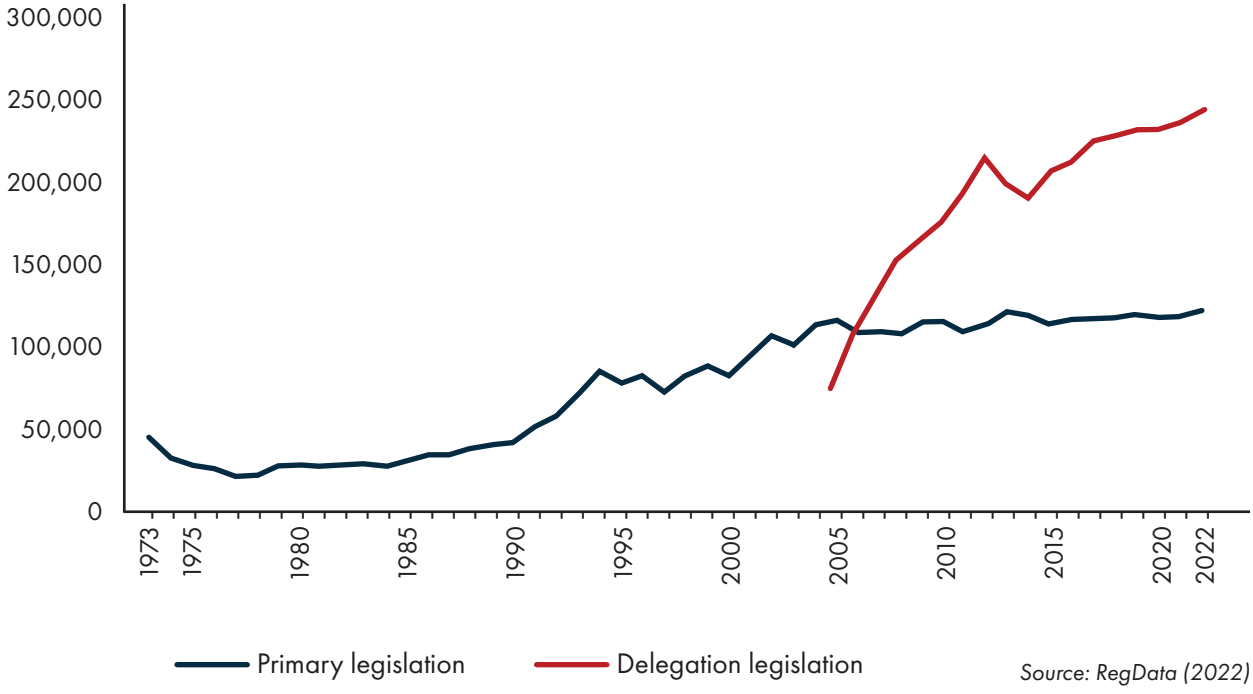
Future red tape cutting initiatives should look to delegated legislation as a tool to reduce the regulatory burden on Australian enterprise.

CHART 3: *Regulatory restrictiveness clauses in delegated legislation, 2005-2022*



Source: RegData (2022)

CHART 4: *Comparison of regulatory restrictiveness clauses in primary legislation and delegated legislation*



Source: RegData (2022)

The majority of regulation growth since 2005 has occurred in delegated legislation. Restrictive phrases in delegated legislation have increased by 168,037 since 2005, while primary legislation has only seen an increase of 5,819 restrictive phrases in that time (Chart 4).

In net terms, 96.7 per cent of the growth in regulatory restrictiveness clauses has occurred in delegated legislation, compared to the 3.3 per cent which has taken place in primary legislation. In other words, for every one restriction introduced in primary legislation, 28 restrictions have been introduced in delegated legislation.

This analysis highlights the trend in Australian governance away from rule by parliament towards rule by unelected regulators. Regulatory restrictiveness clauses found in delegated legislation now make up the majority of all restrictive clauses in Australia's federal regulatory framework. In 2005 it constituted 39.5 per cent of restrictive clauses. By 2022 it constituted 66.3 per cent. This means that almost two-thirds of federal restrictions currently in force are not the product of debate and approval by the elected parliament.

Notably, this count of restrictions does not include an analysis of quasi-regulatory documents published by government departments and agencies that lack official legal status but nonetheless have restrictive effects in practice. IPA research in 2019 identified 56,965 pages of quasi-regulatory documents created by just five major federal agencies in the banking and finance sector.[6] Quasi-regulatory documents are even more removed from democratic oversight and accountability than delegated legislation, but are not able to be measured by RegData as such documents are not collected or stored in a central database (such as the Federal Register of Legislation).

Compounding the undemocratic trend is the fact there are provisions in legislation that allow for delegated legislation to be exempt from scrutiny and disallowance by the Commonwealth parliament altogether. For any red tape reduction effort to be successful, these provisions must be removed so that future regulation is subject to parliamentary oversight and disallowable by the elected parliament.[7]

6 Kurt Wallace, *Regulatory Dark Matter: How Unaccountable Regulators Subvert Democracy by Imposing Red Tape without Transparency* (Institute of Public Affairs Research Report, 2019).

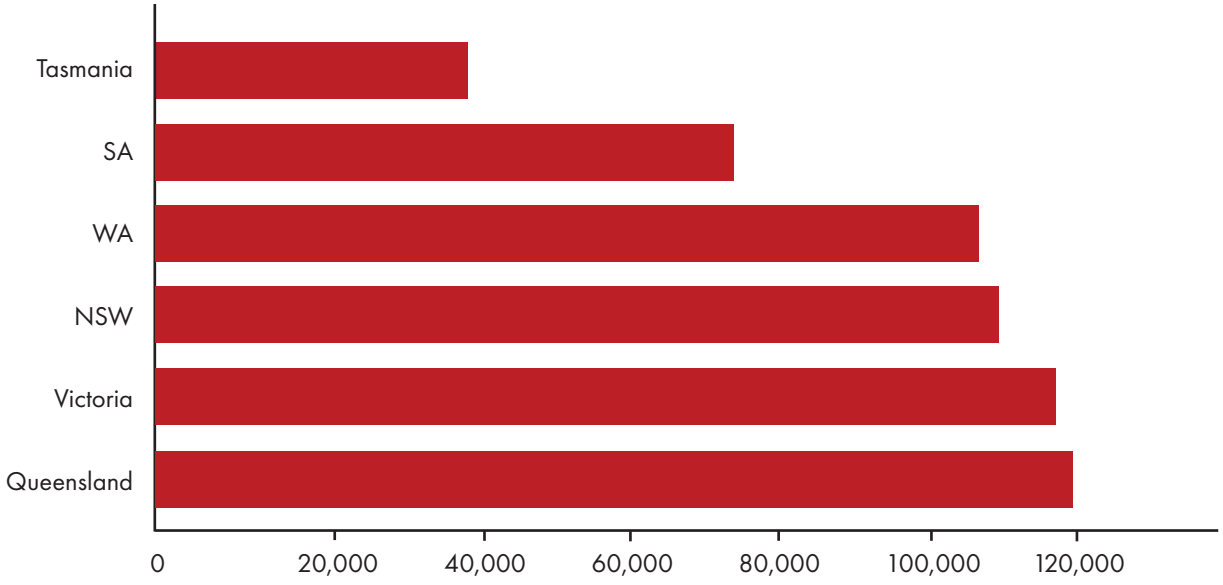
7 Dara McDonald and Morgan Begg, *Bypassing Democracy: A Report on the Exemption of Delegated Legislation from Parliamentary Oversight* (Institute of Public Affairs Research Report, 2020).

Analysis of state regulatory restriction count

Since the IPA last conducted regulation analysis with RegData, all Australian states have increased the amount of red tape in their regulatory frameworks.

- Queensland has the most regulatory restrictions with 121,356 restrictions, up from 118,765 in 2019.
- Victoria: 119,126 restrictions, up from 113,737 in 2019.
- New South Wales: 111,494 restrictions, up from 107,726 in 2019.
- Western Australia: 108,927 restrictions, up from 107,812 in 2019.
- South Australia: 76,564 restrictions, up from 75,222 in 2019.
- Tasmania: 41,375 restrictions, up from 39,514 in 2019.[8]

CHART 5: *Number of restrictive phrases in state laws in 2022, by jurisdiction*



Source: RegData (2022)

At a state level, Queensland imposes the most regulatory restrictions in the nation, followed closely by Victoria.[9] However, the gap between Queensland and Victoria is closing: the proportional increase of regulatory restrictions in Victorian laws since 2019 (4.74 per cent) was more than twice as high as the increase in Queensland over the same period (Chart 6).

These findings support previous IPA research which demonstrates the Victorian economy is falling compared to the rest of the country. Victoria's economy is struggling to recover from state government policies implemented during the COVID-19 pandemic, which had a direct economic and fiscal cost of $218.7 billion between 2020-21.[10] Additionally, Victoria's economy is at the greatest risk of stagnation due to rising levels of government debt resulting from systemic budget deficits.[11]

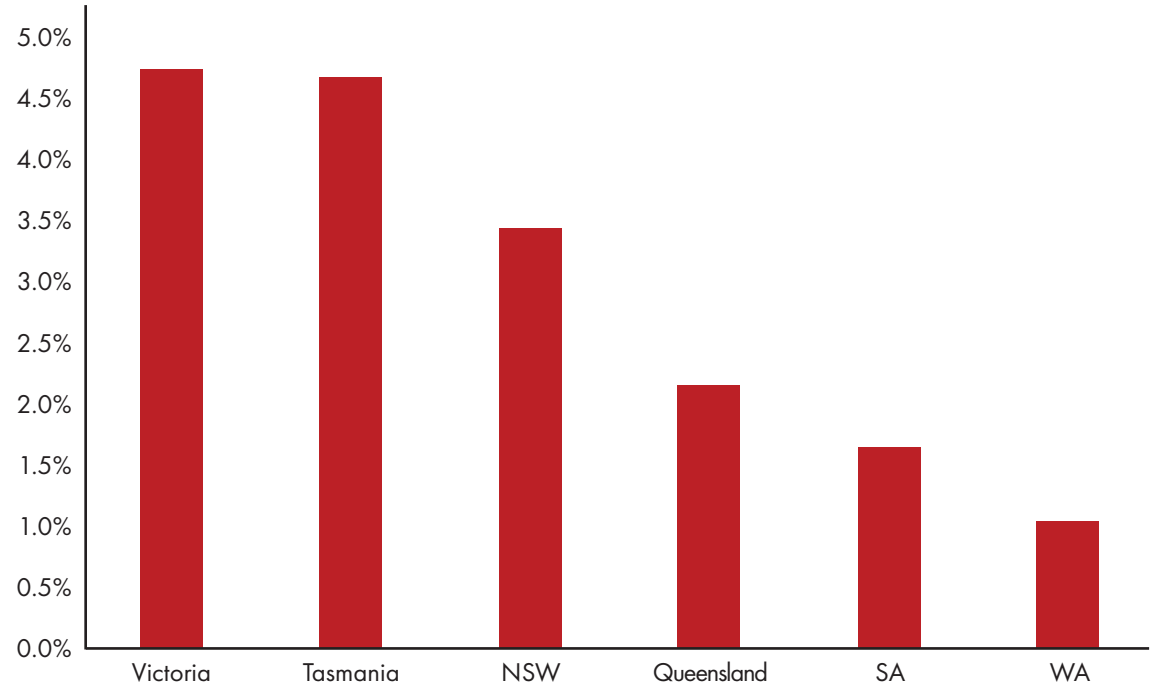
8 Daniel Wild and Cian Hussey, *The Growth of Regulation in Australia* (Institute of Public Affairs Research Report, 2019).

9 Ibid.

10 Morgan Begg and Daniel Wild, *Hard Lessons: Reckoning the Economic, Social, and Humanitarian Costs of Zero-Covid* (Institute of Public Affairs Research Report, 2022).

11 Daniel Wild and Kevin You, *Victoria on the Edge: Debt, Deficits and Unsustainable Growth* (Institute of Public Affairs Research Report, 2022).

CHART 6: *Percentage increase of regulatory restrictions by state, 2019 to 2022*



Source: RegData (2022)

RegData also measures the total number of words contained in state legislation and regulation. This allows for an estimate of how time consuming it can be for regulated actors to avail themselves of the extent of regulation which applies to them. The time required to read regulations has increased drastically since 2019. Specifically:

- Victorian legislation and regulations contain 20.9 million words which would take 29 weeks to read. In 2019 it would have taken 27 weeks to read.
- NSW legislation and regulations contain 20.6 million words which would take 29 weeks to read. In 2019 it would have taken 28 weeks to read.
- Queensland legislation and regulations contain 18 million words which would take 25 weeks to read. In 2019 it would have taken 24 weeks to read.
- Western Australian legislation and regulations contain 16.2 million words which would take 23 weeks to read. In 2019 it would have taken 22 weeks to read
- South Australian legislation and regulations contain 12.9 million words which would take 18 weeks to read. In 2019 it would have taken 17 weeks to read.
- Tasmanian legislation and regulations contain 7.9 million words which would take 11 weeks to read.[12] In 2019 it would have taken 10 weeks to read.[13]

Mechanisms to stop the growth of regulation

In Australia, the amount of red tape in the economy has never been higher. A reason why the red tape problem has been getting worse, and is yet to be solved, is because past governments have been poorly equipped, lacking the tools and mechanisms to address the problem.

Governments often admit that there is excessive regulation and make commitments to fix the problem. But they often fail to implement the necessary steps to address the problem.

The federal government has only had one deregulatory period in the 21st century. This was because it implemented a red tape reduction program to ensure a policy target was met.

Having a proven and successful red tape reduction program is crucial to reducing red tape. Without a plan, any government promise to reduce red tape cannot be met as there is no method driving the promise.

Programs adopted by governments abroad which have successfully reduced red tape have explicitly addressed three components: a metric, a target, and a method.

Metrics that are used to quantify red tape vary. They include dollar cost estimates, the number of acts passed, the number of pages in legislation, the size of regulatory documents or the number of restrictive clauses found in legislation. The metric or benchmark acts as an important key, enabling an assessment of whether regulation has increased or decreased. The number of restrictive clauses is the metric that this report uses in quantifying the level of red tape in the economy.

The next component is setting a clear goal stating how much the government intends to reduce the red tape burden by. For instance, the government may decide it will decrease red tape by 20 per cent over five years.

The last component of the program would be a method of reduction—or a mechanism. For example, the adoption of a two-in-one-out rule whereby the government mandates that two regulatory rules be eliminated for every new regulatory rule that is introduced. In this paper, we will refer to this framework as the Ideal Regulatory Budget.

This section of the report provides five deregulation programs that have been successfully implemented either domestically or internationally, and five that could be implemented but have not.

Resurrect repeal days in parliament

In 2014, the federal government adopted a framework which was consistent with the Ideal Regulatory Budget. It involved establishing a benchmark, setting a target and creating a method to reduce red tape. The benchmark was an economic calculation of the estimated cost of red tape. The target was a reduction in the cost of regulatory burden of $1 billion annually. And the method was the introduction of bi-annual red tape repeal days in parliament.[14]

CASE STUDY: Australia (2014-2016)

A new law was introduced in 2014 to allocate two days each year whereby parliament sat to exclusively repeal or amend subordinate legislation. This was the *Omnibus Repeal Day (Autumn 2014) Act 2014*.[15] This approach was abandoned in 2016 by the Turnbull government, as it claimed the success of the repeal days made the tool redundant for future use.[16]

The targeted effort by the Abbott government to reduce red tape was a success, which is reflected in the Reg Data analysis. There was a decline in the number of restrictive clauses found in legislation and regulation. Prior to taking office in 2012, there was a total of 332,861 restrictions. This number dropped to 315,363 by 2014, representing a five per cent decline. It is worth noting that this is the only observed decline in restrictions in both legislation and regulation from one year to the next since 2005. This coincides with data released by the Australian National Audit Office, which highlighted that the measures to reduce the regulatory burden resulted in a reduction of regulatory costs amounting to $4.8 billion over two years, exceeding the $1 billion annual target.[17]

Furthermore, in the past decade there has been only one observed period of decline in the number of federal government bodies. Federal government bodies include agencies such as the Clean Energy Regulator, the Reserve Bank of Australia, and the National Heavy Vehicle Regulator. The decline in federal government bodies occurred between 2013 and 2015, from 1332 bodies to 1182.[18] This demonstrates that the focus on reducing red tape not only successfully repealed restrictive laws and regulations, but also reduced the number of federal government agencies capable of producing and enforcing regulation.

14 Darcy Allen and Chris Berg, *Australia's Red Tape Crisis* (Connor Court Publishing, 2018) 214.

15 *Omnibus Repeal Day (Autumn 2014) Act 2014* (Cth).

16 Sid Maher, 'Success makes red tape repeal days redundant', *The Australian* (4 February 2016).

17 Australian National Audit Office, *Implementing the Deregulation Agenda: Cutting Red Tape* (2016) 19.

18 The number of federal government entities is listed at the Australian Government Organisations Register.

Implement a one-in-two-out rule system for the introduction of regulation

The one-in-two-out rule mandates that for every new regulation created, at least two prior regulations be identified for elimination. The rule has been successfully implemented in the United States during the presidency of Donald Trump, in the UK, and in several Canadian provinces. Its predecessor, the one-in-one-out rule, has been implemented by governments such as those in Germany, Spain, Finland, and Canada. Although adopted far more widely, the one-in-one-out rule has had far less success in reducing red tape when compared with the one-in-two-out rule.

CASE STUDY: British Columbia

In 2001, the Government of British Columbia, Canada, successfully formulated and executed a plan to reduce red tape. At the time, the state was one of the worst performing provincial economies in the country. From 1994 to 2001, British Columbia's economy grew at a rate of 2.5 per cent annually, whereas the national economy grew at a rate of 3.9 per cent annually. In response, the provincial government embarked on a novel, first of its kind regulatory reform program to improve economic growth.

The successful reform policy was consistent with our Ideal Regulatory Budget. It included:

- **Establishing a benchmark or metric for red tape:** The count of 'regulatory requirements' was the proxy used to benchmark and measure regulatory stock. The definition of 'regulatory requirements' was 'any action or step that a citizen, business or government must take to access government services or programs, carry out business or pursue legal privileges'.[19] Each ministry was required to count all their regulatory requirements within their acts, policies, and regulations – which totalled 330,812 regulatory requirements.[20]
- **Outlining a target:** The government set a clear goal of reducing red tape (count of regulatory requirements) by one third over three years. Meaning by 2004, the goal would be achieved if the province enforced fewer than 220,541 regulatory requirements across the economy.
- **Mandating a method:** In an effort to achieve the abovementioned target the government imposed a regulatory budget upon itself, mandating that two regulatory rules be eliminated for every additional rugulatory rule introduced. This has become to be known as the one-in-two-out rule.

The regulatory budget program was a success. By the end of 2004, the number of regulatory restrictive clauses had been reduced by 37 per cent and British Columbia's economic performance improved dramatically. Previously trailing the national economy in terms of GDP growth, British Columbia ended up surpassing the national rate. Between 2002 and 2006, provincial GDP was 1.1 percentage points above the national average. [21]

Furthermore, by 2017, the number of regulatory restrictive clauses had decreased to 170,140. This represents a 48 per cent reduction since efforts started in 2001.

19 Bentley Coffey and Patrick A.McLaughlin. *Regulation and Economic Growth: Evidence from British Columbia's Experiment in Regulatory Budgeting* (Mercatus Centre, 2021).

20 Ibid.

21 Laura Jones, *Cutting Red Tape in Canada: A Regulatory Reform Model for the United States* (Mercatus Centre, 2015) 3.

CASE STUDY: United States (2017-2021)

Within days of taking office, President Trump issued Executive Order 13771 – *Reducing Regulation and Controlling Regulatory Costs*. The executive order stated, 'whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.'[22] Through the setting of the regulatory target, the administration had established the two metrics which they were to use to quantify red tape, being net changes in the stock of regulation and dollar cost estimates.

Context is crucial in understanding why Trump's deregulation agenda was a high priority. His predecessor was highly regulatory with red tape peaking in the USA economy in 2016. Previous research published by the IPA noted the Obama Administration imposed an average regulatory cost of $110 billion per year. During its final year in office, the Obama Administration introduced a record number of 95,894 pages of regulation and legislation. Further to this, the number of new economically significant rules, which are regulations implemented by executive branch agencies that 'have an annual effect on the economy $100m or more or adversely affect the economy in a material way' peaked in 2016 during the Obama administration.[23]

President Trump added far fewer regulations than previous administrations. A report published by the IPA in 2019 noted the Trump administration reduced regulatory costs by $31 billion (AUD) by the end of 2018. President Trump's first year in office saw the fewest number of economically significant regulations published since records began in 1996, totalling 36. The second year resulted in the equal second lowest number of major rules published. The number of these rules published in both 2017 and 2018 is well below the average annual number of rules published since 1996, at 70. The total number of pages of legislation during the Trump Presidency dropped to its lowest number since 1993 at 61,950 pages, a 35 per cent reduction from 2016.[24]

22 Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs (30 January 2017).

23 Daniel Wild and Cian Hussey, *The Trump Administration's Red Tape Reduction Agenda* (Institute of Public Affairs, 2019).

24 Ibid.

Create a Red Tape E-Hub

A Red Tape E-Hub is a website where individuals, businesses, and regulatory bodies can directly engage with one another regarding regulatory compliance. Furthermore, it is an online community where businesses operating in similar industries can discuss issues relating to regulation, and importantly, a location where business can voice ideas on ways regulation can be reformed and how red tape can be reduced. This has been implemented by three state/provincial governments.

CASE STUDY: Alberta

The Canadian province of Alberta launched a red tape reduction policy consistent with our Ideal Regulatory Budget. The goal was to reduce costs for businesses and Albertans by one-third within four years. The metric was a count of the regulatory requirements that existed in all statutes, regulations, policies, and forms, and a mechanism adopted was the establishment of red tape website. The website allowed the public to make recommendations to the government on ways to reduce red tape. Over 200 recommendations made by the public were implemented, and the most recent report suggests that regulatory requirements reduced by over 31 per cent compared with 2019, saving Albertans $2.1 billion in regulatory costs.[25]

CASE STUDY: British Columbia

The Canadian province of British Columbia launched a webpage in 2016 which featured a 'help cut red tape' button.[26] The webpage was designed to provide the public with a direct channel to provide recommendations to the government on how to reduce red tape. Within the first year, there were more than 500 recommendations made, and the province implemented over 200 of these recommendations. Some ideas proposed which were eventually implemented included streamlining event permits, simplifying bank communication rules, and minimising costs for reduced mailing and recycling.[27]

CASE STUDY: Western Australia

Launched in 2018, Streamline WA was established to improve regulation and create new jobs. The Streamline WA Steering Committee acts as an intermediary between regulators and the business community. The initiative has seen several process improvement programs established, such as Approvals WA, Online Aquaculture Management Reporting System and Small Business Friendly Approvals Program. Several acts have also been passed which aim to improve regulation, including the *Mining Amendment Act 2022* which aims to improve the efficiency of the approvals and administrative process, and the *Environmental Protection Amendment Act 2020* which reduces duplication of approvals and assessments.[28] Western Australia now ranks as the slowest growing regulatory state since 2019 according to RegData analysis.

25 Service Alberta and Red Tape Reduction, *Red Tape Reduction Annual Report 2021-2022* (Government of Alberta, 2023) 24.

26 British Columbia, 'Factsheet: Red Tape Reduction' (8 March 2017): news.gov.bca.ca/factsheets/red-tape-reduction.

27 Ibid.

28 Streamline WA, https://www.wa.gov.au/government/government-initiatives-and-projects/streamline-wa.

Expand the use of regulatory sandboxes

In certain industries, entities must obtain a high number of permits, licences, and approvals in order to remain compliant with the law. This form of excessive regulation can lead to high barriers to entry, which disproportionately disadvantages entities entering the market compared to existing firms. In a survey conducted by PwC, 13 per cent of start-ups identified regulations and bureaucracy as their biggest obstacle. [29] And given that Australia is a world leader in the *decline* of business startups, the need for regulatory reform which fosters business innovation has never been greater.[30]

The regulatory sandbox seeks to address this obstacle. It involves the provision of a safe and secure commercial environment whereby businesses can test out their ideas under relaxed regulatory conditions. It intends to minimise the cost and time required to launch innovations and aims to harbour a commercial environment which is conducive to business experimentation. The ideal sandbox should promote and encourage entrepreneurial activity by ensuring new market participants are not deterred from starting new businesses by high costs of entry or bureaucratic start up processes.

CASE STUDY: United Kingdom's Financial Conduct Authority regulatory sandbox

The Financial Conduct Authority (FCA) regulatory sandbox, established in the United Kingdom in 2016, enables Fin-Tech companies to test their products and services with the support and supervision of the regulator. It is intended to provide innovators access to regulatory expertise and make regulation more navigable. Since 2016, The FCA sandbox has received over 550 applications. Firms that recently completed the program reported it made it easier to follow regulatory requirements, and resulted in a better understanding of the regulatory environment.[31]

CASE STUDY: Australia's Enhanced Regulatory Sandbox

Introduced by the federal government in 2020, the Enhanced Regulatory Sandbox allows individuals and businesses to test certain new financial services or credit activities for up to 24 months without having obtained an Australian Financial Services Licence or Australian Credit Licence.[32] Since its inception, the number of start-ups within the financial and insurance services industry has been growing. There was a 6 per cent annal increase in financial and insurance services businesses in the financial year ending in 2022, compared with a 2 per cent annual increase in the financial year ending in 2020.[33] Regulatory sandboxes should not be limited to the Fin-Tech sector and should be expanded to other sectors with high barriers to entry.

29 PwC European Start-up Survey 2019, *pwc.com*

30 Steven Gloerman and Jason Clemens, *Demographics and Entrepreneurship: Mitigating the Effects of an Aging Population* (Fraser Institute, 2018) 88.

31 FCA Innovation Hub – Regulatory Sandbox 2023 , *fca.org.uk*, Government of the United Kingdom

32 Australian Securities and Investments Commission, *Information Sheet 248 Enhanced Regulatory Sandbox* (August 2020).

33 Counts Of Australian Businesses, *abs.gov.au*, Australian Bureau of Statistics

Establish Sunset Agencies

The Commonwealth government is not a single entity, but rather a nexus of government departments, agencies and bodies. In 2016, the federal government maintained 1,181 bodies. Today, that figure has grown to 1,312.[34] Many of the bodies maintained by the Commonwealth government are involved in the development, creation, and implementation of regulation. These regulatory agencies impose burdensome compliance costs on businesses and individuals. A sunset advisory commission could check whether these bodies are still appropriate and relevant over time.

Sunsetting the institutions that regulate could function as a powerful check on the growth of red tape. It could serve as an effective legislative oversight tool, responsible for ensuring that the number of regulatory bodies is kept to an efficiently minimal level.

A Sunset Commission established in Australia could serve a well-defined purpose. It would clean up and refine the executive branch of government, which at present is the main source of regulatory growth.

CASE STUDY: Texas

This policy has been successfully implemented in Texas for over 50 years. According to its website, The Texas Sunset Advisory Commission is a self-proclaimed 'state commission tasked with eliminating government waste, duplications and inefficiency for more than 130 Texas state agencies'.[35] The Texas Sunset Commission conducts periodic reviews of every state agency apart from universities and courts. These reviews involve the commission undertaking extensive research and analysis, and involves engagement with stakeholders and the public. The commission then makes recommendations for every agency under review and presents them to the full legislature. These reviews are typically conducted every 12 years. The Sunset Act has the power to entirely remove a state agency or have its functions transferred to another agency, if the parliament deems it will improve efficiency. [36]

Since 1977, 42 government agencies have been abolished and a further 52 agencies have been transferred or consolidated. The commission has conducted 570 reviews of state agencies, and since 2001, 80 per cent of the recommendations made by the sunset commission have been implemented. As the number of agencies has been reduced, so has the cost to keep them operating. The reduction in agencies has been estimated to save the government $1 billion.[37] For every dollar appropriated to the Sunset Commission since 1985, $18 has been returned. This demonstrates the Sunset Commission has been a cost-effective mechanism with a successful track record of minimising a state's regulatory footprint.

Texas is renowned for its relaxed regulatory environment which is known to promote business activity. According to a survey conducted by Von Lehman, Texas ranks amongst the friendliest state governments for red tape and regulation and for overall business friendliness.[38] Because of the movement of businesses to business friendly environments, Texas now leads the country in the number of Fortune 500 companies headquartered in the state.

34 The number of government entities is listed at the Australian Government Organisation Register.

35 Texas Sunset Advisory Committee, *www.sunset.texas.gov*, Government of Texas.

36 Ibid.

37 Impact of Sunset Reviews : Texas Sunset Advisory Committee, *www.sunset.texas.gov*, Government of Texas.

38 Von Lehman Advisory Firm, *Which states are the most and least small business friendly* (https://vlcpa.com/).

Require parliament to approve regulations

Australians are facing an unprecedented level of regulation introduced through delegated legislation which ultimately limits their ability to do business.

Delegated legislation refers to the rules created by ministers and regulators by virtue of authority conferred on them by parliament. As opposed to primary legislation, which are laws that are debated on and passed directly by an elected parliament (Acts of Parliament), delegated legislation are rules made exclusively by departments and agencies which are not elected by the public. Therefore, delegated legislation is undemocratic, subject to limited oversight, and may not represent the views of the public.

Most of the regulatory growth at the federal level since 2005 has been in the form of delegated legislation. For every one new restriction imposed by primary legislation, 28 have been imposed by delegated legislation. Given the increasing prevalence of and reliance on delegated legislation to make rules, it is imperative that it be subjected to greater scrutiny.

Requiring parliament to approve the creation of rules would result in greater parliamentary oversight of the executive branch of government. The need for such a mechanism in the Australian context has never been greater, given 66 per cent of existing federal restrictions in Australia have been made through delegated legislation and therefore have not been subjected to debate and approval by elected officials.

CASE STUDY: Virginia

An example of a subnational government proposing to require legislative approval of delegated legislation is the US state of Virginia. The proposed Virginia House Bill 1934 would require the state legislative body to approve new regulations that have an economic impact of more than $500,000.[39]

39 HB 1934 Administrative Process Act; certain reulations to require legilstive approval.

Impose caps on the increase of restrictive regulation

Caps on regulation by policy impact analysis

'Policy Impact Analysis' is a tool designed to help inform policy makers on the cost and benefits of a proposed law. It is intended to help policy makers determine if the benefits of achieving a regulatory goal exceed the cost of undertaking a regulatory action. Some variation of policy impact analysis is conducted in the US, UK, Spain, Germany, and Australia.

The federal government has a guide to policy impact analysis.[40] The guide outlines that an impact analysis must be conducted where a policy proposal is likely to have a 'more than minor change in behaviour or impact' on people, businesses, or community organisations.[41] It is important to note that policy impact analysis is used merely as a guide to inform policy makers when making decisions. Policies, regulations, or rules which are subjected to policy impact analysis and are found to have a significant cost, are not deemed invalid or required to undergo any alterations.

CASE STUDY: Virginia

The US state of Virginia has taken the use of policy impact analysis a step further than Australia. The state government introduced House Bill (HB) 1934, which proposed legislative approval for new regulations with an economic impact of more than $500,000. In contrast to Australia's guiding framework, HB 1934 would make it mandatory that new rules with significant costs be subject to increased scrutiny, debate and ultimately approval by the Virginia state congress.

Every new regulation which is made in Australia should be subjected to policy impact analysis. If the proposed regulation was going to have an economic cost of more than $1 million, the regulation would be deemed null and void. At this point, for it to be reconsidered, the proposed regulation would need to be debated and approved by the parliament. This could be achieved by adding a clause in the *Legislation Act 2003*, stating that any new regulations with an economic impact of more than $1 million be void and require parliamentary approval. Given that these rules and regulations are estimated to impose a significant cost on individuals and businesses, it is important they are subject to more scrutiny, debate, and ultimately approval by the parliament.

40 Office of Impact Analysis, *Australian Government Guide to Policy Impact Analysis* (March 2023) 50.

41 Ibid.

Penalise regulators for excessive rulemaking

Changing the way regulators behave is a potential means of reducing red tape. Regulators are ordinary people who are receptive to incentives and disincentives. Regulators, often acting out of self-interest and aiming to preserve their relevance, can cement their authority by expanding regulatory output.[42] This ultimately results in an over-abundance of regulation, which accurately describes the current regulatory landscape in Australia.

Fines for over-regulating

Fining regulators for excessive rule making could be an effective mechanism to manage the growth of red tape. Increasing the probability of punishment is effective at deterring unethical behaviour.[43] To put it more simply, fines are more effective than a bonus in altering individuals' behaviour.

CASE STUDY: Philippines

Rodrigo Duterte, former President of the Philippines, signed an administrative order in 2018 which mandated agencies report how they were cutting red tape. The order directed agencies to retain only procedures and requirements necessary to fulfil their mandates.[44] Agencies were required to produce a report which outlined their existing regulations, the timeframes it took them to provide services and the legal basis for each regulation. Upon submission of the report, the government evaluated whether the agency was compliant with the directive. Agencies and individuals that did not comply faced penalties such as fines, dismissal from service, or imprisonment.[45]

In 2022, the number of permits required by businesses fell by 60 per cent, and the time it took for agencies to provide services fell by 90 per cent. The government also filed over 500 cases against public servants who were not compliant, which led to 24 arrests.[46]

42 James M. Buchanan, and Gordon Tullock, *The Calculus of Consent* (University of Michigan Press, 1962).

43 Katharina Laske, Silvia Saccardo and Uri Gneezy, *Do Fines Deter Unethical Behavior? The Effect of Systematically Varying the Size and Probability of Punishment* (5 April 2018) 1.

44 Ralf Rivas, 'Duterte orders agencies to eliminate "overregulation"', *Rappler* (27 Febryary 2020).

45 Ibid.

46 Anti Red Tape Authority, *Accomplishment Report – 2018-2022* (Office of the President of the Philippines).

Incentivise deregulation through remuneration and agency funding

Linking policy maker remuneration with red tape reductions results

Regulators could be positively incentivised to cut red tape through pay increases and bonuses. Performance related pay has been shown to have a positive effect on job satisfaction, employee commitment and trust in management.[47] The salaries of policy makers would have an 'at risk' component, meaning a portion of their salary is dependent on performance with regards to red tape reduction targets.

This idea was proposed by the Coalition government in 2013, yet it was never adopted.[48] Most importantly, provided that the financial incentives are less than the economic cost savings produced through the reduced regulation, this would constitute a positive sum scenario.

Linking agency funding with red tape reduction results

Another unexplored mechanism both domestically and internationally is increasing or decreasing agency funding depending upon their red tape reduction results. This would act as a positive incentive to change the way regulators behave.

Creating a framework whereby government agencies are subject to a review of their regulatory output is not novel. This concept has been undertaken in various jurisdictions such as Germany, The Philippines, and the Canadian provinces of Alberta, British Columbia, and Ontario.

Yet these jurisdictions have not experimented with linking agency funding to red tape reduction results. This mechanism would reward and penalise agencies accordingly. If the agency generated a net decrease in red tape, it would be elegible for additional funding. Conversely, if the agency generated a net increase in red tape, it would be penalised through reduced funding

Agency funding could also be linked to the positive economic impact of new or repealed regulation. For example, if the agency had repealed regulation, and that action resulted in a positive economic impact to GDP of $1 million, the agency could be eligible for 25 per cent equivalent in extra funding, or $250,000.

47 Chidiebere Ogbonnaya, Kevin Daniels, Karina Nielsen, 'Does contingent pay encourage positive employee attitudes and intensify work?' (2017) Vol. 27 No 1 *Human Resources Management Journal* 94-112.

48 AAP, 'Coalition offers public servants pay rises for cutting business red tape', *The Australian* (8 July 2013).

Expand the use of sunsetting clauses in legislation

Sunsetting of primary legislation

A sunset clause is a provision within a statute, regulation or law, which ensures it will automatically be terminated after a specified period unless re-approved by parliament. In Australia, laws made by parliament do not require any form of periodic review or re-approval once made. Therefore, over time, laws can become outdated and irrelevant.

Various jurisdictions apply sunset clauses to new legislation. This is particularly common in cases where emergency laws are passed to address pressing circumstances, such as *The Anti-Terrorism Act 2005*.[49]

The narrow scope of the sunset rule within primary legislation should be expanded. Parliaments should adopt sunset clauses in the drafting of all new laws. This would mean every new law would be subject to continual review and debate. It would act as a powerful tool requiring legislators to reassess outdated restrictive rules that act as impediments to Australian economic growth.

Sunsetting of delegated legislation

The sunsetting of legislative instruments is enshrined in the *Legislation Act 2003*. Under the act, legislative instruments are automatically repealed after a fixed period, generally after its tenth anniversary.[50]

A ten-year sunset is long by international standards. In the US, President Trump created the Sunset Rule, which automatically repealed regulations every five years unless the respective agencies reviewed their regulations within the required timeframe.[51] It is quite likely that a regulation made in 2005 would be outdated by 2015. Therefore, there is a need in Australia to amend the *Legislation Act*, mandating that all legislative instruments be automatically repealed every five years unless re-approved by the parliament.

49 *Anti-Terrorism Act 2005* (Cth) s 3.

50 *Legislation Act 2003* (Cth) s 4.

51 Deborah Samenow and Alexandra Lafree, 'Fading into the sunset : The last of the Sunset Rule (for now)' (DLA Piper, 26 July 2022).

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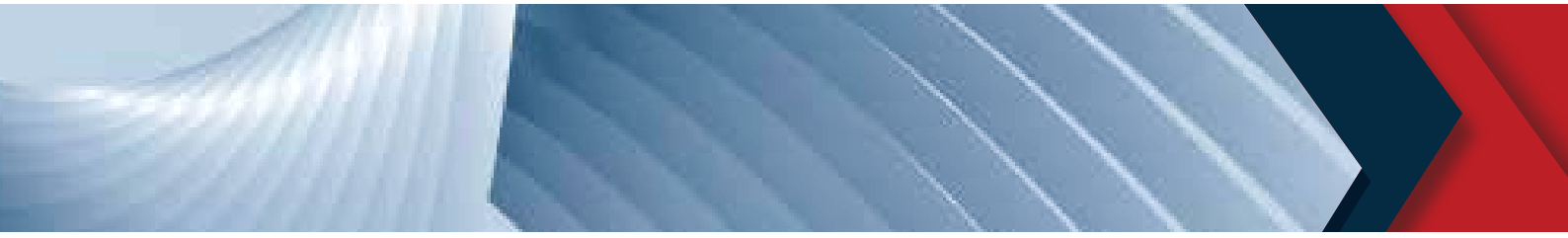

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