Fighting Australia's Over-regulation

He who governs least, governs best.
- Thomas Jefferson

A policy white paper by Senator the Hon. Michael Ronaldson

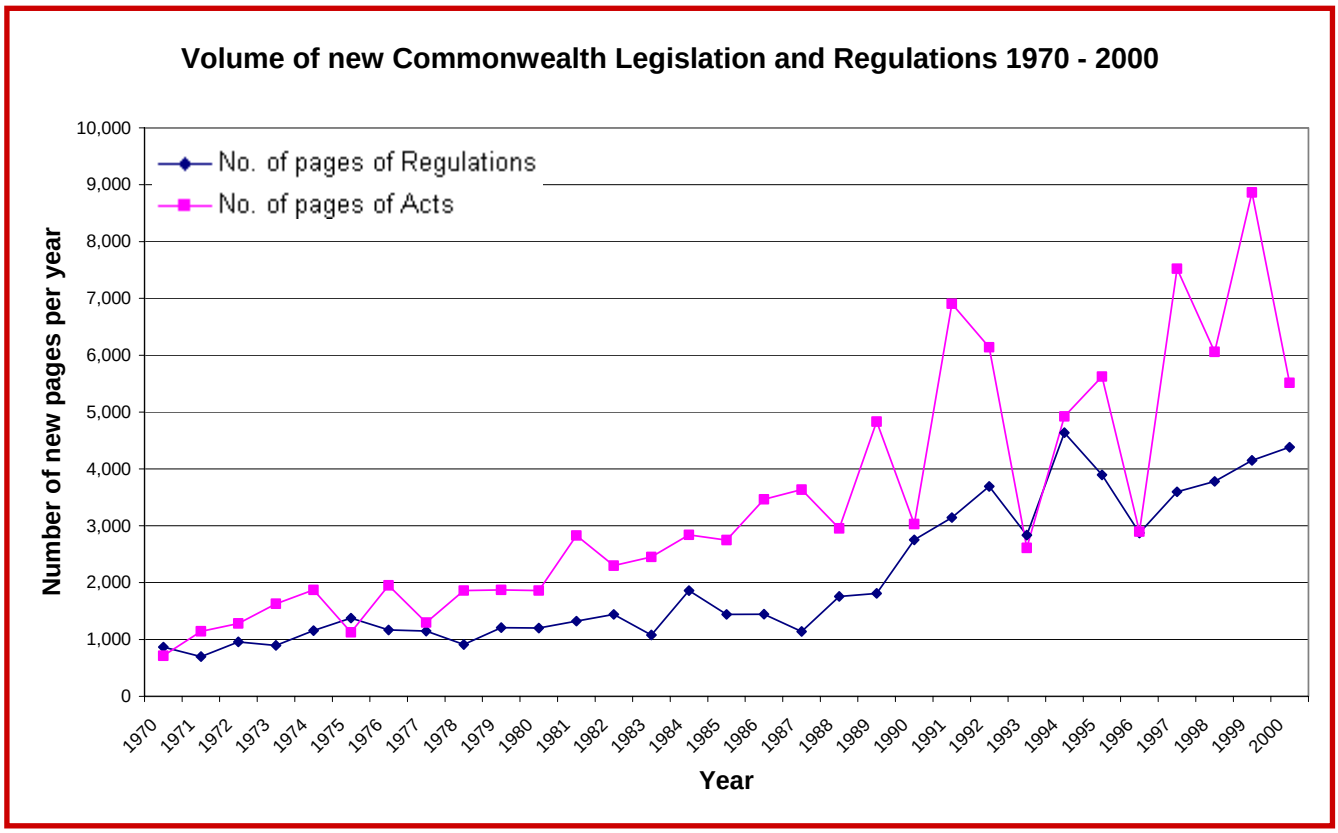
Red tape is a hidden tax. Australian individuals, families, communities and businesses are drowning in a sea of acts of parliament, delegated legislation, forms, non-essential procedures, licences, cumbersome judicial interpretations, rules, regulations and administrative policy.

By its very nature, government power creates transactional and compliance costs. As government assumes responsibility for and control over more and more facets of our society, the more the autonomy and independence of the individual is diminished.

However, the sheer volume of legislation and delegated legislation is now mind-boggling.

As you can see from the chart below, the increase in pages of legislation and delegated legislation or regulations over the 30 years from 1970 to 2000 is breathtaking.[1] Over the 30 years, an extraordinary 104,729 pages of Federal Legislation were complemented by 64,605 pages of Regulations.

The worst year in the time series was 1999, in which 13,017 pages of rules and regulations were passed, an increase of over 800% on the mere 1,579 pages in 1970. In that same year of 1999, House and Senate Hansard – which is now admissible under extrinsic evidence rules to help interpret these statutes – mounted to a further 21,352 pages.



This chart does not even consider the prodigious volumes of rules created by the eight State and Territory Governments or the rules promulgated by the 6,600 elected councillors in 722 Local Governments. Together, the State and Commonwealth Parliaments added 33,000 pages in new laws, rules and regulations in 2003.[2] Indeed the Queensland State Government alone under Peter Beattie nearly matches the Commonwealth contribution to red tape.[3]

1. In 2001 the published volumes of Commonwealth Acts and Statutory Rules stopped consecutive pagination, and I could not in all good faith spend taxpayer-funded time counting up the number of pages after that date!
2. Business Council of Australia, *Business Regulation Action Plan for Future Prosperity*, 23 May 2005.
3. 3. 8,700 pages in 2003 alone.

In New South Wales there are 5,500 local planning instruments across 152 local councils, with, "3,100 zones and 1,700 definitions of parks, hospitals and roads."[4]

In fact, the only reason that the State Governments have not been subject to an even more embarrassing chart to the one above is because it is much harder to work out exactly the quantum of State Regulations – the situation is so bad, nobody is bothering to count.

If you view my page-counting as too simplistic an approach, then a consideration of the number of regulations is no more edifying. In 1971 the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs examined 284 rules, regulations, ordinances and other instruments.

By 1991-1992 the number of rules, regulations, ordinances and other instruments considered by the same committee was 1,562.[5] By 2003-2004 the number of Commonwealth Government regulations (excluding other instruments) was 1,700 (and I would note that each regulation is on average much longer than they were in 1971!).

License fees are both a direct and indirect cost on individuals and business. The ability for some agency or entity other than Parliament to "prescribe" (fees, regulations, etc) appears around some 5,390 individual times in Australian State and Federal legislation.

The move to automatically index fees and charges (without a corollary indexing of tax rates) is even more concerning. For example, in 2003, the Bracks Government indexed 112 state fees and charges – meaning an automatic increase for all Victorians, every year.

This indexing was not matched with an indexing of the threshold for regressive stamp duty and property taxes, nor does it take into account the cost to government, businesses and individuals in changing the forms, notification of fee changes, updating of internal business practices etc. Access Economics has noted that the Business License Information Service[6] has identified over 3,000 separate local government licenses alone, the major cost of which is compliance rather than the license fee itself.

The primary reason for this is that government is the ultimate monopoly. The affect (if not at all times the intention) of the government monopoly on the law-making process is to control what is produced and how the consequential produce is distributed within society.

Competitive federalism may provide some respite for business prepared and able to move between states, but in some cases over-regulation is so bad that companies are forced offshore.

Unchecked, government-driven regulatory environments are an ever-expanding perpetual-motion machine. Any bureaucracy is quickly captured by special-interest groups such as the beneficiaries of the regulation, the minister and their staff who wish to keep that portfolio and make it powerful; the departmental employees who administer the regulation and want to make it "better" and non-beneficiaries who want to be included.

4. *Sydney Morning Herald*, 3 December 2004, quoted in Business Council of Australia, Op. Cit., Pg. 153
5. McHugh, M.H., "The Growth of Legislation and Litigation," *The Australian Law Journal*, Volume 69, 1995, Pg.37
6. http://www.hs.com.au/resource/blis.htm

The Real Costs of Regulation

Regulations are, in reality, a hidden tax on all Australians. Superfluous regulatory burdens add to the cost of hiring workers, reduce competitiveness, increase the price of products and services for all Australians, get in the way of job growth and send jobs overseas.

Indeed, ANU Professor Geoff Brennan has detailed in his studies the political economy of regulation, and the propensity for individual ministers to favour regulation (which shifts the cost "off-budget" to individuals and businesses)[7] in an environment where the Expenditure Review Committee and Treasurer are doing their best to reduce the size of the government in general and the budget in particular.

Estimates of the real costs of the regulatory burden on Australians are at least 8% of GDP,[8] representing a cost of some $16 billion per annum or a cost per Australian of some $826 every year. This may be a very conservative estimate. In 1998 the OECD has estimated that just for small and medium-sized Australian businesses alone the direct compliance costs of regulation was more than $17 billion. Include large businesses, families and community organisations in that equation, and the cost to Australia is too high by any standard. U.S. Studies confirm this quantum of regulatory costs – a recent Small Business Administration study costed the annual regulatory burden on the Americans at US$10,172 per household.[9]

By way of comparison, Australia's total tax take is 31.5% of GDP[10] - meaning that our regulatory burden is effectively a hidden 25% tax-slug on all Australians. Worse, it is a tax-slug that can not be reduced by one ministry or agency – every branch of executive government, though action or inaction, is in part responsible. Indeed, numerous publications have noted that the regulatory burden can distort rational resource allocation and is an inhibitor of productivity growth.[11]

On top of the hidden costs passed on to individuals, families and businesses, government itself must spend significant amounts of taxpayer money supervising these regulations. The Business Council of Australia has calculated the cost for the Commonwealth Government to administer business regulation alone at around $5 billion a year of taxpayer funds.[12] And then there is the staff to administer the regulations. According to the Productivity Commission, in 2003 Federal Government agencies with explicit regulatory functions employed around 30,000 staff.[13]

The increased volume and obscurity of legislative instruments also means that there is a much greater need for the resources of a more and more specialised legal profession and the judiciary. The ballooning volume of regulation has a direct relation to the ballooning volume of litigation,[14] which represents a massive cost to society.

7. Brennan, G., *The Political Economy of Regulation: A Prolegomenon* in G. Eusepi and F. Schneider (eds) 2004, "Changing Institutions in the European Union: A Public Choice Perspective", Edward Elgar Publishing, Cheltenham, Pg. 72-94.
8. See, for example, Access Economics, *Benefits and Costs of Regulations*, Report for the Business Council of Australia, published as an appendices to Business Council of Australia, *Business Regulation Action Plan for Future Prosperity*, *Op.Cit.*
9. Cain, W.M., et.al, *The Impact of Regulatory Costs on Small Firms*, Small Business Administration Office of Advocacy, September 2005, available at http://www.sba.gov/advo/research/rs264tot.pdf
10. Burn, Peter, *How Highly Taxed Are We? The Level and Composition of Taxation in Australia and the OECD*, CIS Policy Monograph 67, 2004
11. Industry Commission, *Regulation and its Review 1995–96*, AGPS, Canberra.;
Productivity Commission 1996, *Stocktake of Progress in Microeconomic Reform*, AGPS, Canberra;
Bell, C. 1996, *Time for Business*, Report of the Small Business Deregulation Task Force, Department of Industry, Science and Tech nology (037/96), Canberra.
12. Business Council of Australia, *Op. Cit.*, Pg.13.
13. Speech by Garry Banks, 2 October 2003
14. Estey J., of the Supreme Court of Canada, in his 1984 address at an international symposium on *The Role of the Legal Profession in the Twenty-First Century* organised by the Law Society of British Columbia.

Perhaps more importantly, the increasing complexity of legislation not only multiplies the demand for increasingly specialised legal interpretation, but it decreases access to our rules for ordinary citizens.

Whether or not it is written in plain English, or available on websites, modern law either can not be found within the mountains of other legislation or can not be understood without an encyclopaedic knowledge of other interacting legislation and regulation. This can not be a good thing for our society or for the institution of democracy.

The combined cost to those regulating, those being regulated and the legal mechanisms which act as umpire will never be known. However, we can be certain regulation is both a significant cause of direct tax and the major indirect tax on all Australians, representing a cost of tens of billions of dollars each year.

Action plan to reduce the regulatory burden

I propose a seven-point plan to reduce the size of government and the imposition on ordinary Australians:

1. Extend the judicial doctrine of desuetude to so that legislation and other regulations which have been unused or brazenly unenforced for many years can be permanently struck down by the judicature;
2. Set regulatory and legislative budgets for all government departments;
3. Introduce a sunset clause on all new legislation and regulation;
4. Radically revamp the Office of Regulation Review within the productivity commission, giving it sweeping new powers and mandating that it:
   - Audit the regulatory impact statements for all new bills, delegated legislation and other regulations with a stronger emphasis on cost-benefit analysis;
   - Refer any regulation which fails either the cost-benefit analysis or the regulatory budget back to Parliament; and
   - Commence a long-term rolling-review of all existing regulations with reference to regulatory cost-benefit analysis and the legislative budgets;
5. Allow business and community organisations the right to challenge the efficacy of existing regulations by requesting a review by the Office of Regulation Review;
6. Increase the House and Senate quorum requirements for debate of legislation so that Parliament can not pass legislation by auto-pilot; and
7. Amend the State and Federal Acts Interpretation Acts to remove changes which allow courts recourse to extrinsic materials to determine the intention of Parliament.[15]

1. Extend the judicial doctrine of desuetude to so that legislation and other regulations which have been unused or brazenly unenforced for many years can be permanently struck down by the judicature;

Lex aliquando dormit, moritur numquam
(Law sometimes sleeps, never dies)
Motto of John Broughton of Broughton, 17th c.

Why do Acts like the *Bounty (Bed Sheeting) Act 1977, Bounty (Printed Fabrics) Act 1981,* and the *Bounty (Citric Acid) Act 1991* still sit on our books of legislation? Why haven't they been repealed along with a big slab of the other 1,800 or so commonwealth Acts currently in force?

15. See for example the 1984 insertion of S.15AB of the Acts Interpretation Act 1901 (Cth), S.35(b) of the Victorian Interpretation of Legislation Act 1984 and S.19 of the Interpretation Act 1984 (WA)

Even an unused legislative instrument adds to the compliance costs for business – as it must be considered and discounted from their "regulatory compliance programme."

This doctrine is not commonly understood to be a part of the common law, and so a statute continues in force, until repealed by parliament, however long the time may have been since it was known to have been actually enforced.[16] There is however some precedent for the principle, and at times the Latin maxim "jus incognitum" or "unknown law" has been used to strike down obscure and obsolete laws by the courts.

Expanding the doctrine of desuetude would give judges the ability to strike down old, unused legislation as no longer law – of course, the guidelines for this should be quite strict, so that activist judges can not use the principle to strike down legislation merely because they do not like it. I am fully aware of the irony that in order to enable this doctrine to be introduced, a new act of Parliament would have to be passed. I undertake to help the drafters make it as short as possible.

2. Set regulatory and legislative budgets for all government departments;

Every government department should have a strict, decreasing, regulatory budget – measured both by quantum and burden of regulation. Any department which goes over their budget would be prohibited from introducing new regulations until they find old regulations to remove. The annual budget for each department would force a decrease in the overall regulatory burden each year.[17]

3. Introduce a sunset clause on all new legislation and regulation;

All regulation should have a "sunset clause" upon which that regulation is either reaffirmed by an action of parliament (in the case of legislation), or an action of the responsible minister (in the case of delegated legislation) or it ceases operation.

The first major experiment in sunset clauses was by the Republican Party Controlled U.S. Congress in the mid 1990's,[18] however this bill did not propose mandatory sunsetting. It has also recently been debated in the last British general elections.

Sunset clauses force parliament to consider whether a rule is still doing its job well, needs to be revamped or is no longer relevant. Sunset clauses should set specified timeframes and a methodology for the sunset review.

4. Radically revamp the Office of Regulation Review within the productivity commission, giving it sweeping new powers and mandating that it :

- Audit the regulatory impact statements for all new bills, delegated legislation and other regulations with a stronger emphasis on cost-benefit analysis;
- Refer any regulation which fails either the cost-benefit analysis or the regulatory budget back to Parliament; and
- Commence a long-term rolling-review of all existing regulations with reference to regulatory cost-benefit analysis and the legislative budgets;

Technically, all submissions to Cabinet involving new or amended regulation that would affect business have required Regulation Impact Statements (RIS) since 1986.

16. *R v London County Council; Ex parte Entertainments Protection Assn Ltd* [1931] 2 KB 215.
17. This action-point reflects policy developments by both the British Labor and Conservative parties in recent years.
18. Regulatory Sunset and Review Act of 1995 (H.R. 994).

The Office of Regulation Review advised that in 2003-2004, only 7% (or 114) of the 1,700 Australian Government regulations were required to have a RIS. Worse, even when completed, RIS' all too often are merely used to justify a new regulation instead of as a tool to measure and balance the costs and benefits.

Regulation Impact Statements should be a mandatory process which forces a real measure of the costs and benefits of regulation. Regulations that fail the test should be referred back to Parliament or the relevant Minister.

5. Allow business and community organisations the right to challenge the efficacy of existing regulations by requesting a review by the Office of Regulation Review

Greater transparency with respect to regulation helps avoid regulatory failures and improve policy development.[19] Ordinary business and community groups should be able to challenge the efficacy of legislation and rules by requesting a cost-benefit analysis of old regulations.

6. Increase the quorum requirements for debate of legislation so that Parliament can not pass legislation by auto-pilot;

The Constitution permits Parliament to set the quorum for each chamber.[20] Quorum for the exercise of powers is currently set to one-fifth of the total membership (thirty) for the House of Representatives[21] and one fourth of the total membership for the Senate (nineteen).[22] It has become practice to ignore the quorum requirements during debate unless quorum is called – meaning that debates occur with only a handful of Members or Senators in the respective chamber.

The mandatory quorum requirements set out in legislation are not onerous – but rather foresee a minimum participation in the debate process for bills to become law.

We currently have the preposterous situation where the potential number of speakers on pieces of legislation is almost endless, but nobody has to listen to them! I propose that the number of speakers on any piece of legislation be limited to (say) ten per party, but that quorum be enforced strictly throughout the legislative process.

7. Amend the State and Federal Acts Interpretation Acts to remove changes which allow courts recourse to extrinsic materials to determine the intention of Parliament.

The use of extrinsic materials – such as Parliamentary debates, explanatory memoranda, Parliamentary committee reports and the like – to interpret legislation increases the burden of regulation. Like the legislative digests, the Commonwealth Hansard has recently ended consecutive numbering of Hansard, but in 2003 there were 24,578 pages of Hansard, not including the Hansards of the many Senate, House and Joint Committees.

By explicitly declaring these as tools in the interpretation of statutes, these tens of thousands of pages are added on top of the tens of thousands of pages of legislation and regulations which must already be considered.

19. OECD, *Regulatory Polices in OECD Countries, From Intervention to Governance*, OECD Reviews of Regulatory Reform, 2002, Paris, See eg. Pg. 65
20. House of Representatives, Chapter I, Part III, Plac. 39; Senate Chapter I, Part II, Plac. 22
21. House of Representatives (Quorum) Act 1989 – S.3
22. Senate (Quorum) Act 1991 – S.3

In the words of The Honourable Justice Callaway, the use of extrinsic materials ensures that, "Cases take longer to prepare and to argue. Judgements take longer to write. Justice delayed is justice denied."[23]

It is possible that occasionally such interpretative provisions prevent a mischief not envisioned by the legislature.

More often than not, the reverse will be true – plain meaning will be abrogated, sloppy drafting rewarded and complexity increased.

Conclusion

Most pieces of regulation do aim to get rid of real problems in our society. This misses the point. In a free and open society government should not be the solution of first resort. Indeed, open societies should be measured by the proportion of our lives that are free from government control – not how much is minutely regulated.

The dead hand of government is heaviest when weighed down with myriad legislation, regulation and delegated rule-making. Open economies are a pre-requisite for open societies. We must open our economy by removing the oppressive burden of regulation.

It is time to cut government down to size.

23. From the edited version of an oral presentation by the Hon. Justice Frank Callaway of the Victorian Court of Appeal at the conference on Working with Statutes held under the auspicesof the New South Wales Bar Association and the Australian Bar Association in Sydney on 18th-19th March 2005.

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