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Gillard knifes Hawke's red tape reform to shield IR law from scrutiny

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IF productivity really is "at the heart of everything this government does", as Julia Gillard claimed the other day, the Prime Minister has some tough questions to answer. Two in particular.

First, why has her government, with little publicity and even less consultation, gutted the regulation review process first introduced by the Hawke government in 1985? And second, is it true that Gillard intends to use the new, emasculated, requirements to downgrade the review of the 2009 Fair Work Act into a mere in-house assessment of its implementation, conducted by the Department of Education, Employment and Workplace Relations itself and excluding any consideration of serious moves to greater labour market flexibility?

To understand what is involved, start with the history. In 1981, Ronald Reagan's Executive Order 12291 required US federal agencies to produce a Regulatory Impact Assessment for all proposed major regulations. The intention was to force agencies to carefully consider the effects of regulations, ensuring the community was informed about the goals being pursued, the options available and the costs and benefits of those options.

Under the Hawke Labor government, Australia was one of the first countries to follow Reagan's lead: from 1985, the government required significant regulatory proposals to include a Regulatory Impact Statement, and in 1986 established the Office of Regulation Review to encourage good regulatory practice. Since then, successive governments have sought to make the RIS process a more effective check on regulatory proliferation.

Until now, that is. For this government has neutered the RIS requirements through changes that run directly contrary to the policy direction pursued from Hawke to Howard. Five of those changes are especially important.

First, election commitments are no longer required to undergo a full RIS process, in which the proposed policy is compared with alternative options. Rather, the policy is to be taken as given, and consideration given only to its implementation. As a result, decision-makers and the public are deprived of any systematic assessment of the burdens those commitments impose on business and on the community.

The government's expansive definition of an election commitment makes this new loophole all the greater. In particular, it covers not only Labor's own election promises but also its agreements with the Greens and the independents. The resulting risks for sound public policy are as obvious as they are far-reaching.

Second, even for full RISs, where different options for achieving the policy goal must be compared, the government can now dictate the alternatives to be considered, as "agencies may be given directions regarding which options to analyse in a RIS for the cabinet or a committee of the cabinet".

Third, when options are compared, there is no longer any requirement to recommend the option that yields the greatest net benefit to the community.

Indeed, there is no longer a requirement for the preferred option to be one that yields net benefits; rather, it may yield net losses but still be recommended.

The only exception is where the policy restricts competition. In those cases, the net benefit requirement has been retained, presumably because removing it would have involved altering the Competition Principles Agreement with the states (which mandates a net benefits test), and that would have brought unwanted publicity to the government's changes.

Fourth, an RIS can now be modified "after the decision-maker's consideration but prior to publication, to include the option adopted (even) where that option was not considered in the original RIS". In other words, RISs can be retrofitted to suit cabinet's decision. And there is no requirement whatsoever to disclose the fact retrofitting has occurred.

Last but not least, responsibility for monitoring RISs has been transferred from the Productivity Commission to the Department of Finance, removing the safeguards independent assessment previously provided.

These changes contradict Labor's repeated promises to bolster the regulation review process.

Nor were those promises insubstantial. In opposition, Wayne Swan pledged a future Labor government to full implementation of the main recommendations of the Banks Taskforce on regulatory reform. Central to those recommendations was a strengthening of the RIS requirements, with the aim of "raising the bar on the standard of analysis and making it harder for a regulatory proposal to proceed if the requirements for good process have not been adequately discharged".

Labor's pledges were repeated after the 2007 election, with Lindsay Tanner vowing to toughen the RIS procedures "to ensure new regulation is enacted only where absolutely necessary and at minimum cost to consumers and business".

But far from keeping those promises, the government's changes void the RIS system of any significance and make the commonwealth's regulatory review guidelines weaker than those of the states. Why then have those changes been made?

A key reason is the forthcoming review under the RIS guidelines of the IR laws. That review was a commitment the government could not escape, but it was unwilling to take risks on an issue affecting its crucial base of support. It has therefore revised the guidelines to give itself carte blanche.

But this is no time to remove what few constraints there are on economically costly regulation. Global uncertainties demand more scrutiny of red tape, not less. And we need scrutiny that is rigorous and independent, not a fig leaf for whatever deals the government cuts.

If it genuinely wants to lift Australia's productivity, the government ought to do three things.

First, suspend the changes to the RIS guidelines until they have undergone a comprehensive, public assessment.

Second, commit to conducting the review of the Fair Work Act at arm's length from government itself, and without constraints on the options it can consider.

And third, put the Productivity Commission back in charge of the RIS process, giving it the powers Labor had promised to prevent policies from being endorsed without rigorous assessment.

The government should, in other words, reverse course. For up to now, all it has done is to make the RIS process truly risible, while exposing its vaunted commitment to productivity to derision.