

TITLE PAGE

A PROPOSAL FOR A UNIFORM AUSTRALIAN REGULATORY MODEL

Thesis submitted by

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Abstract

The problem

The Australian Commonwealth regulators, including the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO), are each governed by their own legislation. That legislation provides each of them with their own investigative and enforcement powers and processes. While those powers and processes are directed to assisting them to resolve similar regulatory issues or problems, they are not uniform across the various regulatory laws. Those inconsistencies are partly the product of successive federal governments' "ad hoc" and reactive approach to the development of the regulatory laws. Further, as problems with a particular regulator's powers or processes are identified, usually as the result of costly litigation, they are rectified by legislative amendments, but those amendments are not made uniformly or consistently across all regulatory legislation, even though the problems may be universal. This approach has meant that some regulators have superior investigative and enforcement powers in comparison to others. In some cases, the problems are not rectified by express provisions and the matter is governed by common law or equitable principles. Those general law principles do not always provide a clear resolution to the problem either. Those inconsistencies and ambiguities adversely impact on the effectiveness and efficiency of the Australian regulatory framework taken as a whole and therefore impact on the effectiveness and efficiency with which governments, businesses and individuals in the economy can operate.

Thesis statement and objectives

It is argued in this thesis that there is an unwarranted inconsistency between the regulatory powers and processes applicable to Australia's four principal federal regulatory bodies, ASIC, APRA, the ACCC and the ATO, and that this inconsistency impacts negatively on the effectiveness and efficiency with which those bodies can discharge their regulatory functions. It is argued and demonstrated that their effectiveness and efficiency can be improved by standardising the relevant powers and processes through reform of their governing regulatory laws. Such reforms are both desirable and achievable by amending the existing regulatory frameworks and by benchmarking the reforms against best practice as observed both within the existing Australian regulatory frameworks and in comparable foreign regulatory frameworks.

The specific objectives of this thesis are to:

- (a) identify the areas in which the powers and processes of ASIC, APRA, the ACCC and the ATO differ and can be improved through alignment or standardisation;
- (b) investigate and suggest better approaches to regulatory reform;

- (c) identify the ideal reforms that should be incorporated in the Australian statutory regulatory regime; and
- (d) propose a mechanism for the implementation of the identified reforms.

The general overarching objective of this thesis is to demonstrate the desirability of adopting a uniform statutory regulatory model, and to suggest the reforms that should be incorporated into such a model (to balance competing public and private interests) that are suitable for adoption by ASIC, APRA, the ACCC and the ATO. Those reforms will give those regulators, the regulated and the judiciary clear guidance as to the applicable rules and procedures in all regulatory matters, and would promote more timely and cost-effective regulatory outcomes and more effective regulation of the Australian economy.

Methodology

The problems inherent in the relevant Australian regulatory laws are identified, defined and analysed by comparing the existing Australian regulatory frameworks and the relevant regulatory frameworks in the United States and the United Kingdom. Each of those frameworks will be analysed according to the competing (and sometimes overlapping) public and private interests that underpin them.

The existing regulatory frameworks are also analysed using universal theoretical and practical principles (derived from regulatory theory and judicial and academic writings) including the need to:

- (a) promote more effective regulation;
- (b) promote greater certainty and clarity in the law;
- (c) ensure greater government accountability;
- (d) promote better decision-making;
- (e) save time and costs in regulatory actions; and
- (f) observe the principles of fairness, including the need to treat like cases alike.

The purpose of the comparative analysis is to identify the “benchmarks” of effective regulation, or “best practice” in, or the advantageous features of, each regulatory framework, as well as to identify the weaknesses and inconsistencies in those frameworks to provide an informed basis for suggested law reform.

Findings

The analysis indicates there is a lack of clarity, consistency and uniformity in the Australian regulatory laws. As a consequence, the Australian regulators, the regulated and the judiciary do not have clear guidance in relation to a range of common regulatory issues which, in turn, has resulted in collateral litigation concerning evidential and procedural issues that are unrelated to the substantive merits of the case. The lack of clarity in the law has not promoted better decision-making in regulatory matters because similar regulatory issues have not been resolved on a consistent basis in the context of the

different regulators and like cases have not been treated alike. This has negatively impacted on what should be the primary goal of achieving effective regulation because compliance is not being achieved in a timely, cost-effective and efficient manner. Those problems may, in turn, have an adverse impact on Australia's economic growth and on the prosperity of all Australians.

Recommendations

The thesis concludes by recommending that the federal government should adopt a more consistent, informed, principled and proactive approach to the formulation of the Australian regulatory laws. The laws governing the core investigative and enforcement powers of ASIC, APRA, the ACCC and the ATO should be made more consistent or, where practicable, uniform. The suggested reforms can be readily and cost-effectively implemented because they only require the enactment of a small number of uniform Commonwealth laws and the amendment of a small number of existing laws. Many of the suggested reforms could be achieved by enacting the proposed *Investigation and Enforcement Powers Act* (Cth) and the proposed *Administrative Powers and Proceedings Act* (Cth) to govern the investigative, enforcement and administrative functions of ASIC, APRA, the ACCC and the ATO and to afford uniform protections to the regulated. This legislation would, at least substantially, eliminate the present confusion and ambiguity in the law and lead to more consistent and effective regulatory outcomes, because the regulators, the judiciary and the regulated would be governed by one set of standards that would be applied consistently to common regulatory problems across all Australian business and financial sectors and regulatory jurisdictions.

The suggested reforms retain the advantages of the current Australian multiple regulator model, including the view that regulators, like ASIC, APRA, the ACCC and the ATO, being bodies that are formed for separate purposes, will function best with their own distinct cultures. The suggested reforms also avoid the potential problems associated with adopting the United Kingdom's approach of merging some regulators into one "super regulator", such as producing inefficiencies and exposing the Australian regulatory system to further substantial disruption and cost. The suggested reforms are also consistent with the views expressed in the United States that "where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce."

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CONCLUSION

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