A PROPOSAL FOR A UNIFORM AUSTRALIAN REGULATORY MODEL

Thesis submitted by

Thomas Harold Middleton, B.Com (JCU), LL.B (Hons) QUT, M. Leg Prac (QUT)

Submitted on 19 June 2007 for the degree of Doctor of Philosophy in the School of Law James Cook University
STATEMENT OF ACCESS

I, the undersigned, author of this work, understand that James Cook University will make this thesis available for use within the University Library and, via the Australian Digital Theses Network, for use elsewhere.

I understand that, as an unpublished work, a thesis has significant protection under the Copyright Act and I do not wish to place any further restrictions on access to this work.

Signature

Date
STATEMENT OF SOURCES

DECLARATION

I declare that this thesis is my own work and has not been submitted in any form for another degree or diploma at any University or other institution of tertiary education. Information derived from the published or unpublished work of others has been acknowledged in the text and in a list of references is given.

---------------------------------    ---------------    -----------------
Signature     Date

--------------------------------------------------    ---------------------------------
Signature     Date
ACKNOWLEDGMENTS

I thank current and former staff members at James Cook University, including Dr Justin Dabner (principal supervisor), Professor Stephen Graw (co-supervisor), Professor Paul Havemann, Malcolm Barrett, Dr Chris Davies, Dr Joachim Dietrich, Karen Ness, Jo Roebuck and Lisa Westcott for their comments and advice on previous drafts of this thesis. I also thank Bronwyn Murray for her assistance in preparing the index and bibliography and Karen McCabe and Shirley Jones for their administrative support.

I also thank Tom Middleton, Emma Middleton and Jack Middleton.
A PROPOSAL FOR A UNIFORM AUSTRALIAN REGULATORY MODEL

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.”
## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 1 – Introduction, Objectives and Methodology and Outline</td>
<td>1</td>
</tr>
<tr>
<td>Chapter 2 – Reasons for Selecting Particular Australian and Foreign</td>
<td></td>
</tr>
<tr>
<td>Regulatory Regimes - And Regulators’ Functions and Objectives</td>
<td>56</td>
</tr>
<tr>
<td>Chapter 3 – Commencement of Investigations</td>
<td>79</td>
</tr>
<tr>
<td>Chapter 4 – Examinations</td>
<td>125</td>
</tr>
<tr>
<td>Chapter 5 – Production of Books</td>
<td>179</td>
</tr>
<tr>
<td>Chapter 6 – Enforcement Powers</td>
<td>232</td>
</tr>
<tr>
<td>Chapter 7 – Release of Information</td>
<td>284</td>
</tr>
<tr>
<td>Chapter 8 – Civil Proceedings</td>
<td>335</td>
</tr>
<tr>
<td>Chapter 9 – Criminal Proceedings</td>
<td>387</td>
</tr>
<tr>
<td>Chapter 10 – Administrative Proceedings and Powers</td>
<td>441</td>
</tr>
<tr>
<td>Chapter 11 – Review of the Regulators’ Administrative Decisions</td>
<td>475</td>
</tr>
<tr>
<td>Chapter 12 – Conclusion</td>
<td>515</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>533</td>
</tr>
<tr>
<td>Table of Statutes</td>
<td>550</td>
</tr>
<tr>
<td>Bibliography</td>
<td>583</td>
</tr>
</tbody>
</table>
CHAPTER 1

INTRODUCTION, OBJECTIVES, METHODOLOGY AND OUTLINE

Introduction ...............................................................................................................................[1.1]

Historical background - ad hoc development of regulatory laws
and the emergence of a national economy .................................................................[1.1.1]

Thesis statement and objectives of the thesis ...............................................................[1.2]

Approaches to regulatory reform ......................................................................................[1.3]

Regulatory formalism ........................................................................................................[1.3.1]

Command and control ....................................................................................................[1.3.2]

Responsive regulation ....................................................................................................[1.3.3]

Principles, rules, actors and mechanisms ......................................................................[1.3.4]

Methodology .........................................................................................................................[1.4]

Reasons for reforms suggested by the thesis .................................................................[1.5]

Promote effective regulation ..........................................................................................[1.5.1]

Meaning of regulation ......................................................................................................[1.5.1.1]

Effective regulation ........................................................................................................[1.5.1.2]

Necessity for regulation ....................................................................................................[1.5.1.3]

Public and private interests ............................................................................................[1.5.2]

Promoting proper disclosure and greater transparency ..................................................[1.5.3]

Greater legal certainty and better and more cost-effective decision-making .............[1.5.4]

Like cases should be treated alike ..................................................................................[1.5.5]

Interdependent relationship of the Australian regulators .............................................[1.5.6]

Regulatory overlap ..........................................................................................................[1.5.7]

Globalisation ......................................................................................................................[1.5.8]

Conclusion .........................................................................................................................[1.6]

CHAPTER 2

REASONS FOR SELECTING PARTICULAR AUSTRALIAN AND FOREIGN REGULATORY REGIMES – AND REGULATORS’ FUNCTIONS AND OBJECTIVES

Introduction ...........................................................................................................................[2.1]

Why compare the Australian regulatory laws with those in the United States
and the United Kingdom? .................................................................................................[2.2]

The approach of the High Court ....................................................................................[2.2.1]

United States ....................................................................................................................[2.2.2]

United Kingdom .............................................................................................................[2.2.3]

Reasons for selecting particular regulators .....................................................................[2.3]

Statutory regulatory objectives .......................................................................................[2.4]

Public interest ................................................................................................................[2.4.1]
Private interest…………………………………………………………………………[2.4.2]
ASIC – functions and objectives………………………………………………………………………[2.5]
APRA – functions and objectives………………………………………………………………………[2.6]
ACCC – functions and objectives………………………………………………………………………[2.7]
ATO – functions and objectives………………………………………………………………………[2.8]
Conclusion………………………………………………………………………………………………[2.9]

CHAPTER 3

COMMENCEMENT OF INVESTIGATIONS

Introduction…………………………………………………………………………………[3.1]
Public interest…………………………………………………………………………………………[3.2]
Private interest…………………………………………………………………………………………[3.3]
Informal inquiry or formal investigation?……………………………………………………………[3.4]
The regulators’ powers to commence an investigation…………………………………………[3.5]
  ASIC and equivalent foreign regulators…………………………………………………[3.5.1]
  ACCC and equivalent foreign regulators………………………………………………[3.5.2]
  ATO and equivalent foreign regulators………………………………………………[3.5.3]
  ASIC, APRA or the ATO acting under other legislation…………………………………[3.5.4]
  Law reform……………………………………………………………………………………………[3.5.5]
Uniform guidelines governing the regulator’s decision to commence a formal investigation………………………………………………………………………………………………………[3.6]
Challenging the regulator’s decision to commence the investigation…………………………………[3.7]
  Abuse of power and contempt of court…………………………………………………[3.7.1]
  Reason to suspect or believe…………………………………………………………[3.7.2]
  Natural justice………………………………………………………………………………[3.7.3]
  Difficulties in challenging the regulator’s decision……………………………………[3.7.4]
  Law reform……………………………………………………………………………………………[3.7.5]
The regulators’ overlapping investigative responsibilities………………………………………[3.8]
  Introduction………………………………………………………………………………[3.8.1]
  Statutory and case law examples of overlapping investigative responsibilities………………………………………………………………………………………………………[3.8.2]
  Proposed uniform guidelines to identify the lead investigator and to reduce the duplication of investigative effort…………………………………………………………………………………………………………………………[3.8.3]
Informants – protections and remedies……………………………………………………………[3.9]
  Informants who are compelled to provide information…………………………………[3.9.1]
  Statutory duty to inform………………………………………………………………………[3.9.2]
  Voluntary informants – statutory protection……………………………………………[3.9.3]
    Protecting the identity of voluntary informants………………………………………[3.9.3.1]
    Protecting voluntary informants from civil or criminal liability………………………[3.9.3.2]
    Protecting voluntary informants from detrimental employment consequences…………………[3.9.3.3]
Conclusion………………………………………………………………………………………………[3.10]
CHAPTER 4
EXAMINATIONS

Introduction.............................................................................................................[4.1]
Public interest........................................................................................................[4.2]
Private interest.....................................................................................................[4.3]
Regulators’ power to issue oral examination notices.............................................[4.4]
Form of oral examination notices........................................................................[4.5]
  First approach to form......................................................................................[4.5.1]
  Second approach to form..................................................................................[4.5.2]
  Law reform - formal requirements for oral examination notices....................[4.5.3]
    Relevance........................................................................................................[4.5.3.1]
    Utility of examination......................................................................................[4.5.3.2]
    Obligation of examinee....................................................................................[4.5.3.3]
    Destruction of documents...............................................................................[4.5.3.4]
    Suggested formal requirements for oral examination notices.................[4.5.3.5]
Obligations of examinee.........................................................................................[4.6]
  Answer all relevant questions..........................................................................[4.6.1]
  Confidentiality...................................................................................................[4.6.2]
  Right to silence.................................................................................................[4.6.3]
  Reasonable assistance.......................................................................................[4.6.4]
Rights of examinee.................................................................................................[4.7]
  Right to a lawyer...............................................................................................[4.7.1]
    Role of examinee’s lawyer...............................................................................[4.7.1.1]
    Regulator’s power to overrule the examinee’s choice of lawyer..................[4.7.1.2]
    Copy of record of examination.....................................................................[4.7.2]
    Natural justice.................................................................................................[4.7.3]
    Law reform....................................................................................................[4.7.3.1]
Privacy of examinations.........................................................................................[4.8]
Undertakings of confidentiality by examinee and non-disclosure conditions........[4.9]
Privileges and the admissibility of statements made at the examination in
subsequent proceedings.........................................................................................[4.10]
  General rule on admissibility of answers.......................................................[4.10.1]
    The privilege against self-incrimination, the penalty privilege and evidential
    immunity.........................................................................................................[4.10.2]
    Law reform....................................................................................................[4.10.2.1]
    Legal professional privilege and evidential immunity..................................[4.10.3]
      Law reform.................................................................................................[4.10.3.1]
Conclusion...........................................................................................................[4.11]
CHAPTER 5

PRODUCTION OF BOOKS

Introduction.............................................................................................................[5.1]
Public interest........................................................................................................[5.2]
Private interest.......................................................................................................[5.3]
Definitions............................................................................................................[5.4]
Scope of the regulators’ power to issue notice to produce books......................[5.5]
  Law reform.........................................................................................................[5.5.1]
Challenging the notice to produce books..............................................................[5.6]
  Abuse of power.................................................................................................[5.6.1]
  Natural justice.................................................................................................[5.6.2]
  Custodian..........................................................................................................[5.6.3]
Form of notice to produce books........................................................................[5.7]
  First approach to form......................................................................................[5.7.1]
  Second approach to form................................................................................[5.7.2]
  Preferred approach to form............................................................................[5.7.3]
    Purpose for which notice is issued.................................................................[5.7.3.1]
    Suspicions may change...................................................................................[5.7.3.2]
    Avoiding delay and destruction of documents.............................................[5.7.3.3]
    Natural justice..............................................................................................[5.7.3.4]
  Specify books to be produced.........................................................................[5.7.4]
    Strict versus wide approach to specification...............................................[5.7.4.1]
  Time and place for production of books............................................................[5.7.5]
    Reasonable time to produce books ...............................................................[5.7.5.1]
    Production of books forthwith......................................................................[5.7.5.2]
  Law reform - formal requirements for notices to produce books................[5.7.6]
Who can receive a notice?..................................................................................[5.8]
  Corporations.....................................................................................................[5.8.1]
    Production of corporation's books by corporation's officer
      - common law problems...............................................................................[5.8.1.1]
    Privileges and duties.....................................................................................[5.8.1.2]
    Practical solution...........................................................................................[5.8.1.3]
  Persons who have custody or control or who do not have custody or
  control of books...............................................................................................[5.8.2]
    Law reform....................................................................................................[5.8.2.1]
Regulators’ powers where books are produced or seized.....................................[5.9]
  Inspect and copy books....................................................................................[5.9.1]
  Use books in a proceeding...............................................................................[5.9.2]
  Retention of books...........................................................................................[5.9.3]
  Statements.......................................................................................................[5.9.4]
Affected persons’ rights where books are produced or seized..............................[5.10]
  Inspection and copying of books.....................................................................[5.10.1]
Regulators’ powers where books are not produced.............................................[5.11]
CHAPTER 6

ENFORCEMENT POWERS

Introduction ...........................................................................................................[6.1]
Public interest .......................................................................................................[6.2]
Private interest .....................................................................................................[6.3]
Freezing orders ....................................................................................................[6.4]
Court order to comply with investigative requirements .....................................[6.5]
Access powers .....................................................................................................[6.6]
  Common law access power ..............................................................................[6.6.1]
  Statutory access power ...................................................................................[6.6.2]
  Law reform ......................................................................................................[6.6.3]
Search warrants ...................................................................................................[6.7]
  The range of search warrant powers available to the regulators ..................[6.7.1]
  Application for, and issue of, search warrants ..............................................[6.7.2]
    Obtain a search warrant urgently .................................................................[6.7.2.1]
  Form of search warrant ..................................................................................[6.7.3]
    Requirement for search warrant to specify particulars ..............................[6.7.3.1]
    Specification of the offence ........................................................................[6.7.3.2]
  Execution of search warrant .........................................................................[6.7.4]
    Competing public and private interests ....................................................[6.7.4.1]
    Reasonable assistance ...............................................................................[6.7.4.2]
    Bring equipment to premises to examine or to process things
      and use electronic equipment at premises ..............................................[6.7.4.3]
  Search and seizure of material not specified in the search warrant ..........[6.7.4.4]
Legal professional privilege .............................................................................[6.7.5]
  ASIC Act, Superannuation Industry (Supervision) Act 1993 (Cth),
    and Retirement Savings Accounts Act 1997 (Cth) ................................[6.7.5.1]
  Crimes Act, Proceeds of Crime Act and Trade Practices Act ..................[6.7.5.2]
  Foreign regulators .........................................................................................[6.7.5.3]
  Law reform ....................................................................................................[6.7.5.4]
Privilege against self-incrimination and penalty privilege .........................[6.7.6]
Uniform search warrant powers ....................................................................[6.7.7]
Penalties ............................................................................................................[6.8]
  Failure to produce books ...........................................................................[6.8.1]
  Concealment or destruction of books ..........................................................[6.8.2]
CHAPTER 7
RELEASE OF INFORMATION

Introduction.................................................................................[7.1]
Public interest.............................................................................[7.2]
Private interest...........................................................................[7.3]
The regulators’ powers to refuse to release information .................[7.4]
   The regulators’ duty of confidentiality.................................[7.4.1]
      Scope of regulators’ statutory duty of confidentiality.....[7.4.1.1]
   Public interest immunity......................................................[7.4.2]
   Exemptions under the freedom of information legislation...[7.4.3]
   Legal professional privilege.............................................[7.4.4]
The regulators’ powers to release information.............................[7.5]
   Exceptions to the regulators’ statutory duty of confidentiality
      – authorised use and disclosure.......................................[7.5.1]
      Release of information to perform regulatory functions ..[7.5.2]
      Release of information to assist other Australian
         regulators or agencies...............................................[7.5.3]
      Law reform.....................................................................[7.5.3.1]
   Release of information by Australian and foreign regulators for
      mutual investigative assistance ....................................[7.5.4]
      Australian regulators’ powers to assist foreign
         regulators......................................................................[7.5.4.1]
      Foreign regulators’ powers to assist Australian
         regulators.....................................................................[7.5.4.2]
      Law reform.....................................................................[7.5.4.3]
   Release of record of examination and any related books to
      the lawyer of a private litigant...........................................[7.5.5]
   Release of investigative information to professional disciplinary
      bodies.............................................................................[7.5.6]

The affected person’s ability to challenge the regulator’s decision to
release information ..............................................................[7.6]

The affected person’s right to access information........................[7.7]
   The affected person’s right to access information to correct errors.[7.7.1]
   Freedom of information legislation.....................................[7.7.2]

Conclusion.................................................................................[7.8]
CHAPTER 8
CIVIL PROCEEDINGS

Introduction.................................................................[8.1]
Public interest............................................................[8.2]
Private interest.........................................................[8.3]
The different purposes of civil, civil penalty and criminal proceedings........[8.4]
The different elements of civil and criminal contraventions.................[8.5]
Civil evidence and procedure rules ................................[8.6]
  Jurisdiction of the courts........................................[8.6.1]
  Law reform.........................................................[8.6.2]
  The meaning of civil evidence and procedure rules.........................[8.6.3]
  Penalty privilege and the privilege against self-incrimination..........[8.6.4]
  Standard of proof.................................................[8.6.5]
  Pecuniary penalty orders.........................................[8.6.6]
  Disqualification orders..........................................[8.6.7]
  Statutory compensation orders.................................[8.6.8]
Civil proceedings......................................................[8.7]
  Public interest action...........................................[8.7.1]
  Statutory compensation orders and account of profits....................[8.7.2]
  Injunctions and asset preservation orders..........................[8.7.3]
Civil penalty proceedings.............................................[8.8]
  Rationale for civil penalties....................................[8.8.1]
  Pecuniary penalty orders........................................[8.8.2]
  Disqualification order...........................................[8.8.3]
  Pecuniary penalty order and disqualification order – guidelines.....[8.8.4]
Conclusion.....................................................................[8.9]

CHAPTER 9
CRIMINAL PROCEEDINGS

Introduction.................................................................[9.1]
Public interest ...........................................................[9.2]
Private interest...........................................................[9.3]
Purpose of criminal proceedings..........................................[9.4]
Commonwealth criminal offences........................................[9.5]
  Definition of a Commonwealth criminal offence.......................[9.5.1]
  Law reform.........................................................[9.5.2]
Strict liability or absolute liability offences..................................[9.6]
Criminal liability of a corporation........................................[9.7]
  Common law.......................................................[9.7.1]
  Specific regulatory legislation......................................[9.7.2]
  Criminal Code Act 1995 (Cth)....................................[9.7.3]
  Law reform.........................................................[9.7.4]
Criminal liability of natural persons for a corporation’s contravention.................[9.8]
The regulators’ and prosecutors’ powers to commence criminal proceedings.......[9.9]
  *The power to appeal.................................................................[9.9.1]*
  *Law reform - power to commence criminal proceedings and to appeal....[9.9.2]*
  *Uniform prosecution policy..................................................[9.9.3]*
  *Publicly available prosecution policy .....................................[9.9.4]*
Jurisdiction of the courts and rules of evidence and procedure..................[9.10]
  *Australia..................................................[9.10.1]*
  *United States........................................[9.10.2]*
  *United Kingdom..................................................[9.10.3]*
  *Law reform..................................................[9.10.4]*
Civil, civil penalty and criminal proceedings in relation to the same conduct...[9.11]
  *General statutory provisions that prevent double punishment............[9.11.1]*
  *Stay of proceedings under general law..................................[9.11.2]*
  *Civil proceedings after criminal proceedings............................[9.11.3]*
  *Criminal proceedings after civil proceedings............................[9.11.4]*
  *Law reform..................................................[9.11.5]*
Conclusion..................................................................................[9.12]

CHAPTER 10
ADMINISTRATIVE PROCEEDINGS AND POWERS

Introduction.................................................................[10.1]
Public interest.................................................................[10.2]
Private interest.................................................................[10.3]
The regulators’ powers to conduct administrative hearings..................[10.4]
  *Constitutional validity of the regulators’ disqualification powers.........[10.4.1]*
  *Suggested reforms to avoid potential constitutional problems...........[10.4.2]*
  *Voluntary compliance........................................[10.4.2.1]*
  *Enforceable undertaking........................................[10.4.2.2]*
Affected person’s rights..........................................................[10.5]
  *Right to a hearing..................................................[10.5.1]*
  *Right to notice of the hearing.....................................[10.5.2]*
  *Right to a private hearing........................................[10.5.3]*
  *Right to a lawyer..................................................[10.5.4]*
  *Right to record of the hearing....................................[10.5.5]*
Rules of evidence and procedure.................................................[10.6]
  *Rules of evidence........................................[10.6.1]*
  *Rules of natural justice......................................[10.6.2]*
  *Rules relating to general conduct of hearing.......................[10.6.3]*
  *The power to summon witnesses...................................[10.6.4]*
  *Privilege against self-incrimination and the penalty privilege........[10.6.5]*
  *Legal professional privilege.....................................[10.6.6]*
Guidelines on disqualification orders..............................................[10.7]
Administrative or judicial review…………………………………………………[10.8]
What further administrative powers should be given to the
Australian regulators?.................................................................[10.9]
Disqualification orders..............................................................[10.9.1]
Cease and desist order.........................................................[10.9.2]
Administrative orders disqualifying persons from contracting with
the government..............................................................[10.9.3]
Conclusion..............................................................................[10.10]

CHAPTER 11
REVIEW OF THE REGULATORS’ ADMINISTRATIVE DECISIONS

Introduction.............................................................................[11.1]
Public interest...........................................................................[11.2]
Private interest.........................................................................[11.3]
Current review procedures.........................................................[11.4]
  When should an applicant apply for review by the AAT or
the Federal Court..............................................................[11.4.1]
Jurisdiction of the AAT.............................................................[11.4.2]
  ASIC – decisions made under the Corporations Act
  and the ASIC Act.........................................................[11.4.2.1]
  ASIC, APRA, or the ATO – decisions made under the
Superannuation Industry (Supervision) Act 1993 (Cth)
  and the Retirement Savings Accounts
  Act 1997 (Cth)..............................................................[11.4.2.2]
  ATO – decisions made under the taxation legislation...........[11.4.2.3]
  ACCC - decisions made under the Trade Practices Act......[11.4.2.4]
  Law reform.................................................................[11.4.2.5]
Jurisdiction of the Federal Court..................................................[11.4.3]
  Review under the AD(JR) Act............................................[11.4.3.1]
  Review under the Judiciary Act 1903 (Cth)......................[11.4.3.2]
  Review under the taxation legislation..........................[11.4.3.3]
  Review at common law...................................................[11.4.3.4]
  Law reform.................................................................[11.4.3.5]
Other methods of scrutiny.........................................................[11.4.4]
Reasons for the decision............................................................[11.4.5]
Arguments for excluding or limiting external review of the regulators’
decisions..............................................................................[11.5]
  Consistency and predictability in the regulators’ decision-making...[11.5.1]
  Abuse of the review process to achieve delay or tactical advantage...[11.5.2]
  Volume and cost of review cases......................................[11.5.3]
  Urgent situations...........................................................[11.5.4]
  Policy grounds.................................................................[11.5.5]
  Vagaries of natural justice as a ground of review...............[11.5.6]
  Vagaries of unreasonableness as a ground of review...........[11.5.7]
Reviewable conduct .............................................................................. [11.5.8]
Reforms to exclude or limit external review of the regulators’
decisions .......................................................................................... [11.6]
Exclude certain decisions from external review ................................... [11.6.1]
Wider discretion for the court and the AAT to refuse a
review application ........................................................................... [11.6.1]
Internal review .................................................................................. [11.6.2]
Confer wider jurisdiction on the regulators to make administrative
decisions .......................................................................................... [11.6.3]
Statutorily protect the regulator’s decision ........................................ [11.6.4]
Self-executing decisions .................................................................... [11.6.5]
Costs penalty .................................................................................... [11.6.6]
Conclusion ....................................................................................... [11.7]

CHAPTER 12

CONCLUSION

Introduction .................................................................................... [12.1]
Summary of findings ......................................................................... [12.2]
Summary of suggested reforms ........................................................ [12.3]
Alternate methods of implementing suggested reforms ................. [12.4]
  Single regulator model ................................................................. [12.4.1]
  Multiple regulator model ............................................................. [12.4.2]
  Hybrid regulatory model .............................................................. [12.4.3]
  Preferred method of implementing suggested reforms ............... [12.4.4]
Conclusion ..................................................................................... [12.5]