

National economic regulation: the cost of (inadequate?) reform

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The multi-layered federal system of regulation is a 'costly regulatory nightmare' for business, creating unnecessary obstacles to efficient and effective economic growth. Following CoAG agreement, the recent decision by the Federal Government to assume responsibility for regulating all consumer credit is a very positive move in this area. However, further reforms that would involve the referral of powers to the Federal Government, particularly in relation to taxation, are likely to be more problematic, requiring substantial constitutional reform rather than High Court decisions on constitutionality.

Countless layers of commercial regulation exist at the Commonwealth, state and territory levels in Australia today. *The Commonwealth of Australia Constitution Act 1900* (the Constitution), when it was framed, divided certain powers between the Commonwealth, states and territories in a manner so inflexible that it has created unnecessary obstacles to efficient and effective economic growth. The uncertainty that continues to face Australian businesses is the result of what is described, not unfairly, as a costly regulatory nightmare. The Business Council of Australia (BCA) has

recently estimated the annual cost to Australian taxpayers of duplicated regulation to be at least \$16 billion.

On 27 February 2008, I delivered Melbourne Business School's inaugural National Australia Bank Lecture in Law and Economics under the title *National Economic Regulation: the cost of (inadequate?) reform*. This article gives an overview of some of the topics covered.

1960s and presented its report in 1972. Its recommended reforms were a long time coming. After extensive consultation between government and industry bodies over a number of years, the Australian Uniform Credit Laws Agreement 1993 was signed. This agreement provided the means through which a national system of uniform credit regulation could be established. Employing a legislative

consistent legislation. However, in 2003, amendments to the *Consumer Credit (Western Australia) Act 1996* resulted in the extension of the Queensland template to Western Australia. The Explanatory Memorandum to the 2003 amendments cited a 'lack of certainty in the marketplace, unnecessary duplication of effort and significant delays in implementing the changes' as the rationale for bringing Western Australia into line with the Queensland Code.

At a meeting of the Council of Australian Governments (CoAG) on 3 July 2008, on the basis of recommendations made in the Productivity Commission's report on Australia's consumer policy framework (discussed later in this paper) the governments of Australia agreed to national regulation of consumer credit through the Commonwealth in order to overcome gaps in, and conflicts between, various state regimes that have continued to emerge over time.

Without this reform, the system will likely remain disjointed and riddled with discrepancies, inflating the cost of doing business in an industry that transcends state borders (see below: Financial regulation).

In addition, CoAG has agreed to Commonwealth regulation of mortgage broking, margin lending and other areas of the financial services market not currently covered by the uniform credit laws.

Corporate law scene

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The federal system

The current Federal system of business regulation is very costly. However, Constitutional reform, which the BCA is vigorously pursuing, will not occur easily, if at all, and we must find other ways of achieving our goals.

Before turning to some potential reforms, I will review some of the areas in which the duplication and differences between the Commonwealth and the states/territories in the regulation of important areas of business have proved costly and time consuming. I have been involved personally in each of the areas discussed below.

Uniform credit regulation

My involvement in the area of uniform credit regulation was through the Molomby Committee, which was established in the late

template, Queensland enacted the *Consumer Credit (Queensland) Act 1994* and the *Consumer Credit (Queensland) Regulations 1995*. The remaining states and territories, except Western Australia, adopted the Queensland template (as it applies in Queensland), from time to time. This method was intended to help guard against the regulation of credit in the states and territories diverging over time.

In the interest of maintaining parliamentary sovereignty, Western Australia enacted alternate but



consistent system of company regulation but few have succeeded.

In the 1980s, the possibility of a truly national company law looked remote. The establishment of the National Companies and Securities Commission (NCSC) early in the decade sought to implement a national approach to company regulation by sitting alongside state and territory regulators. Some of the State Corporate Affairs Commissions, however, were resistant to the efforts of the NCSC to implement a national system, leading to continual frustration and difficulty in the operation of the NCSC.



Subsequently, in 1989, relying on an optimistic belief in its power to regulate corporations under the Constitution, the Commonwealth enacted a national companies statute. A string of constitutional challenges and legislative enactments followed, to see if power could be referred to the Commonwealth. After considerable resistance from some of the states and territories, they all eventually referred their

power to enact companies legislation to the Commonwealth for a period of five years. This resulted in the enactment of the *Corporations Act 2001 (Cth)* and the *Australian Securities and Investment Commission Act 2001 (Cth)*. In 2004, the states and territories agreed to extend the referral of power to the Commonwealth until 2011.

Competition law reform

Previous attempts at competition law regulation failed miserably on constitutional grounds — the *Australian Industries Preservations Act 1906* and the *Trade Practices Act 1965* are two examples. By contrast, the *Trade Practices Act 1974 (Cth)* (TPA), influenced heavily by the decision of the High Court of Australia in the case of *Strickland v Rocla Concrete Pipes Limited (1971)* 124 CLR 468, has been a successful initiative. The Act did not, however, cover all aspects of Australian business and, over the years, a number of moves have sought to ensure that the Commonwealth legislation operated over all sectors of the economy.

In the early 1990s, a joint paper authored by then-Prime Minister Hawke, former Treasurer Keating and the late Senator John Button entitled *Building a Competitive Australia* (12 March 1991) represented an important precursor to the establishment of the Council of Australian Governments. The paper called for the elimination of barriers to competitiveness and efficiency within Australia, suggested a uniform approach to competition laws and foreshadowed the review by the Hilmer Committee.



This Committee, set up by Paul Keating when he became Prime Minister, was chaired by (now Professor) Frederick G. Hilmer. It conducted a review of Australia's national competition regime and proposed wide-ranging and significant reforms to the TPA. The National Competition Policy (NCP), adopted in April 1995, provided a framework for implementing the Hilmer reform agenda. One significant recommendation of the Hilmer Review led to the introduction of Part IIIA of the TPA, our so-called 'essential facilities' regime.

Unfortunately, this regime calls for a number of different layers of decision-making. The first layer involves a recommendation on the requirement for access by the newly formed National Competition Council (NCC), followed by a decision of a relevant government minister, and the possibility of a review by the Australian Competition Tribunal (ACT). Then, if the parties cannot agree to the terms of access, the Australian Competition and Consumer Commission (ACCC) can be asked to arbitrate. Its

decision can then be appealed to the ACT.

This system has proved costly, and has been the subject of criticism by the High Court of Australia in the PAWA case (*NT Power Generation Pty Ltd v Power and Water Authority* (2004) 210 ALR 312). Later in this overview, I cover some suggested reforms that might improve the operation of our access regime.

Future problem areas

The following discussion covers areas that I believe need reform. It is intended as an overview, and does not represent an exhaustive list.

Consumer policy/consumer protection

Australia's consumer protection framework is a multi-layered legislative system involving Parts IVA, V (excluding Division 1AA), VA and VC of the *Trade Practices Act 1974* and the equivalent provisions in the state and territory *Fair Trading Acts*. Further, there are a number of pieces of industry-specific legislation administered by the ACCC and state and territory Fair Trading agencies.

In May 2008, the Productivity Commission's final report entitled *Review of Australia's Consumer Policy Framework* was released, in which it considered the consequences of this multi-layered system. In its report, the Commission found that a nationally coherent policy framework would contribute to:

- the development of nationally competitive markets with enhanced productivity and innovation; and
- a more imminent realisation of the economic integration goals of



the Australian and New Zealand Governments.

The Productivity Commission set out a number of important recommendations, including the:

- implementation of national generic consumer law, based on the consumer protection provisions of the *Trade Practices Act 1974*;
- establishment of the ACCC as the sole regulator of the product safety provisions;
- joint enforcement of consumer law by the ACCC and the state and territory regulators with the option of states and territories referring their enforcement powers to the ACCC;
- transfer of responsibility for consumer credit and related advice to the Commonwealth;



- creation of a regulatory review system to advise when industry-specific legislation is necessary;
- standardisation of minor claims across the country; and
- expansion of the enforcement powers of the consumer regulators.

As noted earlier, in its meeting on 23 May 2008 the Ministerial Council of Consumer Affairs committed to developing a national approach to consumer policy, adopting many of the recommendations of the Productivity Commission's report.

Financial regulation

To promote the continued growth of the Australian economy, particularly Australia's development into the international centre for Asian financial services, we must eradicate duplication of regulation and red tape. First, a truly national system of financial regulation is necessary. Second, unattractive tax laws, be they state or federal, that discriminate against the operation of companies in this sector must be addressed. The present state of overlapping and sometimes inconsistent regulation creates an unacceptable and costly burden for businesses, which, in turn, dampens investment opportunities.

A good example is the number of pieces of legislation that regulate

telemarketing in the financial services industry, including:

- the anti-hawking provisions of the *Trade Practices Act*;
- *State Fair Trading Act* provisions;
- the *Privacy Act*; and
- the *Do Not Call Register Act*.

Since my paper was delivered, we have seen the turmoil caused by the proliferation of short-selling and activities associated with margin lending, which has resulted in calls for further regulation. As mentioned earlier, the states and territories have agreed to refer further powers to the Commonwealth to enable it to regulate this area of the market more effectively.

Industrial relations

The Commonwealth's ability to legislate with respect to industrial relations is limited. The corporations power in the Constitution bestows on the Commonwealth a power to legislate with respect to foreign corporations or trading or financial corporations formed within the limits of the Commonwealth. As many enterprises do not fall within the definition of a foreign, financial or trading corporation, there are significant gaps in the coverage of the Commonwealth industrial relations legislation, the *Workplace Relations Act 1996* (WRA). These gaps have been narrowed somewhat by the use of the Commonwealth's external affairs power, which enables the Commonwealth to incorporate Australia's international treaty obligations into Australian law. However, there remain significant gaps in the Commonwealth's power, providing another instance of a

sector plagued by multi-layered and inconsistent regulation.

To add a further layer of complexity, while the WRA seeks to exclude the general operation of state industrial laws, it encourages state regulation

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in certain areas like occupational health and safety, child labour and long service leave. In addition to these specific areas of regulation, state legislation plays a primary role in regulating employers who fall outside the ambit of the Commonwealth regime. Importantly, however, there is often uncertainty as to whether or not a certain organisation falls within the scope of the Commonwealth regime.

Further uncertainty arises because Victoria referred its power over industrial relations to the Commonwealth in 1996 but retained the option to legislate.

In a report to the New South Wales Minister for Industrial Relations, Professor George Williams has recommended a number of improvements to deal with the fractured system of industrial relations regulation. The implementation of Labor's industrial relations policy, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, promises more significant change in this area.

Carbon trading

The *National Greenhouse and Energy Reporting Act 2007* is the product of a cooperative approach employed by the Commonwealth, state and territory governments aimed at

creating a uniform, streamlined framework for the mandatory reporting of greenhouse and energy data. The aim of this approach is to eliminate the duplication, inconsistency and unnecessary costs of existing reporting regimes.

Given the rising prominence of carbon sequestration and its role in carbon trading, it is foreseeable that third-party access rights to carbon sequestration projects will be a hot topic in the future. Given the immediate need for sound environmental regulation, the present timing issues with Part IIIA, discussed above, must be addressed prior to the implementation of the national trading scheme.

Water

The National Water Initiative (NWI) is an agreement between the Commonwealth and the states that builds on the CoAG framework for water reform, signed in 1994. The NWI enables each jurisdiction to develop and implement water initiatives but water reform has been slow. The 1994 CoAG framework forms part of the NCP under which pricing reforms such

as consumption-based water charges were introduced.

At the Federal level, the *Water Act 2007* and the National Plan for Water Security are aimed at accelerating the implementation of the NWI. While there is no single entity responsible for water allocation decisions, the National Water Commission is responsible for assisting the states in developing implementation plans consistent with the NWI, accrediting the plans and assessing the progress of water reform in the state and territories.

in one jurisdiction has serious implications in other jurisdictions, highlights the problems associated with a fragmented approach in this area.

As a result of direct initiatives of the Rudd Government elected in November 2007, much more progress has been made in Australia, and Victoria has now joined the national scheme. A new intergovernmental agreement on the reform of the Murray–Darling Basin has been signed, one result of which will be the establishment of the Murray–Darling

was less than advantageous when dealing with access. As a first step in reforming Part IIIA, it is recommended that the Tribunal should be the body to decide both the application for access and the terms of access. There is no need, in my view, for a separate Ministerial decision. The ACCC would act as amicus tribunal, as it does now in relation to an application for the authorisation of mergers. Interested parties should be required to put forward the terms upon which they seek access at the time they seek access so that the issues may be considered in one sitting. This approach would expedite the process for obtaining access rights and enable businesses to implement their strategies sooner.

An alternative to this more radical suggestion would be to retain the current system (including the need for Ministerial approval) but require that any ‘appeal’ from the decision of the NCC and ACCC be based on the papers filed with the NCC or the ACCC. The appeal should not be argued de novo. This is the appeal mechanism for the review of ACCC decisions in relation to formal merger clearances.

Interestingly, a review of Part IIIA of the TPA has been foreshadowed by the Hon. Chris Bowen MP, the Minister for Competition Policy and Consumer Affairs.

Centralising power — cooperation, referral and constitutional change

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At the state level, governments are involved in water policy and regulation encompassing water resources management, water quality, pricing, environmental impacts, service standards and customer protection.

The dire situation in the Murray–Darling Basin, where water use



Basin Authority to develop a whole of Basin Plan to ensure sustainable practices within the Basin taking into account the various interests at play.

The most significant reform in this area will be disaggregation of the water utilities into their monopoly and competitive components. An appropriate access regime will be required for the monopoly components, while private industry will be responsible for water supply and government will be responsible for regulation. Recent moves suggest this is now likely to be completed.

How to improve Part IIIA of the TPA

As noted above, the High Court, in the PWA case (*NT Power Generation Pty Ltd v Power and Water Authority* (2004) 210 ALR 312), suggested that Part IIIA

Association with a view towards cooperation on key issues. CoAG's success as an intergovernmental forum hinges on the goodwill of all

Perhaps such an approach should be applied universally. CoAG could continue to be the main avenue for this type of cooperation.

As our economy's global focus grows, so too does the need for such referral. Given the desire of the states to retain their sovereignty, there is often, and understandably so, resistance to a referral of power. The mechanism for facilitating this referral process must be perfected. Money may be the answer.

parties. While CoAG has not always operated effectively, the mood has most certainly improved since the election of the Hon. Kevin Rudd MP as Prime Minister in late 2007.

As noted, a number of examples of cooperative regulation already exist in Australia. In some instances cooperation works; in others it does not. One approach may be to designate to a certain state the task of devising a sensible solution to a certain area of regulation, with regular CoAG meetings to ensure these solutions are implemented.

Second, the issue of referral of power from the states to the Commonwealth has worked but often with painful success. As our economy's global focus grows, so too does the need for such referral. Given the desire of the states to retain their sovereignty, there is often, and understandably so, resistance to a referral of power. The mechanism for facilitating this referral process must be perfected. Money may be the answer. Currently, there are plans to review the manner in which the states are funded for relinquishing their taxation powers.

Finally, on the issue of constitutional reform, it is my belief that such reform is extremely unlikely. While certain decisions of the High Court have provided some guidance in relation to the constitutionality of national regulation, it is the unavoidable difficulty of the common law that such decisions are based on the particular facts before the Court. We will need to rely on something more than the decisions of the High Court on issues of constitutionality; we will need constitutional reform. ■

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