

Regulation is more political than technical

Regulation, Litigation and Enforcement

edited by Michael Legg

Thomson Reuters

review by Rick Sarre

Thirteen contributors, each senior in their field of endeavour, cover every conceivable topic in regulation in this work, including directors' duties, whistle-blowing, the continuous disclosure regime under the *Corporations Act 2001*, shareholder class actions, the role of ASIC, the importance of civil penalty litigation and the criminalisation of cartels. There is an important section on derivative liability, which makes directors and officers potentially liable for statutory breaches by their company even if they were not directly complicit in the breach.

Regulatory theorists frequently talk of the importance of not relying exclusively

on one form of regulatory technique, but rather on seeking out an optimal regulatory mix. "Command and control" regulation of the environment, for example, can

be supplemented by voluntary approaches (often referred to as 'soft' law) such as self-regulation, voluntary codes, environmental charters, co-regulation, negotiated agreements and so forth. The book deals with these matters very well.

If it has a weakness, it is the failure to drive home the crucial importance of the context within which regulation operates. Some years ago Fiona Haines and David Gurney, in an excellent piece entitled "Regulatory Conflict and

Regulatory Compliance: The Problems and Possibilities in Generic Models of Regulation", in the Australian Institute of Criminology's Research and Public

Policy series, illustrated how the extant economic and political environments constrain, and sometimes impede, regulatory efforts, especially where different regulatory regimes impose conflicting aims and requirements. They observed that regulation is more a political than technical activity. This is a very technical book. It explains the necessary regulatory bells and whistles but it deals less convincingly with how it is possible for cracks to appear with, seemingly, annoying regularity.

As reported by ABC's *Four Corners* on 4 March this year, investors in Gold Coast-based fund manager LM Investment have lost hundreds of millions of dollars, in some cases money that represented most of their retirement savings. LM Investment is simply a fund manager, and thus subject to little prudential regulation. An LM spokesperson said an earlier claim by its marketers that its managed performance fund was a "bank-like facility" was withdrawn as soon as LM realised the potential in investors' minds for confusion. LM Investment has now shut up shop in Australia and its principals have gone overseas. Our theorists need to explore with more vigour how our regulatory environment sometimes fails us, and what we must do to prevent those failures in the future. □

