

MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

A paper by the Australian Attorney-General's Department

Introduction

1. The increasing internationalisation of the financial markets provides scope for the freedom of movement of financial instruments and the participants in those markets. The process of internationalisation is also producing growing interdependence and openness of national trading systems with those of other countries. At the same time this process creates administrative, jurisdictional, detection and enforcement problems in the regulation of national trading systems with those of other countries. At the same time this process creates administrative, jurisdictional, detection and enforcement problems in the regulation of national markets and the international aspects of trading. These problems are reflected by the increased scope for the pursuit of undesirable market practices across national boundaries, and the penetration of another country's markets by offenders and undesirable participants known to, or even prohibited from operating in, their home country but who are unknown to that other country.

2. As a result of these issues there is now an increasing awareness amongst Governments that the internationalisation of the financial system requires an appropriate policy response across a wide range of regulatory issues. Integral to the maintenance of investor confidence in, and the efficiency of, national financial markets must be the development of effective co-operation between the national business regulatory agencies responsible for administering and monitoring those markets. This co-operation involves the capacity to both seek from and provide to such agencies in other countries flexible, speedy and effective assistance.

The need for a Special Co-operative framework for Business Regulation

3. Senior officials from Commonwealth Law Ministries have recognised, at their meeting in London on 19-23 June 1989, the need to develop a more enhanced level of assistance between Commonwealth business regulatory agencies to combat securities market fraud: Mutual Assistance in the Administration of Justice: Co-operating to combat fraud in the Financial Markets: A memorandum presented by the Commonwealth Secretariat.

4. In particular, officials recognised the need to develop a mutual assistance regime that recognises the wide range of functions exercised by business regulatory agencies. The range of matters in respect of which regulatory agencies require co-operation cannot be adequately satisfied by relying on the established mechanisms for mutual assistance in traditional criminal matters.

5. The range of matters on which regulatory agencies may need assistance in areas outside established channels for assistance in criminal matters include:

- . the gathering of information regarding a decision whether to apply administrative sanctions such as
 - the refusal to admit, and

- the disqualification of, or the imposition of restrictions on, participants in the market;
 - . the taking of civil legal proceedings eg seeking injunctions or compliance orders, or the recovery pecuniary penalties, for market fraud and misconduct; and
 - . the investigation of, and bringing prosecutions for, market regulation offences which may not be regarded as part of the traditional criminal law in all countries.
6. Any scheme for enhanced co-operation between business regulatory agencies should recognise, and be flexible enough to accommodate the exercise of, such regulatory functions and the framework in which those agencies operate. The mechanisms for co-operation must be able to take account of the different structures and the varying types of agencies ranging from those jurisdictions having regulatory commissions with policing functions to those jurisdictions where the regulatory system is based on the concept of self regulation. In particular, because of the need to act quickly in a fast moving market system, there should be a capacity in any such scheme to provide assistance quickly and with a minimum of procedural formality appropriate to the circumstances of a particular request.
7. This paper examines the mechanisms and procedures to provide for enhanced international co-operation between Commonwealth and other national business regulatory authorities for the more effective policing of the financial markets nationally and internationally.

Current co-operative arrangements

8. There are generally two levels of assistance that have been developed between national regulatory agencies. The first level involves day to day co-operation on matters of policy and practice and the exchange of information, both public and confidential, between agencies. The second, and more formal level enables agencies to act in aid of one another by the exercise of mandatory information gathering powers under the law of one country to assist in the enforcement of the laws of another country.
9. With respect to the first level of co-operation there appears to be general willingness amongst regulatory agencies to co-operate informally with foreign agencies having corresponding functions. Such assistance, in the absence of specific legislative support, cannot usually extend beyond the sharing of information held by the relevant agency. The provision of such assistance does not involve the use of mandatory powers for that purpose. In the absence of authority specifically enabling the agency to divulge information of a confidential nature or already in its possession through the use of its compulsory powers in respect of matters arising under local law, the agency is bound to comply with its relevant legal obligations regarding the disclosure of information.
10. Such co-operation may be reinforced by formal arrangements made between regulatory agencies through the negotiation of bilateral memoranda of understanding (MOU) or multilateral undertakings, such as one entered into by a number of members of IOSCO (International Organisation of Securities Commission). These arrangements (including 'first generation' MOUs) neither provide a legal basis for the exercise of mandatory powers nor impose binding legal obligations to exercise such powers. They do, nevertheless, have a significant part to play particularly in both acknowledging the need for, and providing a voluntary mechanism to enable, cross-border co-operation for the effective regulation of, and maintenance of confidence in, financial markets.

11. With respect to enforcement matters and combating fraud in the markets, such arrangements may be useful in particular areas such as where a market participant operating in one country has come to the attention of an overseas regulatory, or where information in respect of a particular matter or investigation is otherwise in the possession of an overseas agency.

A Legislative Scheme for Mutual Assistance

12. However, these voluntary arrangements are not adequate to deal with the investigation of complex international securities market fraud where the relevant conduct or transaction has taken place in an overseas jurisdiction, and no breach of the law of the other country is involved which would enable it to investigate the matter under its own charter (and thereby pass on any information so obtained to the local agency under the voluntary arrangements described above). Neither can these arrangements effectively deal with such cases where documents or other evidence relevant to that conduct exist in another jurisdiction, or are in the possession of persons residing overseas.

13. For these reasons certain Commonwealth countries, such as the United Kingdom, New Zealand, and a number of Canadian provinces, as well as other key participants in the international financial markets, such as the United States, have developed legislative regimes for the exercise of mandatory powers by a domestic agency to assist investigations by overseas agencies. Other countries, including Australia, are considering the development of similar legislative schemes. Such powers are the most effective weapon in the armoury of national business regulatory agencies to deal with the challenges of international fraud and misconduct in the financial markets.

14. An examination of the legislative schemes that have been developed indicates adherence to the following general elements:

The mechanism is as simple as possible and capable of providing quick and flexible responses. The purpose of the mechanism is to provide effective assistance in particular bilateral circumstances, with a minimum of formality. The request for assistance, which requires no particular formal application, may be made by a business regulatory agency directly to the authority responsible for administering the laws in the other country - in most cases this is the relevant business regulatory agency, or in the case of the UK it is nominally the Secretary of State although the powers of the Secretary may be delegated under that legislation. Consistent with the objectives of speed and effectiveness there is no need for a formal Government to Government approach. Consequently, as discussed further below, the systems do not require the support of bilateral or multilateral treaties between national Governments.

The assistance provided generally corresponds to the regulatory and surveillance functions and compulsory powers of the agency concerned. Such powers may follow from existing investigative powers or be set out in stand-alone comprehensive provisions. It provides the capacity for the exercise by the regulatory authority of mandatory powers to gather information, including the oral provision of information, the production of documents or other assistance. Consistent with the business regulatory functions of the agencies involved, the assistance is available whether the outcome of the provision of assistance might be the taking of administrative action, or civil or criminal proceedings by the regulatory agency in the other country.

The provision of assistance is discretionary and enables account to be taken of public interest considerations in particular cases, which may require the request for assistance to be refused. The final decision to provide the assistance may be

exercised by the regulatory agency (such as in the United States) but, more usually, the function is given to the relevant responsible Minister of State. The types of considerations which usually may be taken into account in such a decision, include such matters as whether:

- reciprocal assistance would be given to the agency in that other country;
- the request relates to a matter which would be a contravention of the law in the jurisdiction in which the assistance is being sought.

Scope for the consideration of national interest on sovereignty matters is also a feature of such schemes. These considerations may be set out in specified criteria in the legislation, or left to be articulated in particular cases under a generally expressed discretion. The safeguarding of civil liberties of subjects in the gathering of information may be dealt with as part of the decision to provide the assistance, or the empowering legislation may specifically state that the requirement on the local citizen to provide the information may also be subject to similar civil liberties protections as would be available to a person in respect of an inquiry under their own laws.

15. A legislative scheme comprising these elements is adequate and appropriate to meet the objectives outlined above for an effective regime of mutual assistance between regulatory agencies. The proposed regime that is being developed for the consideration of the Australian Government is consistent with these schemes.

Inter-Governmental and Inter-Agency Arrangements

16. Consideration has been given to whether it would be necessary or desirable for such a regime to be supported by a bilateral or multilateral treaty system, or a system of MOUs between Governments. Commonwealth countries are parties to an arrangement between Governments relating to the provision of mutual assistance within the Commonwealth (the Harare Scheme). A treaty based scheme has been adopted by most Commonwealth countries in the provision of mutual assistance in criminal matters to non-Commonwealth nations. However, it is considered that such a regime based on inter-Governmental MOUs or treaties is neither necessary nor appropriate in the light of the policy objectives of a regime for mutual assistance between business regulatory agencies.

17. The inter-Governmental MOU/treaty model was established for mutual assistance in criminal matters because the requests for assistance made under that scheme relate directly to matters traditionally involving relations between foreign states, and the scheme therefore involves requests for assistance, and a decision on whether such assistance should be provided being made at the Government to Government level.

18. In the case of mutual assistance between regulatory agencies, as has been mentioned, the proposed legislative regime would be limited to the gathering of information on behalf of the overseas agency. Matters directly relating to the extradition of alleged securities market offenders, for example, would continue to be dealt with under the mutual assistance in criminal matters regime. The legislative regime would also be confined to national business regulatory agencies.

19. For these and the following reasons an inter-Governmental MOU/treaty system would be inappropriate for the proposed regime because -

the regime would be intended to be an administratively simple, speedy and convenient facility which may be utilized at the responsible agency to agency level, rather than directly between Governments;

the request by the relevant foreign agency would not, and would not be intended to give rise to a binding international legal obligation to provide the assistance requested; it would provide a facility to the domestic agency to provide the assistance requested in appropriate cases.

In the light of these matters the legislation empowering the regulatory agency to provide the assistance when so requested, and setting out the limitations subject to which such decisions are to be based, would provide a sufficient and publicly identifiable statement of the scope of the power in question.

20. A role is, however, seen for the use of 'Inter-Agency' MOUs to supplement such a regime. Such MOUs could, for example, either on a bilateral basis or multilateral basis, provide helpful recognition of the desirability of agencies providing such co-operation by way of use of the compulsory information gathering powers. It would need to be recognised that such Inter-Agency MOUs would not provide, and were not intended to provide, either a legal basis for the exercise of compulsory powers or binding legal obligations to exercise such powers. They could, however, provide a desirable and formal expression of the understanding between the respective agencies that they will co-operate to facilitate the exercise of powers and functions by the other in connection with the laws they administer. MOUs relating to the exercise of compulsory powers in aid of foreign agencies (known as 'second generation' MOUs) are presently being developed between some national agencies that have been conferred with such powers.

Conclusion

21. There is a need for national business regulatory agencies within the Commonwealth to further develop the level of co-operation which is presently available under voluntary arrangements.

22. There is also, however, a need for Commonwealth countries to agree on the need to develop an appropriate legal structure to enhance the level of assistance between business regulatory agencies within the Commonwealth. Such a legislative regime would, as outlined above, provide a capacity for the various agencies to compulsorily gather information on behalf of other agencies in appropriate cases.

23. The increasing impact of the international financial markets on national capital markets of Commonwealth countries, and on the business and financial ties between Commonwealth countries, points to a need for a level of co-operation between overseas agencies which would warrant the establishment of a mechanism that was not limited only to co-operation on Commonwealth matters. In this regard the mechanisms for co-operation developed within the Commonwealth should have regard to the approach adopted in equivalent non-Commonwealth countries, such as the multilateral arrangements agreed to by some of the members of IOSCO.

24. Commonwealth countries should agree to encourage their national business regulatory agencies to provide assistance to other agencies and to actively seek the development of agreements, such as MOU, between such agencies which recognise the need for and support the provision of such assistance.