Comparative Australian/American Law
Professor Rosen
Summer 2013

Course

This course will explore various aspects of regulation in the United States and Australia. The course will be co-taught with Daniel Stewart of Australia National University.

The course examines the significance and application of regulation in modern legal systems. Objectives include: 1) understanding of basic aspects regulatory processes in the U.S. and Australia; 2) better comprehension of the significance of different sources of regulatory law, including foreign governments, the U.S. government, and others; and 3) improved understanding of the lawyer’s role in interacting with regulators.

Administrative Items

Classes: Students must be available to meet pursuant to the Australian course calendar.

Class Performance: Regular, punctual class attendance and participation are course requirements along with submission of required written materials.

Grading: Final grades will be based upon class participation, participation in class exercises, and a final paper.

Text and Other Materials: Reading material will be assigned throughout the course.

Contact Information: My e-mail address is krosen@law.ua.edu.

Recording Devices: The use of recording devices is prohibited without my prior permission.

Accommodations: Students with disabilities or special needs are encouraged to contact Claude Arrington, Associate Dean for Students/Academic Services, at 205-348-5750 (carrington@law.ua.edu) so that any individual needs for support services can be evaluated and accommodated in a timely manner. Please let me know if I can be of assistance as well.
Course Outline

I. Module 1: Introduction and Authority to Regulate

II. Module 2: Agency Rulemaking

III. Module 3: Encouraging Compliance: Enforcement, Education and Exposure

IV. Module 4: Role of the Courts

V. Module 5: Self-regulation / Private Regulation / Deregulation
Tentative Readings. (Please note that we intend to also incorporate local guests lecturers as available to enrich coverage)

Module One: Introduction(s) and Authority to Regulate

Introductions and Meaning of Regulation?

Day one and, after the usual introductions and administration we will set the scene for the course. Topics to be introduced include:

- What do we mean by regulation?
- Theories of regulation
- Methods of regulation
- Evaluating Regulation

Reading:


Recommended:


Preparation:

- Bring along some information about a particular regulatory regime you want to explore further in the course and comment on whether you think it is particularly effective or ineffective, and why.
Australian Regulatory Framework

We will consider the constitutional and institutional framework which establishes the relationship between the legislature, executive and the courts. In particular we examine the scope of separation of powers and its value in identifying the characteristics of the Australian regulatory framework. Topics include:

- Separation of powers and limits on regulatory agencies, incl limits of executive, legislative and judicial power of government agencies.

- Federalism and relationships between Cwth and State agencies

Reading:


Recommended:


See also:

U.S. Regulatory Framework

- The U.S. administrative state from a systemic perspective
- Legislation, oversight, and the relationship between the President, Congress, and Administrative Agencies
- Federalism and State Administrative Agencies

Reading:

Module Two: Agency Rulemaking

U.S. Agency Rulemaking

- The Administrative Procedure Act, the rulemaking process, and economic analysis
- Other agency interpretive guidance

Reading:


Australian Rulemaking

We will examine the basis on which Commonwealth legislative instruments are developed and put into effect. It will examine the Legislative Instruments Act, and its requirements for consultation and registration. It will also examine the role of parliamentary scrutiny and other non-judicial forms of accountability placed on rule-making through FOI and Ombudsman review. There will also be a consideration of the role of Ministerial guidelines and Government procurement in attaining regulatory objectives.

Reading:


Recommended:


Exercise: Administrative Agency Rulemaking Exercise
Module Three: Encouraging Compliance: Enforcement, Education and Exposure

Compliance options in Australia

We will look at the options facing a regulatory agency, or designer of a regulatory regime, considering how to encourage compliance and the issues that different forms of enforcement give rise to. Topics to be covered include:

- The regulatory pyramid
- Choice of enforcement mechanism
- Role of education, establishing guidelines, etc.
- Disclosure as enforcement: naming and shaming, incl corporate disclosure regimes.

Reading:


Recommended:


See also:

U.S. Enforcement Action

- Initiation of enforcement actions and standards for their evaluation
- Settlement processes
- Private Rights of Action

Reading:

Module Four: Role of the Courts

US Judicial Review of Agency Action

- Statutory interpretation
- Chevron Doctrine and how much deference to give agencies

Reading:


Judicial Review in Australia

We will consider the accessibility and role of judicial review, considering issues of justiciability, jurisdictional hurdles for review of legislative decisions, and role of deference.

Reading:

- *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28

Recommended:


Exercise: Tobacco Regulation and Plain Packaging
Module Five: Self-Regulation/Private Regulation/ Deregulation

Private Actors as regulators in Australia

We will consider the various ways in which non-government actors can be involved in regulatory schemes. It will follow on from the discussion of judicial review last week to examine broader questions of accountability and legitimacy of such involvement. Various case studies and examples will be used, including securities regulation.

Reading:


Recommended:

• Grabosky, P. ‘Beyond Responsive Regulation: The expanding role of non-state actors in the regulatory process’, (2012) Regulation & Governance

Private regulators and Deregulation in the U.S.

• “Official” powers of private regulators (e.g., securities industry self-regulatory organizations)

• Self-created industry standards

• Deregulation and the JOBS Act adjustment of private offerings and crowd funding revisited

Reading:

• About the Financial Industry Regulatory Authority, http://www.finra.org/AboutFINRA/
• About the International Chamber of Commerce, http://www.iccwbo.org/about-icc/

Exercise: Regulation of the Media