

Regulatory Trends

Introduction

This title should be read in tandem with the Regulatory Structures title, which outlined the four main types of regulatory approaches to regulating professions: self-regulation, government regulation, co-regulation and meta-regulation. The development from self-regulation through to meta-regulation represents the overarching regulatory trend. Rather than a linear progression, however, the image of sedimentation is more accurate since it captures the fact that different ways of regulating have been deposited onto existing ones. Regulatory structures build on each other as composites. This title looks at certain elements of this process.

The regulatory trends in focus are:

- Competition and Consumer Protection Agenda;
- Challenges to Traditional Associational Control;
- Extension of Regulatory Enforcement;
- Attention towards Large Professional Service Firms and their Seniors;
- New Problems, New Regulatory Targets;
- National and International Uniformity and Co-operation; and
- Regulatory Accountability.

Competition and Consumer Protection Agenda

The dominant rationale for the regulation of the professions has been competition and consumer protection. As part of a wider process of liberalisation that started in the 1980s, the self-regulatory model is being de-regulated and re-regulated on two grounds: one, that the traditional self-regulatory model is anti-competitive; and two, that despite the claims of public-interestedness, it is failing to serve the interests of the 'consumer'. In moves that mimicked the activities set by the Thatcher government with respect to all the status professions, market-based incentives and consumer protection regulation have been introduced to the Australian professions. Driven by the federal and state governments and the Australian Competition and Consumer Commission, the microeconomic reforms have 'sought to weaken professional monopolies, dismantle restrictive arrangements, and challenge entrenched privileges'.¹ For the consumer, new legislation has sought to ensure that their needs are met and that practitioners comply with transparent, fair and reasonable billing practices.

Some writers have argued that the competition agenda is far stronger than the consumer protection program, and in some areas at its expense, specifically, access to professional services and products. The competition (anti-monopoly) program continues to drive most regulatory activity including with respect to professional start-ups or e-commerce. Indeed, there is evidence of companies offering professional services

¹ Daniel Muzio and Stephen Ackroyd, 'On the Consequences of Defensive Professionalism: Recent Changes in the Legal Labour Process' (2005) 32 *Journal of Law and Society* 615, 622.

themselves beginning to enforce competition law through private litigation, sidestepping the regulators altogether.

Challenges to Traditional Associational Control

When professional associations had more or less a monopoly on individual professional discipline, formal enforcement against professionals was rare. It was mostly limited to disciplinary proceedings involving fraud or liability involving gross negligence. As part of the dismantling of traditional self-regulation, professional associations have had their regulatory functions either taken from them or had them supplemented with government agencies in co-regulatory arrangements (see the Regulatory Structures title, the Corporate/Firm Internal Complaint Handling title and the External Complaint Handling and Discipline Systems title). These government bodies have powers of compulsion of evidence and powers to enforce their determinations according to standards that diverge, at least in some respects, from traditional professional values and emphases. This development has seriously challenged the associations' control over discipline and 'exit' from the professions, though some associations have maintained more authority here than the state regulators.

Meanwhile, the other, traditional form of associational control relates to admission or 'entry'. As part of the trend towards meta-regulation, proponents of outcomes-based regulation have questioned the validity of the associations' extensive education, training and other, 'traditional' requirements such as professional indemnity insurance, availability of a compensation fund, and legal professional privilege. They argue that so long as basic practice standards are met, such as those in a Code of Conduct, it should be questions of price and service quality that determine which level of regulation and protection a customer both chooses and to which they are then entitled.² For example, in the legal professional context, instead of universal entry standards, 'an optimal regulatory framework should not try to regulate all legal activities uniformly, but should have a targeted approach, where different activities are regulated differently according to the risk(s) they pose rather than regulating on the basis of the professional title of the provider undertaking it'.³ So, for example, the regulator could set differential education standards and licence a provider, depending on the perceived risk of an activity.

In order to preserve their positions and in accordance with their driving beliefs about professionalism, the professional associations have responded by not simply shoring up entry requirements, but by making themselves centrally important to drafting and distributing practice standards. There are four types of standardisation that associations (and professional workplaces) are influencing: the technology or instruments used in the work, the performance standards or outcomes of the work, terminological standards or the language/vocabularies used to frame professional problems and their solutions, and, finally, the

² Competition and Markets Authority, *Legal Services Market Study* (December 2016) 164-6.

³ Competition and Markets Authority, above n 2, 201 [6.22].

behaviour and procedures for 'good practice'.⁴ Establishing practice standards helps ensure that professional knowledge is clear, evidence-based and consistent. It also strengthens the boundaries between professional and non-professional and reinforces the crucial role of the associations.

The working out of power sharing between regulators and associations continues, with some professions and jurisdictions achieving more successful co-operation than others.

Extension of Regulatory Enforcement

One feature of the shift from professional autonomy to accountability grounded in external regulation (see the Governance Accountability title) has been an increase in the variety and robustness of enforcement regimes against professionals.

In contrast to traditional accountability rooted in peer-review, one of the main modes of regulated enforcement is formal complaints proceedings by consumer clients. These proceedings often involve an ombudsman empowered by legislation and there are commonly several levels (for example, mediation and negotiation) at which the parties are encouraged to resolve their differences. If there is failure to agree there may be a hearing in which the ombudsmen or, if it has led to a disciplinary proceeding, a tribunal member makes a determination to resolve the dispute.

In addition, professionals may find themselves the subject of legislation designed for a purpose other than their primary professional one. For example, accountants who give financial advice are regulated as financial advisers by the Australian Securities and Investments Commission ('ASIC'). A legal professional employed by a corporation challenged by competition compliance may come to the notice of the Australian Competition and Consumer Commission ('ACCC'). Commonly, this will involve a range of sanctions if liability is found.

There are also industry-based recourses. These are usually in the form of a company limited by guarantee of which professional providers become members. They are bound by the terms of the company's by-laws or constitution in a member contract that may include terms dealing with complaints handling and disciplinary proceedings.

In some regulated professional disciplinary schemes, senior professionals become peer assessors of matters alongside those appointed by the professional regulator. Parker criticised this as a continuation of professional (self-serving) autonomy and a failure of reform.⁵ Indeed, while professional discipline can lead to expulsion from a profession, generally a professional regulator will be content with admonition,

⁴ Four types of standards: S Timmermans and M Berg, *The Gold Standard: The Challenge of Evidence-based Medicine and Standardization in Health* (Temple University Press, 2003).

⁵ Christine Parker 'Regulation of Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676, 676.

demonstration of remorse and/or a fine. This is especially likely if the professional has made restitution to the client.

By contrast, where a sectoral regulator like ASIC or the ACCC takes action, it has powers ranging from fines and enforceable undertakings to referring a party for civil penalty action or prosecution. Notwithstanding Parker's criticisms in some areas, overall, regulatory enforcement avenues have proliferated and can be tougher. These days, before a party is offered an enforceable undertaking⁶ or deferred prosecution agreement⁷ to end an investigation or other proceedings, they will generally have to admit liability. This is a worldwide enforcement trend elaborated upon below. In the US, this toughening stance on regulatory non-compliance has been formalised in the 'Yates Memo'.⁸

The Yates memo is addressed mostly to deferred prosecution, though it is influential on enforcement policy more generally. As well as admitting liability, the memo requires organisations to surrender the names and details of officers' involvement in non-compliance as a condition of deferring prosecution. This is to enable regulators to pursue an enforcement trend of proceeding against individuals, not only organisations. Employed professionals are often significant enablers of corporate and organisational conduct,⁹ and may be the subject of decisions taken under the Yates memo and its international counterparts.

Attention towards Large Professional Service Firms and Their Seniors

Perhaps not something that immediately comes to mind, an increasingly dominant source of regulation over professions and professionalism is the workplace. The workplace exerts different forms of control, sometimes in ways that are not entirely compatible with either associational or external regulatory authority. These forms of regulation over professional behaviour and meaning are most concentrated in large 'professional service firms' servicing the corporate sectors, where the hybrids of traditional professionalism and business modes are most pronounced. They include staff selection, socialisation, training, performance review and other forms of 'identity work', professional fees, and the emphasis on 'whole-of-firm' and team approaches to work operations.¹⁰ These practices are altered and enhanced by the increasing possibilities of technology.

As mentioned, government regulators have begun to recognise that traditional regulatory models, based on individual character and commitment, are no longer sufficient. In large organisations, they fail to address the organisational, collective and increasingly global nature of professional practice and the systemic causes of professional breaches. There has been a mixture of regulatory approaches and proposed approaches here.

⁶ A form of settlement of civil regulatory proceedings available to 19 Australian regulators ranging from environmental protection to financial sector, common internationally and frequently used.

⁷ A form of settlement of criminal regulatory proceedings available to a wide range of US regulators, available in the UK and about to be introduced in Australia.

⁸ In September 2015, the US Department of Justice issued the 'Yates Memo', under which the department has stated it intends to step-up its action against individuals involved in corporate contraventions: Memorandum from Sally Yates, Deputy Attorney General, US Department of Justice to Assistant Attorney General et al, 9 September 2015 <<https://www.justice.gov/dag/file/769036/download>> (accessed 23 August 2017).

⁹ *Shaffron v Australian Securities and Investments Commission* [2012] HCA 18.

¹⁰ John Flood, 'The Re-landscaping of the Legal Profession: Large Law Firms and Professional Reregulation' (2011) 59 *Current Sociology* 507, 510.

These vary from direct firm discipline to more aggressively holding senior management responsible, including through the greater use of criminal sanctions. There are also in-between (or, effectively, first stage) approaches in which the regulator seeks to motivate and help organisations develop their own ethics capacities with the regulator as consultant and collaborator.¹¹ The strength of an ‘education towards compliance’ approach is that, without it, standards are left ‘largely to external forces – malpractice liability, litigation sanctions, the practice regulations of government agencies, and the marketplace’, which are all at the expense of self-regulation.¹² From the regulator’s perspective, they also locate within large practices whom to hold to account.¹³ Having someone responsible for their practice’s ethics management gets closer to having an ethics counsel and compliance experts, roles Chambliss and Wilkins identify as crucial to a robust ethical infrastructure within professional service firms.¹⁴

New Problems, New Regulatory Targets

Regulators across the globe face the challenge of how to ensure standards of expertise and ethicality in new and fraught areas. These include how and whether to oversee professional service start-ups and professional e-commerce. Here, many of the typical controls over the entrepreneur (who may not themselves be a trained or licensed professional) are weakened and typical recourses for customers are diminished or non-existent. Professionals are engaging in ethically complicated areas, such as genome sequencing and stem-cell research. These are in contexts in which only certain groups in the population can get access to these and other medical goods, including life-saving medications. Professionals and professional service firms are increasingly collecting sensitive data sets. An aspect of professional risk (see the Professionals and Risk title), which is also a growing regulatory challenge, is how to tackle cyber-crime and reduce its likelihood and impact. At the same time, as mentioned in the trend above, one of the current and growing regulatory targets is professional misconduct in relation to advising corporations where regulators are increasingly turning to criminal laws and procedures.

National and International Uniformity and Co-operation

Across the globe, there is a move towards uniformity of professional standards, procedures and regulation at the national and international levels. This trend is the product of different interests and objectives. They include to support national and international professional services markets by reducing regulatory compliance costs and allowing for professionals to practice in different jurisdictions according to agreed standards of practice. These aims are in line with the competition agenda outlined above.

Increasingly, the regulators themselves are co-operating among themselves and integrating their procedures and outcomes. The immediate aim of harmonisation and mutual recognition is that there is no unnecessary

¹¹ Ted Schneyer, ‘Thoughts on the Compatibility of Recent UK and Australian Reforms with US Traditions in Regulating Law Practice’ [2009] *Journal of the Professional Lawyer* 13, 22.

¹² Schneyer, above n 11, 34.

¹³ Schneyer, above n 11.

¹⁴ Elizabeth Chambliss and David Wilkins, ‘The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms’ (2002) 44 *Arizona Law Review* 559.

cost and inefficiency in doubling-up, for instance, in approving medicines and other therapeutic goods. The Australian government has made international regulatory co-operation a policy: 'if a system, service or product has been approved under a trusted international standard or risk assessment, then our regulators should not impose any additional requirements for approval in Australia, unless it can be demonstrated that there is a good reason to do so'.¹⁵ The wider aim is to share best practices to improve the regulatory institutions themselves.

Regulatory Accountability

Just as the professions and their associations have been subjected to intense scrutiny, increasingly, the regulators too are being called to account. Professional services and products are vitally important to people, to their health, wealth, liberty, natural environments and safety. As such, there is a push for regulators to engage in greater and more meaningful public consultation. This is a big challenge where the public represents a larger and more diverse group than ever before. It is not easy to weigh up and enact different interests. Regulators are being asked to be more efficient and transparent, including in supplying quicker decisions and more information about their decisions. These decisions in the medical regulatory domain include, for instance, high-risk medicines, recalls, medicine shortages and delays. Regulators are being asked to ensure and prove their own expertise in subject-matter regulation, something they will need not least to engage in educational compliance initiatives with the largest professional service firms and institutions.

¹⁵ Prime Minister of Australia, Media Release, 'Industry Innovation and Competitiveness Agenda' (14 October 2014).

Summary

This title describes seven national and international regulatory trends. These trends are inherent in and driving the wider changes to regulatory structures already outlined (see the Regulatory Structures title). These regulatory trends are: Competition and Consumer Protection Agenda; Challenges to Traditional Associational Control; Extension of Regulatory Enforcement; Attention towards Large Professional Service Firms; New Problems, New Regulatory Targets; National and International Uniformity and Co-operation and Regulatory Accountability.

Written by: Justine Rogers and Dimity Kingsford Smith
This subject overview has been written with the support of the following partners:

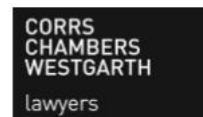


Australian Government
Australian Research Council



UNSW
SYDNEY

CLMR
Centre for Law, Markets and Regulation



Allens > < Linklaters