

Public Risk

Introduction

State regulation is intended to (and does, in theory) improve consumer protection by addressing various risks facing the public. Governments have choices about the form of regulation they can deploy where the different types of regulatory tools are generally seen on a spectrum from self-regulation through to prescriptive rules-based State regulation. Historically, the choice of regulatory intervention has been a consideration of risk to the public and costs to both the government and the intended regulated community. Costs are not always seen in just economic terms but also in terms of individual agency and professional autonomy. Risk is considered in terms of what form of regulation provides best protection for the circumstances and, in this context, 'public risk' primarily means consumer protection.

This article considers the 'trade-off' between risk to the public and need for public protection and whether professional regulation (as a form of regulation of professional conduct) is an appropriate form of public protection and whether it is seen as a trade-off against professional autonomy and self-regulation.

The related article, ['Risk Management and Improvement'](#), discusses the creation of risk management systems and the effective identification of risks.

The Framing of Regulatory Response to Risk

Regulation, traditionally understood, involves the imposition of public authority 'through a system of rules and laws in which the regulator ensures technical compliance by the regulated'.¹ Under this reactive model of regulation, public risks are mitigated by making those risks the subject of technical regulation. However, this traditional approach may fail to protect the public and more particularly consumers from public risks, as it may characterise those risks as being beyond jurisdiction.²

Nicholls, citing Sparrow's work on regulatory approaches aimed at harm minimisation, describes a 'more modern approach to regulation' that focuses on delivering outcomes and public value through a partnership between the regulator and regulated to proactively prevent harms.³ This 'risk-based' approach to regulation focuses on addressing risks that hamper the delivery of public value.⁴ This has been described by Sparrow as the 'craft of regulation'.⁵

¹ Andrew Nicholls, *The Challenges and Benefits of Risk-Based Regulation in Achieving Scheme Outcomes* (Paper presented at the Actuaries Institute Injury Schemes Seminar, Adelaide, 8–10 November 2015)²

<<https://www.actuaries.asn.au/Library/Events/ACS/2015/NichollsRegulation.pdf>>

² Nicholls, above n 1, 2.

³ Nicholls, above n 1, 2.

⁴ Nicholls, above n 1, 2.

⁵ See Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2011).

Nicholls illustrates the distinction between traditional and risk-based regulation using the NSW Motor Accidents Authority (an authority which was abolished on 1 September 2015) as an example.⁶

Importantly, risk-based regulation is not the same as light-touch regulation; nor is it the polar opposite of technical, rules-based compliance.⁷ Instead, it involves a mixture of strategies and regulatory mechanisms, the severity of which depends on the nature of the risk being targeted. For example, a public safety program will call for high levels of prescription, because of the serious consequences of system failure.⁸

In other words, a risk-based approach is a tool for prioritisation; the 'allocation of a regulator's scarce resources and will be influenced to a large degree by the purpose of the regulator's role (e.g. customer protection versus public safety).'⁹

Risk-based regulation has been adopted by many governments as official policy.¹⁰ For example, the NSW Government has issued a document called Guidance for regulators to implement outcomes and risk-based regulation, in which it identifies numerous benefits of a risk-based approach.¹¹ Another reason that risk-based regulation is attractive to governments is that it reduces compliance costs.¹²

Striking the Right Balance

The reality of public risk is that it often arises, or surfaces, at times of critical moment. Designing an appropriate government response and giving careful and slow consideration to the full range of options available for effective and fair design is the privilege of quiet moments and research environments. Governments often find themselves with limited time and a rising tide of community concern demanding urgent action.

The Office of Best Practice Regulation (OBPR) have sought to provide a ready reckoner for legislators on the options available, citing¹³ that the spectrum of regulation ranges through:

1. Self-regulation;
2. Quasi-regulation;
3. Co-regulation;
4. Explicit government regulation.

⁶ Nicholls, above n 1, 9.

⁷ Nicholls, above n 1, 4.

⁸ Nicholls, above n 1, 4.

⁹ Nicholls, above n 1, 4.

¹⁰ Nicholls, above n 1, 7. See also Environment Protection Authority (SA), '*Becoming a Harms-based Regulator – Developing a Problem-solving culture*' (August 2013).

¹¹ NSW Government, Guidance for regulators to implement outcomes and risk-based regulation, NSW Department of Finance, Services and Innovation (October 2016) <https://www.finance.nsw.gov.au/sites/default/files/QRS_Outcomes_Risk_Based_Regulation_Guidelines.pdf>.

¹² See Malcolm K. Sparrow, (29 October 2014) What is a Risk-Based Regulator? John F. Kennedy School of Government, Harvard University, <<https://www.vic.ipaa.org.au/document/item/2784>>.

¹³ Australian Government 2007, *Best Practice Regulation Handbook*, Canberra.

The work of the OBPR was explicitly intended to provide legislative direction to regulatory solutions to public risk problems with an encouragement to solutions that have the characteristics of:

- administrative simplicity
- flexibility; and
- efficiency and equity

In arriving at their analysis of regulatory options, the OBPR identifies that the “government requires that self-regulation be one of the first options considered”¹⁴, where self-regulation is identified as commonly the domain of professions.

When there is public commentary and debate about identifiable risks to the community, or when the issues arising appear complex, it will often seem appropriate to intervene with regulation, or for an existing regulator to intensify enforcement. Amidst the urgent introduction of measures to protect consumers, it can be difficult for professions, their professional standards and disciplinary systems to identify opportunities for professional standards to lift standards in a given area of regulatory interest. While the range of regulatory options has modified slightly the question about what type of model best fits the public risk profile has become more fraught, based largely on the concept of what represents public risk.

The Office of Regulation Review, earlier described that self-regulation should [only] be considered where: there is no strong public interest concern, in particular, no major public health or safety concern;

- the problem is a low risk event and the consequences of self-regulation failing to resolve a specific problem are small; and
- the market is able to correct any problems and there is an incentive for the industry to comply with self-regulatory arrangements.¹⁵

The centrality of risk to the public as an impetus for government regulation is an important consideration. This is especially so when attempting to strike an appropriate balance between government intervention and professional self-regulation.¹⁶

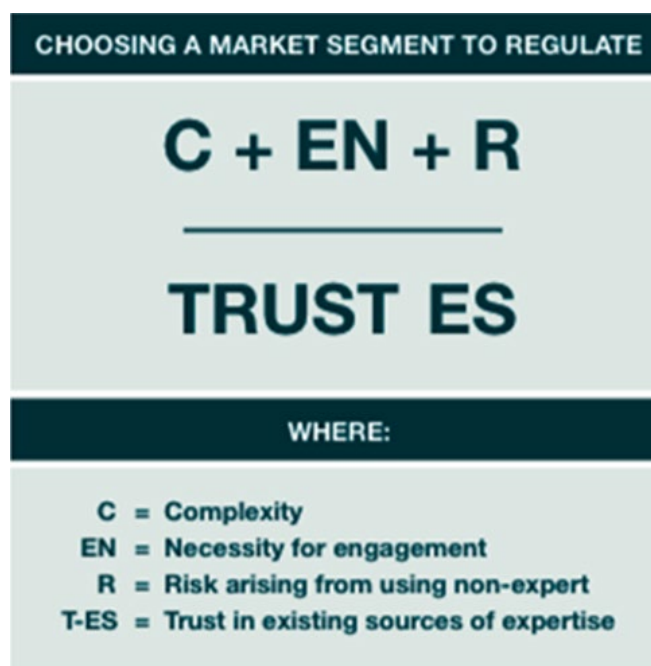
¹⁴ Australian Government 2007, *Best Practice Regulation Handbook*, Canberra, p97.

¹⁵ Office of Regulation Review, *Guide to Regulation – Second Edition: December 1998*, Productivity Commission, 16 October 2001.

¹⁶ Sanders, D, ‘Striking the Right Balance’ (June 2017) *Law Institute Journal* 22.

Determining the significance or likelihood of a public risk trigger is challenging and even when a level of risk is identified, it still does not easily translate to a clear preference of regulatory strategy. To assist in the identification of such opportunities, at least in so far as to whether professional regulation (as in the regulation of professional conduct) is an appropriate response, Sanders has developed a regulatory prioritisation tool.¹⁷

Figure 1: Regulatory Prioritisation Tool



This framework helps assess when it is necessary to rely on government regulatory regimes, as opposed to self-regulation as a professional, supported by a professional association. Public risk, that is, risks posed to consumers, can be identified in the various components of the model. 'R' ('Risk arising from using non-expert'), 'EN' ('Necessity for engagement') include and emphasise risks to the public. Additionally, the more complex the market segment is, the more likely there are to be risks to the community.

Moreover, the way in which risks are defined is important. Black observes that the UK Financial Services Authority's (FSA) risk assessment framework adopts a definition of risk as 'risk of failure to achieve the regulator's statutory objectives'. This is not the same as an assessment of, for example, systemic risk within financial markets, or risks to consumers – these risks are only indirectly incorporated into the FSA's risk approach.¹⁸

¹⁷ Sanders, D. The legitimisation of modern professions (Professional enlightenment of financial planning in Australia), DProf(TransSt) Thesis, CQU, Australia, 2010, cited in Professional Standards Councils, 'Professionalisation of financial services' (White Paper, NSW Department of Justice, September 2015) <https://www.psc.gov.au/sites/default/files/NEW-PSC%20Whitepaper_final.pdf> 6 n 7.

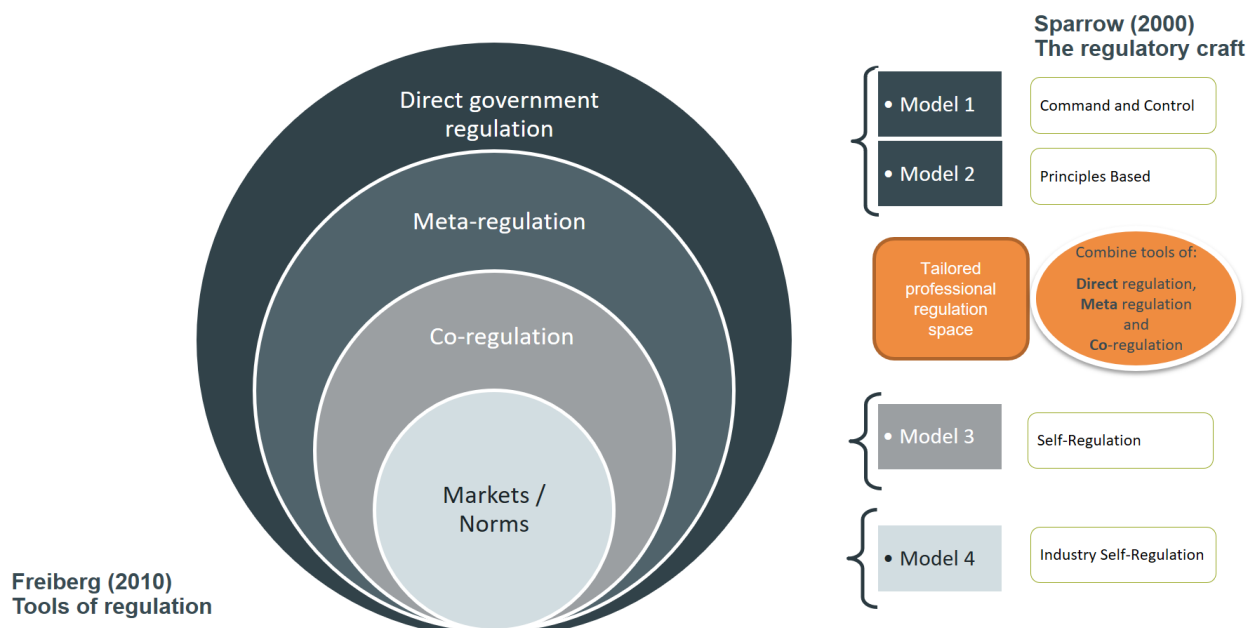
¹⁸ Julia Black, 'Mapping the Contours of Contemporary Financial Services Regulation' (Discussion Paper No 17, ESRC Centre for Analysis of Risk and Regulation, October 2003) 25 <http://eprints.lse.ac.uk/36045/1/Disspaper17.pdf>.

The above comments highlight the importance of the most effective form of consumer protection involves the balancing statutory and government intervention with opportunities for professional associations to engage in a dynamic relationship with the community and government.¹⁹

Freiberg has advanced the discourse on regulatory models with a focus on the dynamism of relationships between the regulated and the community and in this regard identifies meta-regulation and the creation of a negotiated space in the regulatory spectrum.

Figure 2: Tools of Regulation – Freiberg (2010)

Regulation (considerations of Quasi, Formal and Risk based approaches)



Freiberg's work and the overt identification of a meta-regulatory frame creates the perfect space for the operationalising of Sander's regulatory prioritisation tool, focused on striking the right balance between regulatory intervention and the need/opportunity for potential professional regulation with the right (effective) form of professional association oversight.

¹⁹ Sanders, above n 16.

Professional associations represent the community, members, and, when properly executed, the regulatory face of the profession.²⁰ In recent decades, government efforts have been directed at shifting regulatory authority away from the professions themselves and towards statutory systems instead.

Sanders observes that:

'[g]overnment has not always engaged strategically with the changing role of professions or found a way to build regulation that responds to a changing market and professional practice. Government's instinct is instead to respond to public risk and prioritise consumer protection.'²¹

Where a tailored model of regulation can be applied with a professional standards (meta regulatory) framework as a solution, then the Professional Standards Councils, responsible for Australia's unique body of Professional Standards Legislation, provides for the negotiation of unique regulatory arrangements for different professional communities based on the unique public and client risk issues. Professional Standards Legislation is a regulatory framework of which Australia should be proud, and when reflected in the regulatory theorising of leading authors such as Sparrow, Freiberg and Black, can be seen as a genuine regulatory innovation on the global stage.

²⁰ Sanders, above n 16.

²¹ Sanders, above n 16.

Summary

Public risk is considered in terms of what form of regulation provides the best consumer protection for the given market. In determining this decision, a 'trade-off' needs to be considered regarding the potential risk to the public and the loss of professional autonomy and self-regulation.

Traditional approaches may fail to protect the public, and more particularly consumers, from public risks, as it may characterise those risks as being beyond jurisdiction. As such, this article emphasises a general shift towards a risk-based approach that focuses on delivering outcomes and public value through a partnership between the regulator and regulated to proactively prevent harm.

Meta-regulation, utilised by the Professional Standards Legislation, reflects leading regulatory theory and provides the most effective form of consumer protection; balancing statutory and government intervention with opportunities for professional associations to engage in a dynamic relationship with the community and government.

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