

Governance Accountability of Professional Associations

Introduction

This title considers structures and routines of professional association governance. It also considers the need for governance arrangements to be transparent to those who interact with the association and open to new ideas and beliefs from the professional and wider communities.

Balancing Multiple Roles and Many Constituencies

Professional association governance is complicated by decision-making across many functions. Associations must govern their profession and represent constituencies with aligned but varying objectives: association elections and governance representation are usually shaped to this need. Associations are also service providers (e.g., education) with a commercial purpose. They represent member interests, for instance, through public and political advocacy. Associations are often also regulators of their members' conduct.

In some professions, such as accounting, the constituencies within a profession have fragmented, and there are several associations that represent large firms, medium and small firms, or industry sectors.¹ Contri-wise structures of government regulation can sometimes bring a cluster of different associations in allied professions closer. For example, in the medical context, 14 health professions² are regulated by the Australian Health Practitioner Regulation Agency ('AHPRA').³ In the legal profession, a group of the nine largest law firms in Australia, represented by Law Firms Australia ('LFA'), have collectively achieved increased representation.⁴

Structures and Routines of Professional Governance

The Professional Standards Councils ('PSC'), building on the work of Benton, Gonzalez-Jurado and Beneit-Montesinos,⁵ identifies '40 elements of professionalism' which constitute the key standards, processes and practices that a profession should have in place.⁶ Many of these elements relate to the governance of professional associations, in two broad categories: 'organisational and internal governance' and 'external governance and public accountability'.⁷ Examples of relevant elements include criteria for appointment of

¹ Chartered Accountants Australia and New Zealand ('CAANZ'); Certified Practising Accountants Australia ('CPA'); Association of Taxation and Management Accountants ('ATMA'); and Institute of Public Accountants ('IPA'); John Morgan and Pamela Hanrahan, 'Professional Indemnity Insurance: Protecting Clients and Regulating Professionals' (2017) 40 *University of New South Wales Law Journal* 353, 363 n 39.

² There are 14 separate national boards including, e.g., Chinese medicine, chiropractors, dental, optometry, pharmacy. All boards are now supported by AHPRA under national Health Profession Agreements: see <<http://www.ahpra.gov.au/National-Boards.aspx>> (accessed 16 November 2017).

³ AHPRA operates under the Health Practitioner Regulation National Law, which entered into force on 1 July 2010 <<http://www.ahpra.gov.au/About-AHPRA/Who-We-Are.aspx>> (accessed 16 November 2017).

⁴ Justine Rogers, Dimity Kingsford Smith and John Chelley, 'The Large Professional Service Firm: A New Force in the Regulatory Bargain' (2017) 40 *University of New South Wales Law Journal* 218, 254–5.

⁵ D C Benton, M A Gonzalez-Jurado and J V Beneit-Montesinos, 'Defining nurse regulation and regulatory body performance: a policy Delphi study' (2013) 60 *International Nursing Review* 303, 308.

⁶ PSC, *40 Elements of Professionalisation* <<http://www.psc.gov.au/sites/default/files/App%204.%2040%20Elements.pdf>> (accessed 16 November 2017).

⁷ PSC, *What Is a Profession?* <<https://www.psc.gov.au/what-is-a-profession/academic-view>> (accessed 16 November 2017). See also, e.g., Andrew Friedman, Mary Phillips and Ming Ming J D Chan, *Governance of Professional Associations: The Structure and Role of the Governing Body* (Professional Associations Research Network, 2002).

senior officials, mechanisms for holding committees reporting to the Board accountable, publicly available operating procedures, and clear appeals processes.

Ideal professional governance is based in regular, transparent direct election of office-bearers by members. Committees and boards (often filled by volunteers) should have published mandates and membership. Associations are usually companies limited by guarantee or may have a mutual structure. Historically, many adopted a less transparent structure with a committee or college which appointed the council (the term used for the board in many professional associations), which in turn appointed the college members. Accordingly, it was in the committees of the association where the multiple constituencies of which associations are comprised sought influence. Now, it is more often the case that the general membership votes for their associational government.

Moving from internal to externally facing governance, transparency and clear communication with members and other stakeholders (such as consumers and government) are essential. These characteristics are noticeably absent when, for example, an association seeks to evade public inquiry;⁸ deny its members the ability to express their concerns; and makes decisions requiring a significant financial outlay without apparent regard to the views or interests of constituents.⁹ In such circumstances, legal recognition and protection of an association's professional status may be withdrawn.¹⁰

With challenges to traditional professional autonomy being replaced with greater accountability (see the Professional Accountability title), constitutional reforms of associations have led to more transparency and member participation.¹¹ Now, associations often have 'electoral colleges' where member professionals vote for council members, a certain number from each constituency within the association (e.g., country members; city members; and corporate members). The degree to which voting has extended to association committees not part of the governing council is variable. Some examples are outlined below:

- The Law Society of NSW is governed by the Law Society Council, which features representation from various segments of the profession: country, suburban, city, corporate, large firm, etc.¹² The Society's Committees have powers, authorities and tasks delegated by the Council but do not have a

⁸ Edmund Tadros, 'CPA board shows contempt for members: Senators', *Australian Financial Review* (online), 12 September 2017; Jane Hume, 'CPA was a sorry tale of obfuscation, ducking and weaving', *Australian Financial Review* (online), 14 September 2017.

⁹ Edmund Tadros, 'CPA Australia spent \$6m on former CEO Alex Malley's book, TV show', *Australian Financial Review* (online), 14 September 2017.

¹⁰ See PSC, 'Latest News: CPA Australia Ltd Professional Standards Scheme' <<https://www.psc.gov.au/news-and-publications/latest-news/cpa-pss>> (accessed 16 November 2017).

¹¹ See, e.g., Ellen Kuhlman and Mike Saks, 'Introduction: Changing Patterns of Health Professional Governance' in Ellen Kuhlman and Mike Saks (eds), *Rethinking Professional Governance: International Directions in Healthcare* (Policy Press, 2008) 1, 2. See also, in the Australian context, Rosalie Boyce, 'Organisational governance structures in allied health services: A decade of change' (2001) 24 *Australian Health Review* 22 <<http://www.publish.csiro.au/ah/pdf/AH010022>> (accessed 16 November 2017).

¹² NSW Law Society, *Law Society Council* <<http://www.lawsociety.com.au/about/organisation/council/index.htm>> (accessed 16 November 2017).

vote in addition to the personal franchise of members.¹³ All Solicitor Members are entitled to vote in elections for the Council.¹⁴

- The Council of the Australian Medical Association similarly accepts nominees representing ‘Special Interest Groups’ (e.g., physician, surgeon, psychiatrist) and ‘zones’ (geographic locations).¹⁵ Professional members are entitled to vote in elections for the Council.¹⁶
- The Financial Planning Association of Australia (‘FPA’) has a two-tier board/committee structure, where members of each tier are directly elected by vote of FPA members.¹⁷
- Under the Law Council of Australia’s constitution,¹⁸ voting rights are distributed among the law societies and bar councils that represent states and territories, as well as to one of the LCA’s constituents, Law Firms Australia (‘LFA’).¹⁹
- The governing board of Engineers Australia is an example of the previous approach. The board is supported by sub-committees, division groups, college boards and panels.²⁰ Board Directors are elected by National Congress, which is a representative body of 35 – 37 members.

Any association will need a constitution, including provisions establishing the governing council and its committees and their decision-making routines. Given the multiple functions undertaken by associations, the kinds of decisions made by councils vary, and the governance required likewise. For example, a disciplinary decision might be made, say to expel a member. This may be appealed to an internal association panel, and then perhaps appealed further to a court or tribunal – as illustrated by the NSW legal profession, where the legislated judicial oversight of the NSW Supreme Court plays an important role in controlling the legal community.²¹ To satisfy the requirements of natural justice, it would be appropriate to have an independent panel instead of the council (whose job, often delegated to the CEO, is to win members) make these disciplinary decisions and for them to be implemented by council vote. There would be significant conflicts of interest if either the CEO or other executives were to make these decisions. By contrast, in making a business decision to expand, say, continuing education services, there is less potential for formal review. It may still be necessary to make education offerings in line with regulations; with the association’s own member education requirements; or simply to follow, as good practice, the recommendations of standards

¹³ NSW Law Society, *Committees* <<http://www.lawsociety.com.au/about/organisation/committees/index.htm>> (accessed 16 November 2017).

¹⁴ See NSW Law Society, *Memorandum and Articles of Association of The Law Society of New South Wales* (at 26 October 2017) cl 8.3.7(a) <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/018262.pdf>> (accessed 16 November 2017).

¹⁵ Australian Medical Association, *2017 Election of Council* <<https://www.amansw.com.au/2017-election-of-council/>> (accessed 16 November 2017).

¹⁶ Australian Medical Association, *2017 Election of Council*, above n 15.

¹⁷ Financial Planning Association of Australia, *Governance* <<https://fpa.com.au/about/governance/>> (accessed 16 November 2017).

¹⁸ See Law Council of Australia, *Constitution of Law Council of Australia Limited* (at 28 November 2015) <https://www.lawcouncil.asn.au/docs/0609a808-2fb5-e611-80d2-005056be66b1/LCA_Constitution_-_as_adopted_on_18.6.16.pdf> (accessed 16 November 2017).

¹⁹ Rogers, Kingsford Smith and Chellew, above n 4, 254.

²⁰ Engineers Australia, *Corporate Structure and Reports* <<https://www.engineersaustralia.org.au/About-Us/Corporate-Governance/Corporate-Structure>> (accessed 16 November 2017).

²¹ NSW Law Society, *Law Society Council* <<http://www.lawsociety.com.au/about/organisation/council/index.htm>> (accessed 16 November 2017).

organisations. All these different types of decisions should have governance or risk management processes (and where necessary, assurance) with record-keeping and appropriate levels of transparency.²²

The separation of the executive from disciplinary decisions by comparison with business decisions is observed by associations in practice:

- When the Law Society of NSW receives a complaint, its Professional Standards Department will assign an investigator to the case. Its Professional Conduct Committee then takes further action, including by referring the case to the Administrative Decisions Tribunal (ADT) if professional misconduct is involved.²³
- In the medical profession, the National Law establishes procedures for misconduct, enforcement and appeals.²⁴ Taking the example of a NSW-based disciplinary action, a complaint may be directed to one of the 14 Councils or the NSW Health Care Complaints Commission. The Council and Commission must consult,²⁵ and there are different available courses of action open to them.²⁶ Serious disciplinary matters are decided by state tribunals such as the ADT.²⁷
- The FPA's dispute resolution processes are codified in its Disciplinary Regulation. The FPA's investigating officers handle complaints and make recommendations to a Conduct Review Commission, an independent board that conducts hearings and makes determinations.²⁸ Following an investigation by a nominated Investigating Officer, the Chair of the FPA's Conduct Review Commission may summarily dismiss a member in breach of FPA procedures or direct the FPA to commence disciplinary proceedings.
- Engineers Australia employs a similar procedure, with a Professional Conduct Committee that imposes disciplinary sanctions if a complaint is substantiated. There is a right to (internal) review.

This is one manifestation of a general principle that professional bodies should ensure that they have strong connections to other external bodies with cognate responsibilities, such that places to speak and be heard about the concerns of the body are numerous.

²² See Professional Standards Councils, 'Policy Statement on Complaints and Discipline Systems' (Policy Statement, August 2014) <<https://www.psc.gov.au/sites/default/files/Complaints%20and%20Discipline%20Systems.pdf>> (accessed 16 November 2017).

²³ NSW Law Society, *How the Complaints Process Works* <<https://www.lawsociety.com.au/community/makingacomplaint/complaintsprocess/index.htm>> (accessed 16 November 2017).

²⁴ See, e.g., *Health Practitioner Regulation National Law 2009* (NSW) pt 8 'Health, Performance and Conduct'.

²⁵ *Health Practitioner Regulation National Law 2009* (NSW) s 145A.

²⁶ *Health Practitioner Regulation National Law 2009* (NSW) ss 145B, 145C.

²⁷ See, e.g., Katie Elkin et al, 'Doctors disciplined for professional misconduct in Australia and New Zealand, 2000–2009' (2011) 194 *Medical Journal of Australia* 452. See also AHPRA, *Court and Tribunal Decisions* <<http://www.ahpra.gov.au/publications/tribunal-decisions.aspx>> (accessed 16 November 2017).

²⁸ See, e.g., Financial Planning Association of Australia, *Disciplinary Regulation 2016* <https://fpa.com.au/wp-content/uploads/2016/11/2016_09_28_Disciplinary-Regulation-2016.pdf> (accessed 16 November 2017).

Conflicts of Interest

Avoiding conflicts of interest is an important goal of high-quality governance. In the medical context, as Rothman et al observe, professional medical associations ('PMAs') play an essential role in shaping standards of health care because their conferences, continuing education courses, guidelines and public advocacy influence practitioners and the public alike.²⁹ However, many PMAs receive extensive funding from pharmaceutical companies and medical device manufacturers. Accordingly, there is significant potential for real and perceived conflicts of interest. The authors argue that PMA policies concerning conflict management are not particularly consistent or stringent, and they propose a set of recommendations which would prevent the appearance or reality of undue industry influence. This approach is likely to have application to other professions as well.

Conflicts of interest can also be created in situations involving classes of members. The FPA had previously permitted organisations to be members, including organisations with large advice distribution networks. This caused difficulty in making policy changes when the FPA, in 2009, attempted to reduce conflicts of interest by banning commissions.³⁰ The organisations had the power to withdraw all their employees and networks from the association. Ultimately, a constitutional change was passed so that only persons could become voting members, and organisations required their employees and representatives to become personal members.

The above examples demonstrate the significant potential for conflicts of interest when an association's activities are significantly funded or sponsored by industry organisations or where organisations have membership. It is for these reasons that personal professional membership is a characteristic of established professions.³¹

Transparency and Openness to Changes in Professional Membership and Community Attitudes

As outlined above, associations should have effective governance structures and routines. Governance arrangements must be transparent and open to new members and those who interact with the association and their ideas and beliefs. Associations should have leaders and practices which connect them to changes in the needs, interests and beliefs of their membership and the community which relies on their advice and services. To remain distinctive professions must on one hand retain a strong self-identity and relative autonomy. On the other hand, professions and their associations risk irrelevance unless they can adapt their distinctiveness to new influences and events. Paradoxically, the legitimacy and autonomy of associations

²⁹ David Rothman et al, 'Professional Medical Associations and Their Relationships with Industry: A Proposal for Controlling Conflict of Interest' (2009) 301 *JAMA* 1367.

³⁰ In 2009 the FPA announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for members: Financial Planning Association of Australia, 'Financial Planner Remuneration Policy' (October 2009) <<http://riskinfo.com.au/news/files/2009/10/091023-fpa-financial-planner-remuneration-policy.pdf>> (accessed 16 November 2017).

³¹ Financial Planning Association of Australia, 'The new FPA: Member Consultation Paper' (November 2010) <<http://riskinfo.com.au/news/files/2010/11/101124-fpa-member-consultation-paper-20101.pdf>> (accessed 16 November 2017); Lucinda Beadman, 'FPA membership shake-up', *Money Management* (online), 25 November 2010 <<http://www.moneymanagement.com.au/news/financial-planning/fpa-membership-shake>> (accessed 16 November 2017).

can only persist if they are adaptable and 'open' to the public.³² A similar argument has also been made in the context of corporate regulation.³³

Speaking practically, Breakey argues that demand for change and new, or altered, professional standards and conduct may come not only from professionals themselves, but from clients and the wider public who benefit from the goods of professional work.³⁴ Professional associations can meet this demand by shifting their focus from internal to external matters; recognising their outward-facing role and engaging with relevant external organisations and persons; and allowing their agenda to be influenced by appropriate external influences as well as internal stakeholders. For example, ethical codes might ideally be drafted to accommodate changing views, using open textured language so that they are responsive and open to conversations in the public domain. Some examples of areas where this type of professional and public engagement have led to change are considered below.

Diversity

In June 2016, the Law Council of Australia released the National Model Gender Equitable Briefing ('GEB') Policy. It has been adopted by the NSW Bar Association.³⁵

Wellbeing of Members

Several organisations now exist to support the wellbeing of professionals: for example, the Tristan Jepson Memorial Foundation focuses on wellbeing in the legal profession,³⁶ and Beyondblue's Health Services Program addresses the prevalence of anxiety, depression and suicide among health services workers.³⁷ See also the title on Wellbeing of Associations.

Community Engagement

The FPA provides pro bono services to individuals and families suffering financial hardship in the wake of natural disasters and has also introduced a Pro Bono Financial Planning Referral Service with Cancer Council to connect families affected by cancer with pro bono financial assistance.³⁸

³² See Deen Sanders, 'Reinventing Regulation' (June 2014) *Law and Financial Markets Review* 98 <https://www.psc.gov.au/sites/default/files/Reinventing%20regulation_Deen%20Sanders.pdf> (accessed 16 November 2017).

³³ See Christine Parker, *The Open Corporation* (Cambridge University Press, 2002); Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility' (2007) 15–16 <https://www.psc.gov.au/sites/default/files/Meta-regulation_Christine%20Parker.pdf> (accessed 16 November 2017).

³⁴ Hugh Breakey, 'Supply and Demand in the Development of Professional Ethics' in Marco Grix and Tim Dare (eds), *Contemporary Issues in Applied and Professional Ethics* (Research in Ethical Issues in Organizations vol 15, Emerald Group Publishing, 2016) 1, cited in Dimity Kingsford Smith, Thomas Clarke and Justine Rogers, 'Banking and the Limits of Professionalism' (2017) 40 *University of New South Wales Law Journal* 411, 415.

³⁵ Anthony McGrath, 'Gender Equitable Briefing at the Bar' [2016] (Summer) *Bar News* 28 <https://www.nswbar.asn.au/docs/webdocs/BN03_2016_GEB.pdf> (accessed 16 November 2017).

³⁶ Tristan Jepson Memorial Foundation <<http://www.tjmf.org.au>> (accessed 16 November 2017).

³⁷ BeyondBlue, *Health Services Program* <<https://www.beyondblue.org.au/about-us/our-work-in-improving-workplace-mental-health/health-services-program>> (accessed 16 November 2017).

³⁸ Financial Planning Association of Australia, *Pro Bono Service* <<https://fpa.com.au/fpa-community/pro-bono-service/>> (accessed 16 November 2017).

The legal profession also engages with the community by providing pro bono services. Many Australian law firms have pro bono programs that employees participate in. There is also a national pro bono aspirational target of 35 hours of pro bono legal services per lawyer per year.³⁹ Members of the profession also volunteer at community legal centres.

Summary

Governance accountability refers, in one sense, to the governance structures of professional associations. It includes the processes for election or appointment of key individuals; procedures for strategic decision-making; and communication with constituents. It is important that governance structures respect characteristics which are typically emphasised by the professions, such as collegiality, civility and equality.

In addition to transparency, orderliness and values-related formal government structures, governance accountability also reflects the ways in which professional associations – acting as a proxy for the profession as a whole – are open to ideas in the community and can adapt to the implications on their professions of a changing world.

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This subject overview has been written with the support of the following partners:



Australian Government
Australian Research Council



UNSW
SYDNEY



³⁹ See Australian Pro Bono Centre, *National Pro Bono Aspirational Target* <<http://www.probonocentre.org.au/provide-pro-bono/aspirational-target/>> (accessed 16 November 2017).