

Regulatory Structures

Introduction

This title outlines the four main types of regulatory approaches or structures involved in regulating professions. Historically, professional associations were the primary regulators of professions through 'self-regulation'. However, increasingly, government has intervened, initially through direct regulation. More recently, it has been through 'co-regulation', where the professional association has a formal legislated role, or 'meta-regulation', involving more indirect, multitiered or principles-based regulation allowing for greater flexibility.¹ Contemporary regulatory structures tend to involve a combination of these approaches.

The title has the following parts, where the interaction of the professions and regulatory structures is considered:

- Self-Regulation;
- Direct Statutory Regulation;
- Co-Regulation;
- Meta-Regulation;
- Features of a Mega-Regulatory Approach in the Professions;
- Interaction of Combination of Types; and
- Summary.

Self-Regulation

A profession will involve a professional association with rules and requirements that regulate the conduct of its individual members. The independence implicit in this self-regulation is at the heart of the concept of a profession. Otherwise, individuals would be operating independently of each other with little self-identification as a profession and little power to negotiate the borders of professionalism with government and would-be competitors. Professional associations have membership rules in relation to, for example, entry and exit, member conduct and professional standards. They also have norms governing the conduct of their individual members that are part of the ethos of the professions, captured by the term 'ethics', set out in written codes of professional ethics. A primary interest of this article is how these codes of ethics co-exist with government regulation. Cary Coglianese and Evan Mendelson identify a range of ideas as to what the term 'self-regulation' means:

What counts as self-regulation can range from any rule imposed by a non-governmental actor to a rule created and enforced by the regulated entity itself. Sinclair, for example, describes self-regulation as a form of regulation ... with respect to which, 'government yields none of its own authority to set and implement standards'.²

¹ See, e.g., Ian Bartle and Peter Vass, *Self-Regulation and the Regulatory State – A Survey of Policy and Practice* (Research Report No 17, Centre for the Study of Regulated Industries, School of Management, University of Bath, 2005), 1, although they do not also refer to meta-regulation.

² Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 146, 147.

Julia Black, however, identifies a criticism made by detractors of the concept of 'self-regulation'. They argue that it is self-serving and may be viewed by some as a 'soft option' to be used for matters of low public interest or risk.³

Figure 1: Progression of Structural Models for Regulation



Direct Statutory Regulation

Statutory regulation is highly visible. It is written, has the force of law and attracts penalties for non-compliance. Such a statute will provide for a regulator to administer a regulatory regime, either through a government department or a specially-established agency, for example, the Legal Services Commissioner for New South Wales ('NSW'), which regulates NSW lawyers.⁴ There appears to be an overall trend towards more professions being subject to a specialised government regime, especially where the government sees the profession as vital and where there have been ongoing problems with the self-regulatory model.

Statutory regulation includes not only the primary legislation, but also subordinate instruments made under the legislation, such as rules, regulations and orders, which are also effective as law. These contrast with the self-regulatory contractual obligations that exist between a private professional association and its members.

When a government regulates a profession, it moves from being a civil society institution to being part of a plural regime where associational and governmental rules and supervision and enforcement co-exist. A statutory regime will legally override any conflicting self-regulatory rules or norms. However, it is never likely to extinguish the existing professional rules and norms. Often the requirements within the statutory regime will be based on pre-existing professional rules and codify much of the pre-legislative status quo. The leading reason for the statutory regime is generally more effective enforcement.

³ Julia Black, 'Decentralised Regulation: Understanding the Role of Self-regulation in a "Post-Regulatory" World' (2001) *54 Current Legal Problems* 103, 115.

⁴ See Office of the Legal Services Commissioner, *Welcome to the Office of the Legal Services Commissioner* <<http://www.olsc.nsw.gov.au/>> (accessed on 31 July 2017).

Co-Regulation

While a statutory regime can exercise extensive and detailed control over its entire professional scope, it does not have to. A regime may expressly incorporate well-established professional associations or other self-regulatory organisations ('SROs') into the regulatory framework to assist with both the detailed rule-making or the enforcement of the regime. This form of delegated function with its interaction between the government regulator and the professional association or SRO is referred to as 'co-regulation'. An example is the way the Australian government delegates to the Law Society of NSW, the role of co-administering the regulation of NSW lawyers under the *Legal Profession Uniform Law*.⁵

Co-regulation provides an 'oasis' of autonomy for a profession within a wider direct statutory regime. Commonly, this oasis will reflect an older associational self-regulation as is the case for NSW lawyers. It is an approach which acknowledges some level of commercial and legal autonomy for an established profession within a statutory regime.

Co-regulation which has also been adopted in relation to professions will normally involve a combination of statutory obligations and private contractual rights between the professional association and its members. It will usually retain the primary right of the association to exclude a member as a form of disciplinary sanction, restricting their access to essential professional or business functions. However, this may be accompanied by statutory powers, through the government regulator, for the enforcement of the association's rules. The regulator will also have express powers it can exercise on its own initiative. The government or government regulator will also usually have some role in consenting to or influencing the association's rule-making. The association, too, will usually have to report to government on how it has discharged a variety of supervisory and administrative functions.

Meta-Regulation

The concept of 'meta-regulation' developed around the 1980-90s to refer to a new approach by government towards regulation that moved away from the command and control model of direct government intervention or the formal concept of co-regulation. Governments in the UK, the US and to some extent Australia moved towards lighter-touch forms of regulation relying more on disclosure and reporting. These were often combined with non-governmental professionals or advisors as 'gatekeepers'. These actors such as accountants, auditors, accreditation experts, rating agencies, lawyers and engineers were enrolled for verification and assurance that the underlying bodies were complying with the regulatory requirements. This was a move away from the welfare state in which government supplies services directly. Instead, there grew a 'new regulatory state' in which government contracts with private entities to do the direct service provision of regulation. This movement was captured by David Osborne and Ted Gaebler's metaphor from the 1990s that the state should 'steer' while the civil society and sometimes market organisations should 'row'.⁶

⁵ *Legal Profession Uniform Law 2014* (NSW).

⁶ David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (Plume, 1993) Ch 1.

The concept of meta-regulation goes further than the concept of co-regulation by embracing a wide range of non-government actors and, rather than concentrating on rule-making as co-regulation tends to do, it can extend to a wide range of regulatory strategies, some of them indirect.

Christine Parker and John Braithwaite argue that moves from government statutory regimes of 'command and control' to government working with professional associations, SROs and the private sector can better harness existing social norms and goodwill inherent within civil society:

The idea is that government leverages its resources by facilitating activity in markets and civil society to help accomplish public policy objectives. These forms of regulation can be characterized as 'meta-regulation' ... not solely state regulation, not solely market ordering, but government regulation of plural regulation in the private sector and civil society.⁷

As Braithwaite points out, the characteristic feature of the 'new regulatory state' is that the state 'regulates the regulators', rather than the regulated.⁸ Parker describes meta-regulation as the regulation of self-regulation and adopts it to the company entity context.⁹ Applied to professional firms, this approach would have firms evaluate and report on their own self-regulatory action. Then, through disclosure and other modes of supervision, regulators would assess whether the ultimate purposes of the regulation are being met and ensure that the public purposes of the meta-regulatory regime are being operationalised by firms.¹⁰ The goal is to have the values associated with the regulatory purposes internalised by individuals as well.

Features of a Mega-Regulatory Approach in the Professions

'Meta-regulation' is not a term of art and has been used in a variety of ways. Coglianese and Mendelson identify some of these:

Definitions of meta-regulation also vary. Some have focused on the interaction between government regulation and self-regulation ... Others use meta-regulation more broadly to refer to interactions between different regulatory actors or levels of regulation. Parker treats meta-regulation as a process of 'regulating the regulators, whether they be public agencies, private corporate self-regulators or third-party gatekeepers'.¹¹

⁷ Christine Parker and John Braithwaite, 'Regulation' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 119, 141.

⁸ John Braithwaite, 'Accountability and Governance under the New Regulatory State' (1999) 58 *Australian Journal of Public Administration* 90.

⁹ Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) ch 9.

¹⁰ Parker, *The Open Corporation*, above n **Error! Bookmark not defined.**

¹¹ Coglianese and Mendelson, above n **Error! Bookmark not defined.**, 147-8.

It is useful to identify how some of the features of meta-regulation can operate in a professional setting. Because the term 'meta-regulation' is innately connected to the idea of multi-level regulation, it is also regularly used to refer to multi-level government statutory regulation. A government regime may have, for example, a primary regulator that directly regulates a targeted population but also have an overseeing statutory body, which co-ordinates or directs the primary regulators. This overseeing body is also then taking on a meta-regulatory role. An example of this is in the regime regulating the health professions in Australia. The regime creates primary regulators for 14 health professions, for example, the Medical Board of Australia for doctors. However, it then also establishes a 'meta-regulator', the Australian Health Practitioner Regulation Agency to oversee and coordinate the activities of the 14 primary regulators.¹²

Supra-national and international organisations can, in the same way, also be viewed as meta-regulators. For example, the European Union regulates the activities of its member states indirectly through directives or principles which member states must then implement. International bodies such as the International Organisation of Securities Commissions ('IOSCO') are also meta-regulators as they set standards that member government regulators must implement in their home jurisdictions.¹³

Meta-regulation can also refer to the concept of open-textured principle-based regulation, which gives flexibility and discretion to the regulated population. As with other notions of meta-regulation, principles-based regulation can also be contrasted with traditional command and control regulation as it allows scope to professional associations and other private organisations to fill in the gaps and the detail and allow them to retain discretion to self-regulate.

Meta-regulation has at its heart an idea that government regulators have limited resources, limited and out-of-date information, and limited normative influence. Thus, indirect regulation through regulating other regulators (whether statutory bodies or private associations) can be an effective and flexible tool in achieving the spirit of the regulation. It does not require the resource-heavy and direct methods usually associated with traditional, command and control regulation.

The *Professional Standards* regime¹⁴ regulated by the Professional Standards Council ('PSC') is an example of a meta-regulatory regime.¹⁵ It regulates professions indirectly by regulating the professional association rather than the professional firms or individuals. It treats the associations as co-regulatory partners. It is also a principles-based regime where professional associations are given significant discretion as to how they implement those principles with the PSC's role focused on monitoring the spirit of the requirements rather than technical, rule-based compliance.

¹² See Australian Health Practitioner Regulation Agency, *AHPRA - Regulating Australia's Health Practitioners in Partnership with the National Boards* <<https://www.ahpra.gov.au/>> (accessed on 31 July 2017).

¹³ See IOSCO, *The Global Standard Setter for Securities Markets Regulation* <<https://www.iosco.org/>> (accessed on 31 July 2017).

¹⁴ Including the *Professional Standards Act 1994* (NSW), *Professional Standards Act 2003* (Vic), *Professional Standards Act 2004* (Qld), *Professional Standards Act 2004* (SA), *Professional Standards Act 1997* (WA), *Professional Standards Act 2005* (Tas), *Professional Standards Act 2004* (NT), *Civil Law (Wrongs Act) 2002* (ACT).

¹⁵ See Professional Standards Councils, *21 Years of Regulatory Innovation through Professional Standards* (Professional Standards Council, 2015).

Julia Black's concept of 'decentred regulation' which combines government regulation with non-government, societal and even technological regulation, in line with sociological views of how society 'regulates' itself,¹⁶ is another way of explaining this pluralism in social control.

Combination of Types

Contemporary regulatory regimes including those involving professions often consist of a combination of the above regulatory types. Professions inevitably retain some level of self-regulation through the professional association and increasingly a level of direct statutory regulation. More recently, however, statutory regulation has moved to also include co-regulatory and meta-regulatory features. For example, financial planners may belong to a self-regulatory association such as the Financial Planning Association which sets requirements. The *Corporations Act* also imposes statutory licencing and other requirements. For financial planners employed by an ASX market participant, the ASX's co-regulatory market participant rules also apply. The Act also has a meta-regulatory aspect. For example, auditors, as third parties, are obliged to report financial planning firms they suspect may have breached the Act.¹⁷ Further, while many of the Act's provisions imposed directly on planners are specific, the provisions setting out standards for the ASX are usually principles-based. For example, the exchange must act in 'a fair, orderly and transparent' manner.¹⁸ There is also a multi-layered hierarchy at play. A firm is required to oversee individual planners, ASIC oversees firm activity and ASIC's actions are, in turn, overseen by the relevant government Minister. Further, ultimately, ASIC's approach to regulation must be in accordance to principles laid down by IOSCO.

¹⁶ Julia Black, 'Decentring Regulation: Understanding the Role of Self-regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103, 111.

¹⁷ *Corporations Act 2001* (Cth).

¹⁸ *Corporations Act 2001* (Cth) s 792A(a).

Summary

This title outlines the four main regulatory approaches, including for regulating professions, namely: self-regulation, direct statutory regulation, co-regulation and meta-regulation. It then shows how contemporary regulatory structures for regulating the professions will usually involve a combination of these regulatory approaches.

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