

# **Modern Professional Practice and its Future**

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Structural Types of Professional Regulation:  
Comparative Case Studies in Australia and the UK

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## **1. Introduction**

This working paper explores the various types of regulatory structures used to regulate professions. In modern times, the government has taken a more active role in regulating the professions, a role historically the preserve of professional associations. The interrelationship between self-regulation and government regulation has resulted in a range of different regulatory structural types. The paper identifies the main types: self-regulation, government statutory regulation, co-regulation and meta-regulation and then uses four case studies – doctors and financial planners in Australia and the UK – to investigate what type of regulatory structure applies in each case and uncover what issues might exist.

## **2. Regulating Professions: Structural Types**

### **The Concept of Regulation**

The term ‘regulation’ is used in a range of ways. However, this paper uses the term to cover both the written and unwritten requirements and norms of both government and non-governmental organisations such as professional associations.

### **Structural Types of Regulation**

The main regulatory types which appear in the literature and in policy discussions are: no regulation, self-regulation, government statutory regulation, co-regulation and meta-regulation.<sup>1</sup> In practice, however, regulatory regimes rarely consist of just one of these archetypes and often involve a number or all, to varying degrees.

#### *No Regulation*

Professions, by their very nature, will almost inevitably involve some form of regulation by a professional association over member conduct. So it is unlikely there will be no regulation of the profession.

#### *Self-Regulation*

The idea that a profession normally involves a professional association regulating the conduct of members is referred to as self-regulation and is at the core of the concept of a profession. Professional associations have written membership rules, such as codes of professional ethics, as well as unwritten norms and practices that also regulate member conduct.

#### *Government Statutory Regulation*

The most visible type of regulation is government statutory regulation, which often creates a statutory regulator to administer the regime. While a statutory regime legally overrides

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<sup>1</sup> See, eg, 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 don’t also refer to meta-regulation.

any conflicting self-regulatory rules or norms set by professional associations, it is unlikely to extinguish all existing professional rules and norms.

### *Co-Regulation*

A government statutory regime may sometimes expressly incorporate professional associations or other self-regulating organisations into the regulatory framework to assist with both the detailed rule-making and/or the administration of the regime. This form of delegated function is referred to as 'co-regulation' and provides some level of official function and autonomy for an established professional association within a statutory regime.

### *Meta-Regulation*

'Meta-regulation' is a term developed in the 1980s to refer to a new approach to government regulation that moved away from a direct 'command and control' model and embraced more indirect forms of regulation. These include, for example, government relying on non-governmental intermediaries such as accountants, auditors, lawyers or rating agencies to verify compliance with regulatory requirements. As John Braithwaite describes it, in the 'new regulatory state', the state regulates the regulators, not the regulated.<sup>2</sup> The term is also used to refer to multi-level government statutory regulation, for example, where a number of regulators are overseen by a statutory meta-regulatory body. The underlying idea behind meta-regulation is that government regulators have limited resources and limited normative influence. Thus, indirect regulation, through regulating other regulators, in particular non-governmental regulators, can be an effective and flexible tool in achieving regulatory outcomes.

The Professional Standards Council ('PSC') is an example of a statutory regulator that relies on meta-regulation to achieve desired outcomes. It indirectly regulates the behaviour of individual professionals by regulating the professional associations. The statutory regime, the *Professional Standards Legislation*,<sup>3</sup> gives the PSC power to approve professional associations that meets its standards. A regulated association must then adhere to a tailored Professional Standards Improvement Program. In return, professional association members receive a level of limited liability where there is an appropriate level of professional indemnity insurance.

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<sup>2</sup> John Braithwaite, 'Accountability and Governance under the New Regulatory State' (1999) 58 *Australian Journal of Public Administration* 90.

<sup>3</sup> A National Law encompassing 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).

### **3. Regulation of Doctors**

#### **Overview**

This Part looks at two cases studies – the medical professions in Australia and in the UK – and investigates what regulatory structures are in place and how the statutory regime and the professional associations interact.

#### **Australian Doctors**

##### *Government Regulation*

The primary government statute regulating health professionals throughout Australia is the *Health Practitioner Regulation National Law*. It regulates 14 professions and has created a statutory regulator – a National Board – for each profession, including the Medical Board of Australia which regulates medical practitioners. This Board sets the requirements for entry to the profession, registers practitioners, sets educational and training standards and develops standards, codes and guidelines.<sup>4</sup> The legislation also creates an overarching regulator called the Australian Health Practitioners Regulation Agency ('AHPRA'), which has a range of roles coordinating the 14 National Boards.<sup>5</sup> While the regime has elements of command and control style regulation, it also has significant elements of meta-regulation. AHPRA can be seen as a meta-regulator of the National Boards and the regime provides significant flexibility to the National Boards and AHPRA as to how they carry out their functions.

##### *Industry Association Role*

The two main professional associations representing doctors in Australia are the Australian Medical Association ('AMA') and The Royal Australian College of General Practitioners ('RACGP'). Both are private self-regulatory organisations with large, overlapping memberships. The AMA focuses on pursuing its members' interests and engaging in public policy advocacy, as well as providing guidance on medical practice issues. The RACGP's primary focus, however, is on providing extensive medical practice guidance for general practitioners. The detailed guidance on practice norms created by the AMA and the RACGP means that these professional associations maintain a significant self-regulatory role within the Australian medical profession.

#### **UK Doctors**

##### *Government Regulation*

Similar to Australia, the UK has a two-tier statutory regulatory structure for doctors. The primary statutory regulator is the General Medical Council. There is also a statutory meta-regulator, the Professional Standards Authority for Health and Social Care ('PSA'), which oversees nine health profession regulators including the General Medical Council. The PSA is

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<sup>4</sup> *Health Practitioner Regulation National Law* s 35.

<sup>5</sup> *Ibid* s 26.

required to assess the performance of these primary regulators, conduct audits, scrutinise their decisions and regularly provide reports on them to Parliament.<sup>6</sup> The role of the General Medical Council is significantly more prescribed by statute and less meta-regulatory than that of the Medical Council of Australia. Similarly, the PSA has much more of an oversight role of the primary regulators than that of Australia's AHPRA.

#### *Industry Association Role*

Self-regulation for the medical profession in the UK is similar to that in Australia. There are two main professional associations – the British Medical Association and the Royal College of General Practitioners – and both play a similar role to that of the AMA and RAGCP in Australia. The British Medical Association is primarily a union and lobby group for doctors, while providing some practice standards,<sup>7</sup> while the Royal College of General Practitioners' primary focus is on setting detailed norms and standards for general practice.<sup>8</sup> This then raises the issue of why the self-regulatory regimes are so similar despite the differences between the Australian and the UK statutory regimes. It may be because, regardless of the extent of the government regime, there will always be a role for an association to promote the profession's interests and because a government regime can never be detailed or flexible enough to encompass all the complexities and continuing changes involved in medical practice.

## **4. Regulation of Financial Planners**

### **Overview**

This part also looks at two case studies, that is, financial planners in Australia and the UK, the regulatory structures in place for regulating them and the interaction between the statutory regime and the relevant professional associations.

### **Australian Financial Planners**

#### *Government Regulation*

In Australia, the primary statutory regime regulating financial planners is the *Corporations Act*.<sup>9</sup> It is an extensive and comprehensive regime, with the Australian Securities and Investments Act ('ASIC') as the statutory regulator. The regime is largely command and control-style. However, it has some meta-regulatory characteristics. For example, it focuses on regulating financial service provider entities, rather than individual financial planners. The entity has full discretion over who it authorises to act as a financial planner on its behalf and the regime delegates a significant amount of supervision to the entities.

#### *Industry Association Role*

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<sup>6</sup> Professional Standards Authority for Health and Social Care, *About Us* <<http://www.professionalstandards.org.uk/about-us/our-work>>.

<sup>7</sup> British Medical Association, *About the BMA* <<http://www.bma.org.uk/about-the-bma>>.

<sup>8</sup> Royal College of General Practitioners, *About Us* <<http://www.rcgp.org.uk/about-us.aspx>>.

<sup>9</sup> *Corporations Act 2001* (Cth).

The largest and most active association representing financial planners is the Financial Planners Association of Australia ('FPA'). The key aspect of the FPA's self-regulatory regime is its Certified Financial Planner program, which requires a member to satisfy a number of education and training requirements considerably higher than those required by the statutory regime. The FPA has also implemented other standards above those required by the regime and actively pursues a reform agenda, its ultimate goal being to have financial planning recognised as a profession.

## **UK Financial Planners**

### *Government Regulation*

The UK regime for financial planners is also largely a command and control model, but with some elements of co-regulation and meta-regulation. The primary statutory regime is the *Financial Markets and Services Act*,<sup>10</sup> with the Financial Conduct Authority ('FCA') as the statutory regulator. An entity must be authorised by the FCA to provide financial services. However, financial planners who provide advice under the ambit of the entity generally still need to be directly authorised by the FCA and cannot just rely on the entity's authorisation.<sup>11</sup> This is significantly different to the Australian regime. Following the 2008 global financial crisis, the FCA implemented a set of additional requirements for financial planners. A firm must now provide an annual report to the FCA with significant details about each of its financial planners, a form of meta-regulation. Further, individual financial planners must obtain an annual Statement of Professional Standing from an accredited association, a form of co-regulation. Thus, accredited associations have a dual role both as an official co-regulator and as a professional association acting for members. This co-regulatory role is another fundamental difference to the Australian regime.

### *Industry Association Role*

The two main bodies representing financial planners are The Institute of Financial Planning ('IFP') and the Chartered Institute for Securities and Investment ('CISI'). The IFP is the UK's equivalent of Australia's FPA. However, unlike the FPA, a major part of the IFP's activity is its official role as an FCA-accredited body issuing annual Statements of Professional Standing. The CISI represents securities and investment brokers and is also an official accredited body issuing Statements of Professional Standing.

## **5. Conclusion**

This working paper provides some preliminary insights into the complexity and range of combinations of structural types currently operating in two professions in Australian and the UK.

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<sup>10</sup> *Financial Services and Markets Act 2000* (UK).

<sup>11</sup> Financial Conduct Authority, *Approved Persons* <<https://www.the-fca.org.uk/approved-persons>>.

## **Issues Arising Out of the Research**

One issue arising out of the research is the extent to which an association's role as a co-regulator may conflict with its traditional role as an advocate for its members, an issue that arises for the UK financial planning associations.

A second issue is the extent to which command and control statutory regimes can restrict professional associations. In theory, extensive statutory regimes could be assumed to limit the role of professional associations. However, in practice this may not necessarily be the case. Given that statutory regulation does not have the depth and flexibility to cover all aspects of professional practice, there may always be a significant role for associations in setting standards, as was shown by the case of Australian and the UK doctors. Further, there will always be a role for professional associations in pursuing members' interests and public policy issues.

A third issue is the idea that the division between command and control and meta-regulatory concepts may be more fluid and multi-faceted than the theory might suggest. This includes the related issue of whether there might be trends internationally towards increasing (or alternatively decreasing) meta-regulatory aspects within statutory command and control regimes.

## **Further Research Direction**

Further research could include widening the case studies to also include US and Canadian regimes as well as investigating additional professions, for example, solicitors, accountants, engineers or information technology professionals. The further research could also potentially consider specific issues such as educational or conduct requirements. However, it will be important to ensure the scope of the research is not spread widely over too many case studies and specific issues.