



National Competition Council

Reforming the Regulation
of the Professions

Staff Discussion Paper

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Rex Deighton-Smith,
Ben Harris and Kate Pearson

The views expressed in this paper are those of the staff involved and do not necessarily reflect those of the National Competition Council.

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Inquiries:

Communications Officer
National Competition Council
12 / 2 Lonsdale Street
MELBOURNE VIC 3000

Ph: (03) 9285 7474
Fax: (03) 9285 7477
Email: info@ncc.gov.au

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The National Competition Council

The National Competition Council was established on 6 November 1995 by the *Competition Policy Reform Act 1995* following agreement by the Commonwealth, State and Territory governments.

It is a federal statutory authority which functions as an independent advisory body for all governments on the implementation of the National Competition Policy reforms. The Council's aim is to 'help raise the living standards of the Australian community by ensuring that conditions for competition prevail throughout the economy which promote growth, innovation and productivity'.

Information on the National Competition Council, its publications and its current work program can be found on the internet at www.ncc.gov.au or by contacting NCC Communications on (03) 9285 7474.

1 Introduction

Many professions are subject to government regulation. The primary objective of this regulation of the professions is to protect the welfare of consumers of professional services and to protect the wider public. Some professional regulation also has broader objectives of ensuring the sound functioning of important social institutions (for example, regulation of the legal profession).

There is a continuing need for regulation in relation to a wide range of professions and occupations. A number of market failures can be identified in different areas, including information asymmetries and externalities. The challenge of reform, particularly in the context of National Competition Policy reviews of the governing legislation, is to:

- ensure that regulatory restrictions relate directly to the achievement of the public benefit objectives; and
- pursue the objectives of regulation at minimum cost to the public in terms of restrictions on competition or other matters.

This National Competition Council (NCC) staff discussion paper considers key issues concerning the National Competition Policy review of professional regulation. It aims to assist State and Territory Governments in implementing their legislative review and reform obligations and in reporting on the reforms undertaken. The paper reflects and expands on the material included in the CoAG Committee on Regulatory Reform's *Guidelines for the Review of Regulation of the Professions Under National Competition Policy* (CoAG, CRR 1999), and in the NCC's Third Tranche Assessment Framework (NCC 2001).

A key purpose of this paper is to outline general principles for reviewing professional regulation, thus promoting consistency in the approaches to review taken across the range of professions. Another key context is the application of the provisions of the Trade Practices Act to professional services as a result of the competition policy agreements. The application of general competition law suggests that regard should be had to the general principles and requirements of the TPA during reform processes.

The paper draws no distinction between professions and occupations. This reflects a view that largely identical considerations apply to the analysis of both areas, together with the fact that the boundary between them is indistinct.

In addition, there is an overlap between professional regulation in the strict sense and 'business regulation', or rules which ostensibly govern aspects of the running of a business, rather than professional practice *per se*. This paper discusses business regulation wherever it forms a significant part of a regulatory system that is essentially directed toward regulating professional practice.

2 Professional regulation today

The NCC has identified a wide range of professions that are subject to substantial regulation and that are regarded as priority areas in terms of NCC assessment of jurisdictions' review and reform activity (NCC 2001). These professions are regarded as priorities because of the extent of regulatory intervention in the operations of the profession and the importance of the markets for these professional services. The professions identified include a wide range of health professions (including pharmacists), the legal profession, architects, engineers, surveyors and valuers, as well as the set of partially regulated occupations.¹

The regulation of the health professions is a major area in which partially regulated occupations exist. All jurisdictions regulate doctors, nurses, dentists, optometrists, physiotherapists, pharmacists, chiropractors and psychologists. However, only some jurisdictions choose to register the following range of health occupations:

- optical and dental paraprofessionals (for example, dental technicians);
- chiropodists/podiatrists;
- osteopaths;
- occupational therapists;
- radiographers; and
- aboriginal health workers.

A wide range of regulatory interventions is used to regulate professions. Table 1, below, provides a summary of the most commonly used forms of professional regulation.

¹ 'Partially regulated' occupations are those subject to regulation in some, but not all, jurisdictions. This status raises the question of the necessity of regulation as a key issue in review activity.

Table 1: Examples of professional and occupational regulation

<i>Type of restriction</i>	<i>Explanation</i>
Entry qualifications	Various types of academic and experience qualifications are needed to become a professional.
Registration requirements	Even if a person has the appropriate qualifications, they must hold a licence to practise.
Reservation of title	Only persons with the appropriate qualifications and/or on the register may use the professional title.
Reservation of practice	Certain areas of practice are not allowed to be performed by persons other than certified practitioners.
Disciplinary processes	Professionals may be asked to explain their actions if their conduct is questioned, and may be disciplined or prevented from practising.
Conduct of business	Some professions have rules that prescribe ways in which the professional may or may not conduct their business affairs. Common restrictions include ownership, profit sharing and advertising.
Business licensing	Businesses must be licensed before they are able to sell their services.

These different restrictions have different, though often overlapping, objectives and a regulatory system is generally constructed from a combination of several. The objectives of each of these forms of regulation is set out below, together with a discussion of potential competition policy questions.

Entry qualifications

Entry qualifications seek to ensure that practitioners possess minimum acceptable levels of competence, thus protecting consumers from the possibility of engaging the services of substandard practitioners due to a failure to accurately assess competence. Minimum qualifications are thus likely to be important particularly where significant information asymmetries exist – that is, where consumers are not reasonably able to inform themselves sufficiently about the skills of different practitioners. Information asymmetries are likely to exist in relation to a wide range of professional services provided to individuals. Information asymmetries are less likely to be of concern for business customers or other high-frequency users of a service.

Entry qualifications generally co-exist with either reservation of title or reservation of practice, which are described below.

Any requirement for minimum entry qualifications sets a barrier to entry to a profession. Therefore, the regulator must determine what is the minimum necessary qualification standard that is consistent with consumer protection. The decision must, at least implicitly, be based on notions of acceptable levels of risk. That is, the decision must involve a notional trade-off between providing protection against adverse outcomes and promoting access to the service. Once a

certain point is reached, requirements for higher entry qualifications will entail progressively smaller reductions in the risk of poor practice and progressively higher consumer costs.

Professionals can have an interest in restricting competition by increasing the qualification requirements, particularly if 'grandfathering' clauses can be used to shield existing practitioners from new, more rigorous qualification standards. A key risk, therefore, is of regulators uncritically accepting advice from self-interested practitioners as to the qualifications that should be required. A co-regulatory system – that is, one in which professional bodies undertake some regulatory functions – may tend to increase the likelihood of this outcome by reducing the degree of government control over standards and/or outcomes.

Registration requirements

Registration means that a person must hold a licence to practice, whether or not they possess any specified prerequisite qualifications. Such a restriction necessarily creates the possibility that a person may be excluded from practising the occupation, despite possessing any necessary qualifications.² This approach may be taken in order to allow regulators to exercise judgment in individual cases on such subjective matters as whether an applicant is of good character. Thus, registration schemes are likely to be favoured where there is a need to exercise subjective judgments in order to achieve a high level of confidence in the suitability of a person to become a practitioner.

Many professions have historically required that practitioners be 'fit and proper persons', although this generic term has increasingly been replaced by more specific requirements in order to increase clarity and reduce the risk of anti-competitive interpretations. In addition to determining questions of character, subjective judgments might be required to assess on the job experience and training in terms of its adequacy as a substitute for, or complement to, formal qualifications. Other requirements such as minimum ages have also been imposed in the past. Again, rules such as these, which have no clear relationship to ensuring better practice, have now been largely eliminated.

A further potential advantage of a registration requirement is that of ensuring that records of all practitioners are kept, improving the ability of regulatory authorities to make contact with individual practitioners subject to complaints and thus potentially improving the effectiveness of the regulatory system.

A registration requirement is potentially more restrictive in nature than the prescription of entry qualifications. The potential for registration to be used in

² Strictly speaking, a true registration scheme, simply involves recording those who have demonstrated that they are qualified to practice. Such schemes are rarely used. More commonly, 'registration' schemes allow for the exclusion of applicants who do not possess the required formal qualifications. A scheme containing such exclusion in fact constitutes occupational licensing.

anti-competitive ways is heightened if decisions on registration are made solely by members of the profession and if those decisions are not subject to adequate scrutiny and appeals processes. Clear guidelines on the use of discretion are also important to reduce the risks of unwarranted anti-competitive effects and improve predictability and consistency.

A regulatory tool that attempts to address these potentially anti-competitive aspects of registration is negative licensing. Negative licensing essentially allows anyone who meets the relevant qualification requirements to practice the profession unless they are placed on a register of those who are ineligible to become practitioners. By this means, persons with very poor records can be excluded from practising without the need for a full registration system to be in place. Negative licensing can therefore be a more efficient process in many circumstances. However, negative licensing provides a lower level of consumer protection than traditional registration and so may be inappropriate where the potential for serious harm is great.

Reservation of title

Reservation of title means that people cannot use a particular title, and possibly its derivatives, unless they hold the relevant qualifications and/or are listed on a register of professionals. However, reservation of title does not imply that persons who are ineligible to use the title cannot provide the services normally provided by members of that profession. An example is the use of the term 'architect'. Use of this title is reserved, as is use of related terms to describe services provided (for example, only architects can advertise that they provide 'architectural design services'). However, there is no restriction on the actual provision of building design services by other professionals, such as draftsmen, who are ineligible to use the title of architect.

Reservation of title attempts to provide guidance to consumers as to the relative qualifications of related professionals providing similar services. It is less restrictive in nature than reservation of practice (see below).

While less restrictive than reservation of practice, reservation of title can nonetheless give rise to competitive concerns. This can occur where members of the profession, or their association, are able to use the reservation of title to reduce consumer confidence in the services of related professions and suggest that only members of their profession are competent to provide services.

Reservation of practice

Reservation of practice means that only qualified or registered professionals are permitted to practise a profession. Most professions with reserved practice also have registration schemes.

Restrictive approaches such as reservation of practice are likely to be justified where poor professional practice would expose consumers of the professional services in question to substantial risks, whether in terms of health and safety or in financial terms. The argument for these restrictions can also be based partly on the potential risks to the wider community, rather than merely the risks to consumers. The regulation of the legal profession provides an example in which the regulatory objective is, in part, to safeguard wider societal institutions and values.

A key competition concern with reservation of practice is with the range of activities that are 'reserved'. A likely risk is that some activities that are often, or even mostly, carried out by the profession being regulated may be included in the reservation without there being any clear benefit in so doing. For example, the practice of property conveyancing is restricted to members of the legal profession in some Australian jurisdictions, while other jurisdictions allow the operation of specialist conveyancing firms, subject to different regulatory restrictions. Evidence suggests that the latter States experience lower conveyancing costs, while major quality problems do not seem to have arisen (Baker 1996, p.37).

There may be justifications for wide-ranging restrictions of practice for some professions. For others, there may be only relatively small areas in which risks to consumers or the public would justify restrictions. In these cases, a specific reservation or reservations should be favoured over a general approach to ensure that regulation is not unduly restrictive and unnecessary costs are not incurred. A possible example is physiotherapy, where specific aspects of practice – such as spinal manipulation – pose significantly greater potential harms than other areas.

Another approach sometimes used is the reservation of different areas of practice to related professional and para-professional groups. The dental profession provides an example of overlapping reservations of practice that allow some services to be provided by different types of para-professionals, while other, higher risk activities are reserved to dentists only.

Regulatory restrictions must be formulated with a clear view of the extent of the likely harms from each major area of practice and a balanced assessment of whether practice requires restriction to achieve social goals.

Disciplinary processes

Professions that are subject to registration requirements almost always have disciplinary processes to ensure that the standards maintained by registered practitioners continue to be acceptable. Disciplinary arrangements generally include a range of sanctions, up to and including temporary or permanent withdrawal of the right to practice.

The specific forms of disciplinary arrangements vary widely. The degree of government involvement in the disciplinary process is one important dimension. In some cases, disciplinary arrangements are entirely in the hands of a government appointed regulatory body. In other cases, the approach is co-

regulatory, with disciplinary arrangements that are formally controlled by the profession itself being given statutory backing by government. It is also possible for disciplinary arrangements to be entirely self-regulatory, though the effectiveness of self-regulation relies on the professional group being highly cohesive and collegiate.

Another set of distinctions between disciplinary processes is in the degree of transparency and accountability built into them. This embraces a set of issues such as whether the disciplinary body's deliberations are open to the public and/or are published after the event, whether there are adequate procedural safeguards (such as appeal mechanisms), and whether the make-up of the disciplinary body is appropriate to ensure that the wider public benefit is served, rather than merely the benefit of the profession, and that public confidence is thereby maintained.

Also important is the quality of the standards enforced by the disciplinary body. In many cases, ethical standards are developed by the profession alone and there may be concerns as to their appropriateness in terms of achieving the public good. Many restrictions contained in these standards have, in the past, been anti-competitive in nature or effect. Examples include injunctions against undercutting the professional body's recommended prices.

Recent reform activity has seen substantial moves in the direction of greater openness and accountability of disciplinary arrangements. However, current practice continues to vary considerably and the quality of disciplinary arrangements continues to be an important issue in professional regulation.

Business conduct

Many professions are subject to rules prescribing how professional businesses may be conducted. The rules include limiting the ownership of businesses to professionals, prescribing standards of practice and restricting advertising. Each of these have potential implications for competition and need to be carefully assessed to determine whether they are likely to provide a net public benefit.

Standards of practice

Many schemes of professional regulation include requirements in relation to standards of practice – usually referred to as 'ethical standards' or 'standards of professional conduct'. Some of the standards adopted in the past have had significant potential to reduce competition and act against consumer interests. Examples include rules specifying that professionals should not quote prices that undercut the professional association's 'recommended' tariff (formerly employed by many Bar Associations) or that professionals should not 'undercut' a price for a job offered by another professional.

Reforms in recent years have addressed many of the ethical standards that exhibited the greatest anti-competitive potential. Moreover, the use of codes to

define ethical standards of practice also has a clear potential to benefit consumers, while providing guidance to practitioners. The question of codified standards needs to be assessed against key regulatory principles as part of the assessment process, as discussed below.

Ownership

Rules restricting business ownership are usually justified on the basis of the need to maintain professional independence, to avoid compromises in practice or decision-making due to commercial pressures. Ownership restrictions typically include requirements that only members of the regulated profession are able to own businesses engaged in providing professional services and/or requirements that members of the regulated profession not be involved in multi-disciplinary practices.

The latter restriction, in particular, may constitute a significant constraint on commercial behaviour, as multi-disciplinary practices increasingly are established to provide a comprehensive range of services to their clients. For example, practices involving accountants, management experts and lawyers are increasingly common.

Thus, where restrictions on business ownership are in question, consideration must be given as to whether any likely benefits in terms of incentives for better professional practice will exceed the expected costs – including dynamic costs³ – of reducing opportunities for innovation and entrepreneurialism in providing professional services.

Professional indemnity insurance

Professional indemnity insurance is insurance carried by professionals to cover them for the costs of any judgments of liability due to professional negligence or incompetence made against them. Benefit levels, taxation treatment and scheme design issues do not pose significant competition issues and hence are not relevant to NCP assessment. However, legislated requirements to insure, and any legislatively endorsed monopoly on the provision of insurance, have important competition implications.

Mandatory insurance

An increasingly common restriction on professional practice is the requirement that all practitioners carry professional indemnity insurance. Several reviews, particularly in the health professions, have recommended the introduction of such requirements.

³ Dynamic costs are those incurred over time due to distortions imposed on the development of a market by the regulations.

Minimum requirements for insurance cover are generally specified in regulation. Compulsory insurance requirements have the objective of ensuring that consumers are able to obtain financial redress in situations in which professional negligence or incompetence have been proven and harms have resulted.

Compulsory insurance requirements can have a number of costs, in addition to the direct costs of the insurance scheme. First, they can have the effect of restricting access to the profession, thus reducing competition and increasing prices. To the extent that professionals cannot obtain insurance at a price they can afford to pay, they are effectively excluded from the profession under a compulsory insurance requirement. Insurers may thereby take on the role of *de facto* regulators of standards, since they will ultimately determine who is and is not able to practice.

Second, the cost of insurance of itself necessarily increases the cost of providing the professional service. Thus, costs to consumers will rise.

Third, there are negative distribution effects. To the extent that premiums do not fully reflect claims experience, the effect is for practitioners with better performance to subsidise the practices of those facing payouts for negligence. This, in turn, means that the clients of better performing practitioners will bear much of the cost of this cross-subsidisation.

There are negative efficiency implications in addition to the equity aspects of this cross-subsidy. To the extent that professionals do not bear the full costs of any payouts in respect of negligent practice, the incentives for the worst performing to leave the industry are reduced. This will clearly have negative implications for consumer welfare.

Given these potential impacts, both the case for compulsory insurance and consideration of the form of that insurance require close scrutiny to ensure that they meet the public benefit test.

Benefits to the community as a whole in requiring professionals to hold professional indemnity insurance may include:

- minimising information problems regarding compensation for loss.
- ensuring a person harmed through negligence is compensated and that the practitioner responsible bears the cost;
- ensuring providers of health care are not forced out of business by large damages awards (Tito 1995, chapter 9); and
- reducing the average cost of insurance due to increases in the size of the risk pool.

The central public interest question is whether positive outcomes such as improved public confidence in the profession and the effective operation of insurance schemes outweigh any anti-competitive effects from excluding uninsured professionals from practising and additional costs from the mandatory insurance requirement.

Provision of insurance

An equally significant question is whether it is in the public interest to require professionals to obtain professional indemnity insurance from a designated monopoly insurer.

Both monopoly and competitive insurance regimes currently operate in the area of professional indemnity insurance. A range of providers of professional indemnity insurance operates in the health sector. Some industrial organisations (including the Health and Community Services Union and the Australian Nurses' Federation) offer insurance as a benefit of membership. A number of professional organisations, such as the Royal College of Nursing Australia, operate insurance schemes. Medical indemnity insurance is generally run by mutual organisations in Australia, and there are a number of commercial businesses offering indemnity insurance to professionals.

This diversity can be contrasted with the legal profession, where the lack of competition in the delivery of professional indemnity insurance means that insurers are prevented from competing for clients and lawyers are denied the chance to obtain insurance that better suits their individual needs.

Monopoly provision ensures that insurance will be available to all practitioners. In contrast, under competitive arrangements, high risk practitioners may have difficulty finding insurance, and be thus unable to practise.

Such an outcome is relatively common in other insurance markets. The ability to exclude very poor risks allows insurers to operate insurance arrangements by maintaining a commercially viable balance of risks. Indeed, there may be some benefit to the community overall from excluding practitioners with poor records from practising in that this could reduce the likelihood of future negligence or error. This argument is bolstered by the difficulties faced by consumers in recognising the quality of practitioners and the risk of negligence.

In sum, consideration of insurance requirements under NCP would be expected to acknowledge the principle of minimum necessary regulation. This should include demonstration that any requirements for compulsory insurance represent a proportionate response to actual or potential identified harms to the consumer, and whether the public benefit is best served through monopoly or competitive provision.

Advertising

The Trade Practices Act and related fair trading legislation constrain the way all businesses and individuals advertise. In addition, much professional regulation contains specific advertising provisions. Advertising restrictions are sometimes seen as means to ensure that the consumer is not seduced by misleading claims. However, equally often, advertising restrictions are based on limiting the nature and extent of competition between professionals, or are based on more esoteric notions, such as the need to preserve the dignity of the profession.

Advertising restrictions can be particularly problematic in restricting professionals' ability to enter new markets or the ability of new professionals to challenge incumbents. Any concerns as to the potential for advertising to mislead consumers or encourage over consumption must be set against the likely costs of restrictions in reducing the availability of information.

The Trade Practices Act and equivalent State and Territory Fair Trading Acts contain generic prohibitions on false, misleading and deceptive advertising. The rationale for such prohibitions is that such advertising has the capacity to distort markets and provide unfair competitive advantages to those who engage in misleading conduct. However, the public benefit case for other, more specific, prohibitions is less apparent.

Review activity under NCP has generally seen a significant reduction in the extent of these prohibitions on specific forms of advertising. However, substantial restrictions remain. Two broad types of restriction can be distinguished. The first constitutes provisions that can be seen as specific forms or applications of the general TPA prohibitions and do not have major implications for competition. This category includes:

- offering an inducement without outlining the terms of that offer;
- using testimonials;
- comparing services;
- offering an unrealistic expectation of beneficial treatment;
- advertising services likely to cause harm; and
- advertising expertise that a professional does not have.

For example, the use of testimonials can be misleading due to the difficulty in ensuring that appropriate contextual information is given and that testimonials are authentic. Similarly, advertising expertise that a professional does not have would fit within the definition of deceptive conduct.

Given the links between these prohibitions and the general TPA provisions, together with the fact that there are clear links between advertising of these sorts and potential harms, little detailed justification would be required in order to support a view that there are net public benefits from implementing restrictions.

By contrast, a range of other, relatively common, restrictions require more detailed scrutiny. These include restrictions on:

- offering an inducement, gift or discount;
- advertising to procure patients;
- promoting unnecessary or inappropriate use of services;
- vulgar or sensational advertising

- advertising in a manner that is unprofessional or likely to bring the profession into disrepute;
- canvassing or soliciting;
- the medium of advertising;
- the size, style and content of advertising; and
- the frequency of advertising.

It is difficult to establish generally applicable links between prohibitions of these types and the reduction in harm to the public. Hence, where restrictions of this kind are maintained following an NCP review, careful attention should be paid to documenting the public interest justification for their retention.

Pricing/fees

Attempts by professional bodies to use co-regulatory powers to influence pricing by members of the profession are increasingly rare. Many of these practices, such as prohibitions on barristers charging less than recommended rates, have been eliminated in recent years. However, some pricing restrictions still exist, often taking the form of maximum pricing restrictions.

While the setting of a maximum price would appear to be consistent with consumer protection, a concern arises if the maximum price effectively functions as a floor price and has the result of limiting price competition. In addition, there is a possibility that a price cap could, by blunting demand signals, lead to dynamic inefficiencies in the market for the professional services in question.

Business licensing

Business licensing means that only those businesses that are licensed are able to operate in the market for a certain professional service. Business licensing is generally implemented as an additional layer of regulation, operating in conjunction with – or in addition to – licensing of the individual professional. The business licence may specify a wide range of conditions under which operation is authorised. For example, it may require that the business operate from particular premises. It is also likely to specify that only a particular professional or professionals are licensed to operate the business.

Business licensing may be used as a means of controlling costs, particularly where there is a significant element of government payment for professional services. Business licensing is also promoted as an additional accountability mechanism in some instances and can bring non-registrants who are directors of the business within the ambit of disciplinary procedures.

Business licensing, particularly when combined with professional licensing, has the potential to constitute a significant barrier to entry to a profession, with clear potential costs in terms of reduced competition and increased prices. Moreover, there is a considerable danger that business licensing will constitute duplication of effort and hence be inconsistent with the principle of minimum necessary regulation. Hence, the public benefits being relied upon to justify the continuation of business licensing schemes should be carefully documented.

3 Regulatory structures: regulation, co-regulation and self-regulation

As important as the tools of regulation are the mechanisms by which they are given effect. There is a continuum of choices between a fully government driven regulatory system and a totally self-regulatory system. The regulation of the professions is perhaps unique in that it has historically been carried out with a high level of self-regulatory input from the professions themselves. Indeed, it is clear that, in many cases, professional attempts at self-regulation pre-date government activity in these fields.

Reviews of the regulation of the professions should have regard to the question of what level of involvement by professional bodies in the regulatory system is likely to be consistent with maximising social benefits and minimising restrictions on competition. To determine this question, it is necessary to have a clear understanding of the costs and benefits, in general terms, of self-regulation and government regulation and of the possibilities for combining elements of the two to form co-regulatory systems.

Self regulation requires a cohesive profession with a strong sense of collegiate identity. Since limited formal sanctions for poor conduct are available to self-regulatory bodies, the informal sanction of censure or disapproval from fellow professionals must be a powerful motivator if purely self-regulatory arrangements are to be effective.

However, a key advantage of self-regulation is that standards-setting and enforcement activity are likely to be informed by a thorough understanding of both the relevant technical issues and the nature of the market in which the profession operates. This means that there is potential for regulation to be more responsive and of generally higher quality.

In addition, self-regulatory systems may be able to draw more readily on the services of prominent professionals to participate in regulatory activities, due to concerns to ensure that regulation of the profession remains the responsibility of the profession, rather than being taken over by 'outside' forces.

Self-regulatory schemes generally operate at no direct cost to the public. By contrast, while most government regulatory systems are operated according to cost recovery principles, in practice few manage to recover the full costs of regulation from the profession. Self regulatory and co-regulatory schemes are also likely to be less costly overall, due to a propensity for professionals to give time voluntarily to serve on them and, in some cases, due to the adoption of relatively less formal processes.

However, self-regulatory processes have a number of limitations that mean that they are unlikely to be relied upon solely where significant potential harms arise from poor professional practice. In particular, professional associations frequently adopt the dual roles of disciplinary body and advocate of the interests of the profession (that is, acting as professional trade unions). These roles necessarily hold the potential for conflict, with the result that professional associations' ability to act as standards setting and disciplinary bodies tends to be compromised.

In addition, self-regulatory schemes are usually wholly internal to the profession, with no significant involvement of non-practitioners in the processes in most cases. Thus, the operations of the regulatory system are based solely on the perspectives of members of the profession and, hence, are unlikely to reflect fully the wider interests of its customers and of the general public.

Professional standards may therefore tend to favour the rights of practitioners unduly and provide less than optimal levels of consumer protection. The problems of lack of independence are likely to be of particular concern in relation to dispute resolution, with fellow practitioners perceived as being likely to judge their peers' actions sympathetically in most cases.

Problems of maintaining public confidence are also possible where processes lack transparency and accountability. Self-regulatory systems tend to score poorly on these criteria, again reflecting the tendency for a collegiate view to be taken, although some notable successes have been achieved.

Finally, the limited ability of self-regulatory bodies to apply meaningful sanctions for poor or unethical practice can tend to undermine confidence that such practices will be effectively deterred.

These weaknesses of self-regulatory schemes mean that few professions are now entirely self-regulated. Arguably, a long-term trend in many countries has been for increasing levels of government involvement in co-regulatory schemes. This involvement seeks to preserve many of the positive features of self-regulation, while adding some statutory backing in order to extend the 'reach' of regulation, and to increase credibility by adding an element of independence from the profession.

Co-regulation can take many forms, essentially forming a continuum between self-regulation and pure government regulation. Most commonly, the government will appoint a supervisory body for the profession with both standards setting and disciplinary functions. Membership has in the past been almost exclusively drawn from the profession itself, although more recent models are increasingly including representatives of consumers or the government or members of the legal profession, amongst others.

Professional standards are generally proposed by the supervisory body and approved by the responsible Minister. Variations include whether the Minister is able to substitute or suggest different standards or simply accepts or rejects those proposed.

4 Principles of good regulation

The above discussion indicates that self-regulation, co-regulation and full government regulation each may be appropriate ways of regulating professions in different circumstances. It shows that each of the specific regulatory tools identified has the potential to serve legitimate objectives and thus contribute to the public benefit. However, each also has the potential to reduce competition and consumer welfare. The choice of appropriate regulatory tools necessarily requires careful judgments to be made on a case by case basis.

Perhaps more importantly, each of these forms of regulatory tool can be implemented in very different ways. The impact that each regulatory tool has in practice is often largely determined by its design. For example, the impacts of professional registration requirements can vary considerably according to the criteria employed and the transparency of the processes used.

Judgments about the quality of professional regulation, including the question of whether restrictions on competition are the minimum necessary to meet public benefit objectives, must be based on a clear and consistent set of regulatory principles. This section identifies and discusses principles for the regulation of professions and occupations.

Clear identification of regulatory objectives

Clear identification of objectives is fundamental to both the design of regulatory initiatives and assessment of their performance. Explicitly identifying regulatory objectives also serves the principles of transparency and openness. Attempts at regulatory capture by vested interests can be made more difficult where regulatory objectives are explicitly stated and justified.

Identification of objectives can be particularly important in relation to professional regulation because of the tendency of regulation to be used to pursue the interests of the professions concerned, rather than those of the public. A fundamental requirement is that the objectives identified are clearly related to broader social benefit goals, rather than being concerned with furthering the status, income or other interests of the professional group.

Objectives should have a clear link to consumer benefit outcomes and to addressing identified forms of market failure, such as information asymmetry (where consumers lack the information to assess competence). In some cases, they may also relate to the protection of the broader community from externality

problems caused by practice of the profession (for example, the risk to third parties of faulty electrical work), though this type of objective would in almost all cases be subsidiary in nature.

Identifiable links between specific restrictions and reduction of harms

The identification of the links between specific restrictions and the achievement of the objectives is also an essential part of regulatory transparency. Provision of this information allows for informed public debate about regulatory choices, including the relative merits of different regulatory approaches. The principle of minimum necessary regulation is, in turn, more likely to be adhered to if there is a requirement to link all major elements of the regulatory structure to the achievement of regulatory objectives.

Restrictions which are likely to require careful treatment in this regard include:

- specific restrictions on practice, to show that significant harms arise from each of the areas proposed to be restricted;
- practical experience requirements imposed in addition to formal qualifications, to ensure that they are not being used primarily as means of restricting entry to the profession; and
- specific advertising restrictions beyond the general requirements of the *Trade Practices Act 1974*, to ensure that they are not likely to function as means of limiting information flow and the ability of new competitors to operate in the market.

In general, the greater the potential anti-competitive effects of a particular restriction, the more carefully should the link with harm reduction be documented and justified.

Regulations and other rules of conduct to be transparent and public

Legislative requirements in all jurisdictions mean that all regulations and rules issued by governments are routinely published and available for inspection by members of the public. However, where self-regulatory or co-regulatory schemes are employed, as is often the case with professional regulation, there is a possibility that no equivalent transparency requirements will be implemented.

It is essential to the confidence of customers and members of the public that the rules of conduct governing professionals are known. Confidence in the rulings of disciplinary bodies is compromised in the absence of such knowledge. More

fundamentally, the ability of dissatisfied clients of a professional to initiate complaints procedures depends on a knowledge and understanding of the standards of conduct to which practitioners are required to conform.

Thus, jurisdictions should ensure that, where co-regulatory approaches are taken to professional regulation, the professional bodies explicitly undertake to make all rules and regulations public and to explain their purpose and merits as required.

Restrictions should be consistently applied, with a presumption against 'grandfather clauses'

A common element of legislation setting out minimum qualification requirements for entry to professions is the use of 'grandfather clauses'. These are provisions that exempt existing practitioners from the qualification requirements applied to new entrants, generally specifying different, and lower, standards. Often, these lower standards include the partial or total substitution of on the job experience for formal qualifications, effectively rendering the qualification requirements null for existing practitioners.

Grandfathering provisions increase the likelihood that qualification requirements will be used illegitimately as barriers to entry to the profession, and have the effect of enhancing practitioner income rather than protecting consumer welfare. To the extent that existing practitioners know they are not required to comply, they will have an incentive to argue for higher minimum qualification requirements than they would otherwise demand.

Grandfather clauses have been defended on the basis that standards of formal education have increased across the board and that it would often be unfair to require practitioners of decades' standing to meet the requirements contained in current professional education courses. However, these arguments must also be considered in the context of increasing acceptance of the importance of continuing professional education and the adoption by some professions of formal requirements in these areas.

Thus, reformed legislation that includes grandfathering arrangements should be carefully justified. Justification should include discussion of the extent of the grandfathering arrangement and consideration of the possible inclusion of alternative continuing education requirements to ensure that equivalence of service quality is maintained.

Enforcement actions to be open, accountable and consistent

Problems with the enforcement of professional regulation have historically been largely related to a lack of consistent treatment and a lack of openness and accountability in the hearing of complaints and application of sanctions.

Many of the elements of an effective investigation and enforcement process are likely to be administratively determined, rather than legislatively based. For example, ensuring adequate resourcing of investigation and prosecution functions is essential if a responsive and consistent approach is to be taken to complaints. If it is not, lack of resources is likely to mean that valid complaints are not pursued, or not prosecuted when warranted. This, in turn, can give rise to perceptions of unequal treatment and perceived injustice on the part of those who have been subject to disciplinary action.

While these matters are unlikely to be dealt with explicitly in legislation, powers relating to the collection of registration fees have a bearing on performance in this area.

More fundamentally, openness and accountability in relation to investigation and enforcement functions are crucial to ensure that these sanctions are not misused to dissuade those whose conduct is innovative and perhaps unpopular with some other professionals, but which is within the range of sound professional conduct and is not a danger to the consumer. Specification of processes, decision criteria, and appeals related matters in legislation can all increase the degree of confidence in the conduct of these matters.

Regulatory bodies should include broad representation, with strong community involvement

A common feature of professional regulatory bodies until recent times has been their domination by members of the regulated profession. In many cases, regulatory bodies have been comprised solely of members of the profession, while in other cases there has been only token representation from other areas, including provision for Ministers to appoint one or two non-professionals, or requirements for a consumer representative.

More recently, new or revised professional regulation statutes have tended to broaden the membership of regulatory bodies. These reconstituted bodies tend to include consumer representation and, in some instances lawyers, with the intention of ensuring that the regulatory body follows appropriate processes in discharging its responsibilities. Notably, however, representation from outside the profession being regulated has generally remained limited. In virtually all

cases, non-professionals have formed a small minority of the members of regulatory bodies.

It is not possible to specify in detail a range of interests that should be represented on all professional regulatory bodies, since specific circumstances and requirements will differ. However, a number of general requirements can be identified.

First, the regulatory body should be constituted in such a way as to ensure that a range of relevant interests is represented on it and to ensure that it is adequately equipped to carry out all its tasks. This means that members should be drawn from a range of backgrounds.

Second, while it is clear that the regulatory body requires the expertise of members of the profession, its composition should avoid the possibility of professional interests predominating. Inclusion of a minority of members from the profession is sufficient to ensure access to relevant expertise. Having a majority of members of the profession increases the scope for professional dominance of decision-making.

Third, given that consumer protection constitutes the largest part of the justification for professional regulation in most circumstances, there should be strong consumer representation on regulatory bodies.

Regulation should be the minimum necessary to achieve its objectives

A frequently noted tendency is for regulatory bodies to advocate successive increases in the extent of the regulation they administer, even in the absence of compelling evidence that existing requirements are inadequate to address identified harms. This can include increasing qualification requirements, adding liability insurance requirements or other changes that create barriers to new entrants.

The impetus for such creeping regulation comes in part from the tendency for professions to seek regulatory protection from competition. However, popular pressure for tougher action in the face of isolated but well publicised instances of harm due to bad practices can also be an important factor.

As noted above, careful attention to the composition of regulatory bodies is likely to reduce the extent to which self-interest from the profession would drive demands for ever-tighter regulation. However, adoption of the principle of minimum necessary regulation is also an important means of ensuring that appropriate disciplines are adopted in assessing new proposals.

In general, NCP reviews have the objective of reducing restrictions on the practice of professions where these are not justified by the public interest. However, in many areas, jurisdictions have used the review requirements of NCP

as an opportunity to review legislation from first principles. Thus, the possibility is open for reformed regulation to include new and more restrictive provisions.

In assessing proposals, care must be taken to ensure that any new and more restrictive regulation is justified in terms of the public interest, pointing to real and substantive failures of past regulatory approaches to demonstrate the need for more restrictive options.

5 Applying best practice principles to key aspects of regulation

This section discusses the major elements of systems of professional regulation from the point of view of the application of the above general principles in each area.

Entry qualifications

The key principles in respect of setting qualifications for entry to a profession are that they should relate to clearly identified objectives and that they should represent the minimum necessary level of regulation to ensure those objectives are achieved. As qualification requirements have major anti-competitive potential, reviews should give careful attention to the application of these principles.

There are a number of particular areas of concern. First, many qualification requirements are based on the holding of an accredited degree or other formal tertiary qualification. While this appears a simple and non-discriminatory criterion, it is essential to ensure that the process of accreditation does not provide unreasonable barriers to the expansion of training provision through offerings of new courses. To the extent that accreditation procedures are co-regulatory in nature, the principle of ensuring that there is wide representation on the accreditation body – rather than domination by members of the profession – should be given considerable weight.

Second, the question of the assessment of overseas qualifications raises specific issues. A fundamental principle is that there should be no discrimination between locally and foreign qualified applicants for registration, other than on grounds of competence. For example, quota arrangements, which have in the past limited the number of overseas qualified people who could become eligible for registration in some professions, are inconsistent with this principle of non-discrimination.

Where foreign qualifications are known to be equivalent in standard to accredited local qualifications, there should be a presumption in favour of eligibility to register. Such equivalence may not always be known with certainty, indicating that testing for competence should be undertaken. In these cases, the nature and standard of such testing should be strictly equivalent to that applied to local professionals.

Registration requirements

A third area of importance is that of 'on the job' training requirements, particularly where these are used as supplements to formal qualifications. As these requirements generally involve supervision by members of the profession, there are clear opportunities for such provisions to be used in restrictive ways. Attention should be given to questions such as whether the prescribed period of supervised practice is the minimum consistent with proper training, whether there are any restrictions on which members of the profession can act as supervisors, and how many trainees can be supervised.

Finally, there should be a strong presumption against the inclusion of other tests for registration that cannot be clearly linked with the objective of reducing risks to the public. These include matters such as minimum age requirements and generic 'fit and proper person' tests. Character may be an important concern in some professions. However, more specific requirements in this area, such as the absence of serious criminal convictions, can significantly reduce the possibility that character requirements are misused to exclude practitioners.

Reservation of practice

Any regulatory schemes that include reservation of practice should be mindful of the principle of ensuring there are clearly identifiable links between regulatory restrictions and the reduction of harms. This approach is particularly important in determining the extent of the reservation of practice that is implemented. For each major area of reserved practice, a clear link to reducing a substantial harm should be apparent. Specific reservations should generally be favoured over general ones, unless most areas of professional practice pose significant potential risks.

There should also be a clear link between the harm reduction expected to occur and the identified objective of the regulatory scheme as a whole. In addition, the case should be made that the adoption of reservation of practice is the minimum response required to achieve the objective; that is, that it is consistent with the principle of using the minimum necessary degree of regulation.

Disciplinary processes

The design and implementation of disciplinary processes are fundamental to ensuring public confidence in a regulatory system. Adopting the principle that regulatory bodies should include broad representation and community involvement will contribute to ensuring that regulated professionals are held accountable for their conduct and that the underlying objectives of the regulation are thereby being supported.

A second element in the achievement of confidence in the regulatory system is the need to ensure adherence to the principle of open, accountable and consistent enforcement actions. Regulatory structures should ensure a high degree of transparency in disciplinary matters, while resources must be sufficient to ensure that credible allegations of misconduct are investigated, so that consistent treatment is achieved, rather than arbitrariness. Disciplinary proceedings should be based on the enforcement of transparent and publicly available rules of conduct. Appeal mechanisms should be provided, should be reasonably accessible and should include appeal to a body independent of the regulatory board.

These substantive and procedural matters are generally specified in legislation. The assessment of reform outcomes against NCP objectives would generally include review of the consistency of the legislation with these principles or the arguments advanced for departures from them, where this has occurred.

Business conduct

Standards of practice

As discussed in chapter 2, above, codified professional standards may provide significant consumer and practitioner benefits but may also have important anti-competitive potential. The direction of reform has generally been to remove many of the more important anti-competitive standards. Thus, where potentially anti-competitive standards are retained, they should be carefully justified in terms of the principle of demonstrating a direct link between the restriction and harm reduction, as well as the principle of adopting the minimum necessary level of regulation.

Ownership restrictions

Ownership restrictions have, as discussed above, generally been justified on the basis that they help to safeguard professional independence and thus ensure that professional judgments are not compromised by commercial considerations. However, it is apparent that such restrictions represent an indirect approach to the achievement of this objective. Moreover, there are potential costs from restrictions on multi-disciplinary practice and other innovations which might otherwise be adopted by entrepreneurial practitioners in response to changing market demands.

For these reasons, any remaining ownership restrictions should be carefully assessed and justified against the principles of ensuring clear links between specific restrictions and identified harms and minimum necessary regulation. In addition, consideration should be given as to whether more direct approaches could be employed to meet any identified need to ensure professional independence and judgement is not compromised.

Indemnity insurance requirements

For the reasons discussed in chapter 2, compulsory professional indemnity insurance requirements can have significant impacts on competition and so should be justified carefully in terms of the principles of minimum necessary regulation and of demonstrating a clear link between harm reduction and the regulation proposed.

While relatively few professions currently impose mandatory insurance requirements, a large proportion of practitioners are currently covered, either through their employer (for example, hospitals, in the case of many health professions) or individually in private practice. There are clear incentives for many professionals to insure, given the prospect of personal financial ruin in the event of a successful claim.

The desirability of insuring is frequently reinforced by professional and industrial organisations and employers, particularly in health care. In addition, a number of employers require professionals to hold indemnity insurance as a condition of contract.

Thus, the extent of additional consumer benefits likely to be associated with compulsory insurance should take account of this background.

Particular care should also be taken in relation to regulation that imposes a monopoly insurer, with a careful argument being made that satisfies the principle of demonstrating a link between harm reduction and the specification of the monopoly provider.

Advertising restrictions

As noted above, the Trade Practices Act and equivalent State and Territory Fair Trading Acts contain generic prohibitions on false, misleading and deceptive advertising. Consistent with the principle of minimum necessary regulation, additional specific restrictions on advertising should be rigorously justified in terms of their role in reducing identified harms and serving the objectives of the regulation in question.

A key problem in establishing public interest justifications for additional restrictions on advertising is likely to be in establishing a clear link between the regulatory restriction and the reduction of an identified harm. For a number of restrictions – for example, restrictions on the medium of advertising, or its frequency and style – links to harms appear tenuous.

In other cases where potential for harm might be considered to exist – such as advertising likely to bring the profession into disrepute – the problem of highly subjective tests remains. Applying subjective standards may reduce some harms while giving rise to others.

Public interest justifications should also draw a clear link between proposed restrictions in these areas and the underlying regulatory objectives, since notions

such as avoiding 'bringing the profession into disrepute' have often been more concerned with protecting producer, rather than consumer, interests.

Pricing/fees

Pricing restrictions are increasingly recognised as likely to be contrary to the public interest and are increasingly rare. Consequently, where such restrictions remain they should be carefully justified in terms of the expected link between the restriction and the anticipated reduction in harm. In addition, the question of whether a pricing restriction represents the minimum necessary level of regulation to address the identified harm should be addressed carefully.

Business licensing

As noted in chapter 2, business licensing is generally undertaken as an extra layer of regulation, used in conjunction with registration of practitioners. The need for this additional level of regulation should be justified in terms of the principle of minimum necessary regulation. This should include a clear demonstration of the reasons registration and other controls will not achieve the regulatory objectives.

Restrictions on ownership of businesses can also be considered an element of business licensing. Where such restrictions are retained, it is important to demonstrate that the benefits, in terms of assuring professional independence, are not outweighed by the dynamic costs of limiting professionals' ability to create multi-disciplinary partnerships and compete in new and innovative ways.

6 Conclusion

This paper has identified and discussed a number of generally applicable principles for the design of systems of professional regulation. Adherence to these principles is likely to generate regulation which generates maximum public benefits and minimises unanticipated costs.

Discussions of reforms to professional regulation should, where possible, refer to these principles in order to ensure that the public benefit case for remaining restrictions is clearly made and best able to be assessed.

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