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General Principles and Issues of Occupational Regulation

Abstract

This statement of general principles of occupational regulation examines the types of benefits and costs that occupational regulation may confer on the community. Accordingly, the statement serves two functions. In the first place it presents a framework within which the regulation of particular occupations may be analysed and evaluated. Secondly, it will provide a framework which a government may adopt in its consideration of requests for further extensions of occupational regulation and in its reviews of current systems.

Keywords

occupations, industrial regulation, licensing

GENERAL PRINCIPLES AND ISSUES OF OCCUPATIONAL REGULATION

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Introduction

Extensive controls over the activities of pawnbrokers, money-lenders, second-hand dealers, hawkers, auctioneers and estate agents and others have been in place in Australia and New Zealand for many years. In some cases the circumstances leading to the introduction of regulation have changed but regulation has continued. Moreover in recent years governments in Australia and New Zealand have received numerous approaches by groups in the community seeking increased occupational regulation. In Australia these groups have included travel agents, opticians, amusement parlour operators, martial arts promoters, refrigeration mechanics, electrical contractors, automotive mechanics, beauticians and life insurance agents.

Concerns have been expressed about the large number of authorities and licence requirements regulating occupations in the various Australian jurisdictions and in New Zealand. Costs of regulation can be reduced by co-ordination and effective administration of the various regulations within any jurisdiction. Moreover, it is well recognized that occupational regulation can impose significant costs upon entry into occupations. Such costs may cause the supply of practitioners to be reduced, leading to higher prices, lower production and consumption of the services provided and reduced employment in the occupation. Hence, governments are becoming increasingly conscious of the need to ensure a proper balance between the costs of occupational regulation and its benefits.

This statement of general principles of occupational regulation examines the types of benefits and costs that occupational regulation may confer on the community. Accordingly, the statement serves two functions. In the first place it presents a framework within which the regulation of particular occupations may be analysed and evaluated. Secondly, it will provide a framework which a government may adopt in its consideration of requests for further extensions of occupational regulation and in its reviews of current systems.

Forms of occupational regulation

There are various forms of restrictions upon entry into particular vocations. However, occupational regulation is not confined to restrictions upon entry but embraces also all the rules that regulate the manner in which a particular occupation is to be pursued and the controls upon practitioners. Examples of such rules are those requiring practitioners to maintain adequate records of transactions, to establish trust accounts, and to make satisfactory security arrangements.

It is common to distinguish different levels of restrictions upon entry. However, the terms used to describe the different levels have not been given consistent meaning. Much confusion has arisen because of the ambiguities of the terms and unnecessary debate has flowed from the supposed implications of a particular term. The concept of licensing in particular has been bedevilled by the attribution of supposed qualities to licensing schemes. Discussion of a particular proposal is diverted into discussion of these qualities. Therefore for the purposes of this paper a definition of terms is proposed.

First, *licensing* has to be considered. It is commonly a very restrictive form of occupational regulation. Under licensing, participation in an occupation is conditional upon persons satisfying a recognized authority that they are able to meet certain pre-determined criteria. Persons who are unable to meet the criteria are prohibited from engaging in the particular occupation, business or activity. Sometimes licensing operates to impose a quota system: the number of participants in a particular industry is fixed—often at a level where supply is commensurate with demand. Entry is not dependent on the attainment of any skill level but the availability of a place. Such licences may be transferable so that entry requires purchase of a licence often at a considerable premium.

Second, *negative licensing* is a form of occupational regulation whereby certain persons may be excluded from an activity. A recognized authority is able to issue or obtain an order prohibiting persons from engaging in an occupation, or a particular aspect of an occupation, if they have breached some rule or have engaged in fraudulent or other unacceptable activities in relation to that occupation.

Third, *certification* is a form of occupational regulation whereby persons possessing certain skills or qualifications are certified by a recognized authority (government or private sector). Participation in the occupation, business or activity by uncertified persons is not normally prohibited although such persons are not permitted to hold themselves out to the public as being certified. Certification often closely resembles licensing because it denies uncertified persons certain rights and privileges of the profession or occupation.

Finally, *registration* falls to be defined. Due to differences in terminology employed in statutes and elsewhere the word 'registration' may be synonymous with 'licensing' or 'certification'. For present purposes, however, registration is a form of occupational regulation whereby persons engaging in a particular activity are required to place their names in an official register, usually for the payment of a fee. In its pure form, registration carries no point of entry regulation because anyone prepared to list their name can engage in an activity. However, regulation is often introduced by imposing point-of-exit de-registration for non-compliance

with statutory or other requirements concerning conduct. Registration is essentially a means of identifying those engaged in a particular activity, although when it contains the de-registration process it is also a means of banning those who engage in fraudulent or unacceptable practices. In practice registration often imposes qualifying conditions which make it a defacto licensing system without the actual issue of a licence.¹

Reactions to occupational regulation

Evaluation of the costs and benefits of regulatory systems depends upon precise identification of who or what is being regulated. The regulation may apply to the entry of businesses to an industry. It may also apply to the persons who can assume positions of authority in businesses of a particular type. Alternatively, the regulation may be directed at a particular type of labour or material used in the business. The costs and benefits of regulatory systems depend crucially on which of these alternatives is adopted.

If, for example, a licensing system limits the number of banks in Australia, no direct restrictions are placed on the labour or materials which may be used in the banking industry. Nevertheless, by restricting the number of banks, the state may facilitate collusion among banks which may raise the prices of banking services and thereby limit the demand for those services and for the labour and materials which go to produce those services.

Instead of limiting the number of businesses in an industry, a regulatory system may require the principals in a business to be licensed, eg the principals in a firm of solicitors. A restriction on the number of persons able to perform the role of a principal will raise the remuneration attracted by such a role and so create an incentive for such persons to employ more non-qualified labour or use more material than would be the case without the restriction on numbers. For example, a reduction in the number of places available for law students in universities or colleges would raise the earnings of lawyers and so cause lawyers to employ more law clerks and secretaries to assist in the operation of solicitors' practices.

Similar chains of substitution of labour or materials occur when restrictions are placed on the number of persons licensed to perform any function or when restrictions are placed on material inputs. For example, the licensing of weapons may cause bodyguard or security firms to use more inputs of the unlicensed type. Alternatively, if a licensed weapon is essential for every guard, the licensing of weapons may cause the security firm to reduce the number of guards and to employ techniques of surveillance which are less labour-intensive.²

Regulation may result in substitutions other than among inputs within firms. Systems of accreditation tend to shift consumers away from those not accredited to those who are accredited. However, even systems of accreditation cause substitution among inputs; the system may raise the remuneration of those who gain accreditation and thereby cause firms

¹ See National Companies and Securities Commission, *A Review of the Licensing Provisions of the Securities Industry Act and Codes* (1986) para 5.4-5.8.

² See A DeVany, WL Graham, TR Saving and CW Smithson, 'The Impact of Input Relations: The Case of the US Dental Industry' (1982) 25 *Journal of Law and Economics* 367.

to substitute non-accredited labour and/or material inputs for the accredited labour.

Burdens of regulation

(a) *Direct costs* There are obviously direct costs for both government and participants in the regulated occupation from restrictions upon entry. An application for a licence must at least be processed, background information may need to be investigated and often a decision on the merits of the application must be made. Even if annual renewals of licences are not demanded, complaints must be processed and ongoing requirements such as audited accounts must be checked. To some extent the burden of these costs may be recompensed through licence fees. However, proper estimation of administrative costs has meant that fees have seldom met costs, but even if they do the system of charging means that the costs are being borne by participants in the occupation. These participants must not only pay the licence fees but must also meet the cost of providing information required by the regulators. The completion of information may extend well beyond filling in forms to the undertaking of investigations. Furthermore, entry standards involving completion of courses of training demand the commitment of time and costs by aspiring entrants and massive government expenditure on education.

(b) *Market impacts* Regulation often diminishes competition and promotes monopoly power. For example, a feature of many regulatory schemes is that control is exercised on the entry of new competitors into the regulated occupation, and such entry restriction may amount to the tyranny of the status quo. Given a relatively stable demand for particular services, a restriction on the supply of those services will lead to price increases.

The necessity for relevant experience is one criterion often used to eliminate entry by competent persons with backgrounds differing from the majority of members of the occupation. In *Gun v Commercial Tribunal*³ a land agent's licence for a retired magistrate was opposed. The applicant had twenty-seven years' experience as a lawyer and magistrate which included much work relating to land dealings. It was argued that this was part-time experience in only a related field and to a large extent under earlier legislation and practice.

It is argued that one of the consequences of regulation on entry into a particular occupation is 'technological lethargy'; that is, a firm with a fixed rate of return and protected from outside competition due to entry restrictions has no incentive to be innovative.⁴ Given that many innovations may result in cost reductions, regulation which inhibits innovation is imposing a cost upon consumers.

Regulation may affect the relative prices of labour and material inputs, and so cause firms to use inefficient mixes of inputs. For example, where regulation of an occupation has the effect of raising the remuneration received by members of that occupation it may cause organizations to

³ (1988) 142 LSJS 137.

⁴ See Green and Nader, 'Economic Regulation v Competition: Uncle Sam the Monopoly Man' (1973) 82 Yale LJ 871, 882.

substitute for such members other labour and material inputs. Such substitution may not be efficient.

(c) *Regulatory processes* A major criticism of all regulation relates to the 'processes of regulation'. Delay, inflexibility and inadequate information for accurate decision-making are all charges levelled at regulatory bodies. Any bureaucracy develops rules from assessments of particular cases. These rules can become inflexible and in different circumstances impede the public interest.

Benefits conferred by regulation

The benefits of regulation vary according to the precise form of the regulation. However, there is a range of goals which occupational regulation may seek to meet.

(a) *Information* Markets produce less information than would be desirable in a perfect world and, in any event, consumers will only search out and utilize information so long as the costs of their search are lower than the savings which they expect to make.⁵ Certification and licensing provide information about practitioners in a particular occupation; the fact that a person has satisfied required standards is an indication to the consumer as to the quality of the service that will be provided. This decreases the cost to consumers of measuring the quality of services.

(b) *Professional competence* Occupational regulation is sometimes directed at ensuring a minimum level of competence for those who participate in a particular industry; for example, a licensing system may require a licensing authority to be satisfied as to the educational qualifications and/or experience of an applicant. Consumers are thus given some guarantee that services provided by practitioners will conform to a basic level of skills. Thus in the case of estate agents, for instance, it is asserted that, in addition to competence in handling of funds, estate agents need a basic knowledge of laws affecting real estate transactions, an understanding of how to determine property valuations and reasonable knowledge of structures and materials if they are to service their clients' needs adequately. If persons act as estate agents without these skills, their clients and persons dealing with the clients may be disadvantaged through inaccurate advice, representations made without sufficient basis or contracts not being properly concluded. Civil remedies against the agent involve considerable cost and may not provide adequate relief because rights against the agent cannot be disentangled from the major transaction. Moreover, the basis of civil action may not become apparent until much later.

(c) *Honesty and fairness* Occupational regulation in the form of licensing may be aimed at ensuring that persons engaged in a particular business are of good character. Moreover it is common to find some mechanism whereby those persons who have engaged in fraudulent or other unacceptable conduct may be 'ordered off' the playing field; that

⁵ See Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in National Bureau of Economic Research, *The Rate and Direction of Economic Activity* (1962); Duggan, *The Economics of Consumer Protection* (Adelaide Law Review Research Paper No 2) 22-38.

is, some form of negative licensing system is in place.⁶ The risk of deception or misappropriation of money for consumers of the service is thus reduced. For example, while the Insurance (Agents and Brokers) Act 1984 (Cth) does not require the Insurance and Superannuation Commissioner to be satisfied that an applicant is a 'fit and proper person' to carry on the business of insurance broking, the Commissioner may refuse to register an applicant where that person has been convicted of a section 25(1) offence; that is, an offence against the Act, or any other law anywhere in the world 'in respect of conduct relating to insurance' or in respect of dishonest conduct provided the Commissioner is of the opinion that the offence renders the person unfit to carry on the business of an insurance broker.⁷ The Commissioner is empowered to suspend or cancel a registration if a broker is convicted of an offence falling within the ambit of this wide range of offences and cancellation of registration for an indefinite period would preclude a cancelled registrant's subsequent application for status under the Act.⁸

(d) *Financial soundness* Occupational regulation may endeavour to ensure the financial soundness of those who participate in an industry. In this connection requirements as to adequate professional indemnity insurance cover, the maintenance of trust accounts, and constraints on investment and usage of funds may be imposed. Again consumers can be assured that practitioners will meet their financial obligations and that their money will not be misappropriated. For example, recent legislation providing for the licensing of travel agents in Australia⁹ provides for compensation schemes to provide funds to compensate persons who suffer loss in consequence of the dishonesty or negligence of a person carrying on business as a travel agent; the death, disappearance or insolvency of a person carrying on business as a travel agent; or the failure on the part of the person carrying on business as a travel agent to carry out contractual obligations properly.

(e) *Public health and safety* Certain activities carry with them risks to the health and safety of the public. The sites on which certain occupations may be carried out may be restricted on the basis of health considerations. Regulations as to who may deal in inherently dangerous commodities or objects such as firearms are likely to be based on considerations of public safety. Often the public affected extends beyond those who deal directly with members of the regulated occupation.

(f) *Assisting the policing of crime* In order to apprehend suspected criminals and to prepare materials used in prosecuting them, the police need to gather information. Some persons providing services as second-hand dealers, dealers in firearms and so on are in good positions to provide some of this information. Some systems of occupational regulation confer a benefit by making it easy to identify such practitioners and by

6 See National Companies and Securities Commission, *A Review of the Licensing Provisions of the Securities Industry Act and Codes* (1986) para 5.10.

7 Insurance (Agents and Brokers) Act 1984 (Cth) s 25(1). Compare the General Insurance Brokers and Agents Act 1983 (WA) s 10(1), where a condition to be licensed as a broker was that the person in question be 'of good character and repute and is fit to hold a licence'. See also the Insurance Act 1960 (Qld) s 11.

8 Insurance (Agents and Brokers) Act 1984 (Cth) s 25(5).

9 Travel Agents Act 1986 (SA) as amended; Travel Agents Act 1986 (NSW); Travel Agents Act 1986 (Vic); Travel Agents Act 1987 (Tas).

compelling them to record the information which may aid the police in their investigations.

(g) *Reducing output of a service* In rare circumstances, restrictions upon the numbers of practitioners in an occupation may be the only effective way of reducing demand for a service to an optimum. It seems that some practitioners are able to expand the demand for their services as they see fit. This demand only exceeds the optimum because normal pricing mechanisms are displaced. The argument therefore tends to be peculiar to medical services where costs are borne by the community generally.¹⁰ This aim of reduction of services through the reduction of participants in the activity differs from the quota systems where the aim is not to reduce consumption of the service but to set a level of participation so that the number of participants is related to the expected demand. Quota systems seek to guarantee a level of income for participants.

Alternatives to intervention

Market failure does not automatically call for government intervention, via occupational regulation or otherwise. Markets fail in varying degrees and government intervention cannot be justified unless the benefits exceed the costs.¹¹ As the Moloney Committee¹² point out:

The Consumer is the taxpayer, and we see small merit in creating an elaborate new system to assist him in one capacity, when he would have to pay for it in the other. In so far as any increased cost fell on industry, recoupment from the consumer would be no less inevitable.

Statutory intervention may be unnecessary in light of the self-enforcement and regulatory procedures that already exist within an occupational group. Such business self-regulation is said to enjoy a number of advantages over legislative control in that it is cheap, flexible and more effective.¹³ Furthermore it is argued that businesses or occupational groups who introduce self-regulatory codes are more likely to comply with the spirit as well as the letter of the code than be resistant as experience indicates they can be to statutory regulation. Standards established in a self-regulatory system can be applied in a commonsense practical way and not in the legalistic technical way of legislative controls.

Self-regulatory codes may however be more concerned with protection of practitioners than the public interests. Advertising codes, for example, have often directed their strongest attacks upon comparative advertising which stresses deficiencies of a competitor's products and have thus reduced public information. Limits upon unprofessional conduct often serve to restrict forms of advertising which are largely of assistance to new entrants. Self-regulation of its nature often flounders on the rocks of non-membership, enforcement, and sanctions for non-compliance.¹⁴

10 See Richardson, *Financial Incentives and Entrepreneurial Medicine* (1986) 12-13; Moore and Tarr, 'Regulatory Mechanisms in Respect of Entrepreneurial Medicine' (1986) 16 Aust Bus LR 4, 35.

11 See, for example, Winter, 'Economic Regulation v Capitalism: Ralph Nader and Creeping Capitalism' (1974) 82 Yale LJ 890, 894.

12 Final Report of the Committee on Consumer Protection, Cmnd 1781 (1962) para 16.

13 See Cranston, *Consumers and the Law* (2nd edn 1983) 373.

14 Generally, see AA Tarr, 'Business Self-Regulation in New Zealand' (1985) 2 Canta LR 312.

Effectiveness of occupational regulation

The effectiveness of occupational regulation must be assessed by reference to the objectives of the regulatory scheme. If, for example, the major *raison d'être* for a regulatory statute is to ensure professional competence, the focus should not only be upon entry standards but should extend to the periodic review of the competence of existing licensees. Many professional and industry associations promote new expertise among their members quite strongly, but this is voluntary and quite apart from the regulatory system. While proved incompetence amounting to negligence may be grounds for being deprived of the right to remain in an occupation, it is rare for a regulatory system to monitor competence of existing practitioners. There are a number of justifications for this:

- (i) Sheer numbers may make it difficult to re-test all practitioners regularly;
- (ii) Given high entry standards, continued employment in the trade or profession may be sufficient to ensure competence—formal examinations may be unnecessary and burdensome;
- (iii) Incompetent practitioners are unlikely to survive long in business or employment; and
- (iv) Mandatory re-testing would disadvantage those practitioners who have become highly specialized.

Since many regulatory authorities are dominated by members of the occupation itself, sympathy for fellow tradesmen or practitioners may blind authorities as to the desirability of monitoring standards, a practice they may regard as insulting and unnecessary. Moreover a major source of information about competence of practitioners is consumer complaints. Often little attention is given to publicity about regulatory authorities or ease of access for complainants. Whatever the reason or justification for not testing the professional competence of existing practitioners, it is clear that satisfaction of entry standards may only amount to a very crude signal to the consumer as to the quality of service that will be provided, especially where the occupation is subject to technological change and innovation in business practice.

Even if the objectives of an occupational regulation scheme are concluded to be laudable, the statutory requirements that are imposed in an endeavour to achieve these objectives may be hopelessly inadequate. For instance, does a character reference from a member of the community as a pre-requisite to the granting of a licence to pursue a certain occupation provide any real or effective protection to consumers against dishonest or unscrupulous persons? Changes in the community may reduce the effectiveness of procedures. Licensing by local justices of the peace in the nineteenth century may have been based on their local knowledge which enabled them to assess character. The capacity of magistrates today bears no comparison.

Since effectiveness must be assessed by reference to the objectives of any regulation before any regulation in whatever form, or level, is adopted a careful evaluation of the aims of any regulation must be undertaken. Relevant to such an inquiry is a consideration and determination of the following:

- (a) Will unregulated practice of this occupation pose a serious risk to the consumer's life, health, safety or economic well-being?

- (b) Are existing protections available to the consumer insufficient? For example, do rights, remedies and access to the courts under the general law afford an adequate avenue of redress?
- (c) Is there an alternative to government regulation that will adequately protect the public? For instance, would business self-regulation and enforcement of a code of practice by a professional association be a viable alternative?
- (d) Will government regulation mitigate existing problems? For instance, how will the proposed regulation correct or preclude consumer injury?
- (e) Will benefits to the public outweigh any potential harmful effects such as a decrease in the availability of practitioners, higher costs of goods or services, and restrictions on optimum utilization of personnel? That is, will regulation yield net benefits to the consumer?
- (f) Do potential users of the occupational service possess sufficient knowledge to evaluate properly the qualifications and/or competence of those offering services?

The responses to the above questions will provide information essential to any consideration of whether there is a need for occupational regulation, or not.¹⁵

Evaluation of alternative regulations

In order to establish that a particular system of regulation is worthwhile two tests must be passed. In the first place, it must be established that the system creates more benefits than costs, ie that the system yields net benefits. Secondly, it should be shown that the system in question creates a higher level of net benefits than do alternative systems.

The cardinal principle which must be applied in assessing whether a system clears the hurdle of greater net benefits than alternatives is that a system which deals most directly with the problem is likely to be superior. If the problem is health, industrial safety, consumer protection or something similar, then it is likely that legislation dealing specifically with those concerns will maximise net benefit. If the regulation of labour markets is used to solve such problems, it is likely that the costs generated will be greater and that the benefits will be lower than under action directed specifically to the problem.

An example of alternative methods of achieving similar ends frequently mentioned in the literature of occupational regulation is that certification may be a more direct means than entry controls of solving the problem of poor information concerning quality. Although certification may be less costly than entry control, the case for certification is not always compelling. A number of factors are involved:

- (a) *The nature of the hazards facing the public* Where consumers are exposed to the risk of physical injury or hazards to their health, one would be more inclined to recommend entry control than where there is only a risk of monetary loss.

¹⁵ Generally, see B Shimberg and D Roederer, *Occupational Licensing: Questions a Legislator Should Ask* (1978) 33-34; AA Tarr, 'Consumer Protection Legislation and the Marketplace' (1983) 5 Otago LR 397.

Furthermore, control is more justifiable where monetary loss is likely to be catastrophic and irretrievable; eg, risks arising from incompetent house painting.

- (b) *The nature of consumer ignorance* Where there are complex technical questions involved, it may be difficult for the consumer to judge the competence of practitioners, and hence difficult for the consumer to judge the message conveyed by the certificate. For instance, it may be more difficult to assess the workmanship of a neurosurgeon than of a plumber. Consumer ignorance not only reflects technical complexity but also the nature of the relationship between the consumer and the practitioner. A construction company which frequently employs plumbers may need less protection than a householder who has to resort to picking a name from a telephone book. The likelihood of the consumer being able to distinguish between certified and uncertified practitioners is also significant. Where distinctions are likely to be very difficult, the argument for any controls is stronger.
- (c) *The distribution of risk* The case for entry control as opposed to certification is stronger where risks are imposed on third parties. For instance, if a householder engages an incompetent tradesman to repair his washing machine, the costs of inferior work are borne by himself. However, if he engages an inferior tradesman to repair the brakes on his motor vehicle, he may be placing innocent motorists and pedestrians at risk.

Nature and level of regulation

On assumption that a need for regulation of a particular occupation is demonstrated, the nature and level of that regulation falls to be considered. The following matters must be borne in mind in determining the appropriate regulatory response:

- (a) In accordance with what is expressed above, a choice between competing systems of regulation must be resolved in favour of that system which creates a higher level of net benefits than do alternative systems.
- (b) The level of intervention and regulation must be at the minimum consonant with the control of perceived mischiefs. Any regulation gives rise to costs, both direct and indirect, and this factor alone should constrain excessive levels of regulation. For example, the requirements for entry must be tailored to the specific objectives of regulation and not include irrelevant criteria such as residential location or membership of a professional organization. Moreover, educational qualification must be the minimum necessary—in length and difficulty—for competence in the occupation; it must not be used as a means of limiting the numbers entering the occupation or raising its status. Finally, requirements for practical experience should be limited to the amount necessary for adequate experience. Unduly long apprenticeships or other requirements for employment-related training should not be

used to provide a cheap source of labour for employers, or to uphold the traditions of the profession or trade, or to make entry more difficult and so limit competition.

- (c) Where possible, regulatory responses should be harmonised in the interests of rationalization and intelligibility to consumer and practitioner alike. Harmony in this context dictates that similar responses are given to similar problems. For example, if the concern is about the honesty and integrity of practitioners, there is no logic or merit in requiring six character witnesses under one regulatory scheme and a single testimonial from a householder pursuant to some other regulatory statute.
- (d) In addition to the question of harmony or consistency, care must be taken to avoid duplication. If another regulation or statute serves the same purpose as the proposed regulation, there is no sense in creating another regulatory scheme where the mischief sought to be curbed by the proposed regulation could be controlled by expanding the scope of an existing statute or regulation, or, in the case of a very general statute regulating deceptive or unfair trade practices, by enforcing the provisions of that statute to counter abuses in the particular occupational area. Thus, as B Shimberg and D Roederer¹⁶ point out:

If an occupation is to be licensed, its scope of practice should be co-ordinated with existing statutes to avoid fragmentation and inefficiency in the delivery of services.

- (e) Emphasis in much occupational regulation is on assessment of an applicant's suitability at point of entry to the occupation. However, as C J Aislabie and K Lindgren¹⁷ state:

... [S]o important is self-interest in explaining business behaviour that any system of restriction on entry that falls short of detailed ongoing control will be regarded by many as inherently inadequate to deal with serious mischiefs.¹⁸

Ongoing control requires the incorporation of adequate measures in the regulatory statute to address particular problems in an industry, and the provision of adequate resources to monitor compliance.

- (f) Careful evaluation of the nature of the consumers of the occupational service will have an enormous impact on the type and level of intervention. Consumers of practitioner services must be identified as regulatory responses will vary according to the level of sophistication, knowledge, gullibility or naivety of the consumers in question.
- (g) Statutory occupational regulation should be uniform throughout Australia so as not to impede labour market mobility.

¹⁶ B Shimberg and D Roederer, *Occupational Licensing: Questions a Legislator Should Ask* (1978) 5.

¹⁷ 'Economic Analysis of Legal Restrictions on Entry into Business' (1975) 3 ABLR 32, 41.

¹⁸ See also R Cranston, *Consumers and the Law* (2nd edn 1983) 62-63.

The regulatory body

Assuming some form of occupational regulation is perceived as being necessary, questions arise as to the appropriate composition of the relevant licensing/regulatory body.

Many statutes arrogate point-of-entry and other regulatory functions to local magistrates' courts. This reliance entails the decentralization of the regulatory scheme, inhibits the growth of any body of specialist knowledge about the industry as a whole and precludes the development of coherent standards and an overall policy for the regulation of the industry.¹⁹ Moreover, as pointed out earlier the original basis for licensing by justices of the peace was founded upon the assumption that such persons by virtue of local knowledge were well placed to assess matters such as character.

An alternative is to create a centralized, specialist licensing/ regulatory body responsible for the issue and administration of licences which regulate occupations. In supporting such an approach in respect of legislation in Victoria controlling secondhand dealers, marine dealers, firearm dealers and pawnbrokers, the Management Services Bureau of the Victoria Police had the following to say:

The amalgamation of the present licensing bodies would result in cost savings, due not only to the expected economies of scale, but also due to the elimination of duplication of enquiries and licences. The drain on police and court staff would also be reduced.

The authority should be required to maintain a central register of all persons who hold particular types of licences. This resource would be invaluable to police enforcing the Acts and for establishing whether or not a person is licensed. Presently most licences are only recorded at the Magistrates' Court of issue.

Should this recommendation not be adopted then, at least, there should be a central repository for records of all licences and applications. This repository would contain details of the applicants' character which would be available to assess suitability to hold a licence applied for on a later date.²⁰

Such a licensing/regulatory body should be comprised of persons from the occupation in question as well as outside community representatives. Industry representation is essential for democratic reasons and because their expertise in technical matters will frequently be indispensable. However, caution has to be exercised in the constitution of the regulatory body to avoid its capture by, or subversion to the interests of, the industry it is charged with regulating. As far as community representatives are concerned, Paul Redmond²¹ points out that there are several rationales in favour of the appointment of such persons to regulatory bodies, namely:

It provides wider perspectives in group deliberation and decision making; the interests of consumers . . . and the general community may be articulated and weighed against the interests, more familiar to professional members, of the group; their participation ameliorates the conflict of interest inherent in the responsibilities of the single regulatory body; it serves also as a prophylactic against easy acquiescence in and identification with the professional view.

19 See AJ Duggan, 'Occupational Licensing and the Consumer Interest' in AJ Duggan and LW Darval (eds), *Consumer Protection Law and Theory* (1980) 166.

20 Submission to the Regulation Review Unit, November 1986, 12.

21 'Regulating Doctors and Lawyers' (1984) *New Doctor/Legal Service Bulletin* 19, 22.

Moreover, regardless of how impartial a regulatory body comprised entirely of industry personnel may be in the discharge of licensing, supervisory or disciplinary functions, as long as that undiluted body is the sole arbiter, there is the risk that the public perception will be one of vested interests dictating outcomes.

It is therefore essential that specialist regulatory bodies should have a balanced membership of industry and non-industry persons. Outside community representation should be sufficient to ensure that their voice is heard and for fears of isolation and industry domination to be assuaged. However, as Duggan observes:²²

It is also worth mentioning that there is no magic in numbers and that an agency with consumer representation which is weak (whether in terms of voting strength or strength of personality) may in practice be more susceptible to industry influence than, say, a committee which lacks consumer representation but has a strong independent chairman.

An effective regulatory body should be centralised, specialist and independent.²³ Such a body is well placed to administer point-of-entry controls, to regulate post-entry conduct, and to adjudicate in respect of disciplinary matters. Specialist knowledge is available and accumulated about the industry and a coherent strategy of intervention can be employed. The amalgamation of functions in a single regulatory body such as the Commercial Tribunals of several states can however detract from special knowledge about particular occupations. Input through varied composition of the Tribunals may not be meaningful. Moreover the specialist knowledge may be equally needed amongst those providing administrative support for the regulatory body. The savings from a single body may turn out to flow from a reduction in service below the desirable level.

Licensing process

Where licensing is deemed to be the appropriate form of occupational regulation, the processes relating to the grant, transfer, renewal and cancellation of licences require careful consideration.

Where licensing is aimed at excluding dishonest or other undesirable persons from practising a particular occupation, an applicant for a licence may be required to provide 'good character' references. Such a requirement is farcical where the licensing authority does not have the means or resources to check the credentials of the persons providing the testimonials. An alternative, more efficient, procedure would be maintained if the police and local council, acting on behalf of the public, had the opportunity to object to the initial granting of a licence. Whilst it is desirable that greater input into the process be obtained, that input must be handled carefully or the result may be the denial of a licence on the basis of

²² See above n 18 at 168.

²³ An example is the Commercial Tribunal in South Australia, established pursuant to the Commercial Tribunal Act 1982, as amended. This Tribunal now exercises the statutory jurisdictions formerly exercised by a variety of boards and tribunals in respect of consumer credit, second-hand motor vehicles, second-hand goods, land agents, brokers and valuers, builders and commercial and private agents. In addition it has licensing and other regulatory functions under the new Travel Agents Act 1986, as amended.

unsubstantiated hearsay.²⁴ Licensing systems have often been used to exclude the victims of prejudice or those holding unpopular views.

Provisions dealing with transfer of licences are cumbersome and unnecessary. Most transfer provisions require, out of concern for the moral character of the transferee, that the transferee satisfy licensing criteria applicable to a new applicant for a licence. Transfer provisions could be dispensed with and all applicants placed on the same footing.

Most licences are issued for a calendar year or are expressed to expire at the same date. Renewal is often contingent upon submission to the licensing authority of a fresh application analogous to the original licence application. Having all licences expire at the same time and requiring fresh applications creates administrative 'log-jams' and unnecessary expense for both administrator and applicant. It would be far more sensible to provide that licences will be continuously renewed twelve months after the date of initial granting subject to: (i) payment of an annual fee; (ii) a power of suspension or revocation by the licensing authority; and (iii) a power of surrender by the licensee.

Movement within Australia should be encouraged. To this end the licensing authority should endeavour to extend recognition to persons holding comparable licences from other states. Many current arrangements for practitioners in border areas are unduly complicated.

Many licensing statutes address the issue of trading hours. This matter is more appropriately dealt with by the general law and no justification for idiosyncratic rules is apparent.

Enforcement and sanctions

The availability of adequate resources for monitoring and ongoing supervision is essential to the effectiveness of any regulatory scheme. The allocation of these tasks to the police is inadvisable in times when limited police numbers and already crowded schedules dictate that low priority is afforded to such tasks.²⁵ Ideally the regulatory body should be assisted by an investigating officer with appropriate qualifications and experience. This officer should be charged with the function of investigating matters relating to the activities of practitioners into which the regulatory body may decide to enquire, whether or not a complaint has been made. The existence of such an investigating officer is essential to the proper functioning of a regulatory scheme, but even more crucial is that sufficient publicity and information is disseminated as to the existence of the regulatory body and its disciplinary function. To quote one example: the Advertising Standards Association in the United Kingdom (the advertising industry's own watchdog on advertisements) had always trumpeted the smallness of the number of complaints as evidence that all was well with the advertising industry. However, following criticism by the Office of Fair Trading and the government in the United Kingdom about the lack of publicity and secrecy of complaint proceedings, a publicity campaign

²⁴ In *Pave v Commercial and Private Agents Board* (Supreme Court of South Australia, Judgment No 638 of 1988) a police report containing opinions based on hearsay and unsubstantiated inferences was used without meaningful opportunity for the applicant to be aware of and respond to its contents.

²⁵ See Committee of the Law Council of Australia, *Report to the Attorney-General for the State of Victoria on Fair Consumer Credit Laws* (1972) para 3.1.1.

was launched and this led to a significant increase in the number of complaints received by the Association. It would be a mistake to assume that members of the public are aware of the appropriate body to which their complaints should be submitted, or even that a ground for complaint exists. Therefore if the 'public audit' of practitioners' conduct is to be improved some attention should be paid to publicity about 'what' a practitioners' obligations are, and about 'where' a complaint can be made.

No regulatory scheme will be effective if it is not enforced by appropriate sanctions. A big advantage of a licensing scheme is that it widens the choice in selection of sanctions by adding the possibilities of refusal, suspension or revocation of a licence. Small fines may have little deterrent value, but a disciplinary body can wield great power with the sanction of revocation at its command. However, it is important that a wide range of sanctions should be available; it would be quite inappropriate to meet breaches of a minor or technical nature with the revocation of a licence, and other much lesser penalties should be available. Indeed, Ross Cranston maintains that:²⁶

Once established, a licensing system is deficient if it does not contain a gradation of sanctions ranging from the mild to the severe. This illustrates a general point about sanctions, that enforcement agencies are handicapped if there is a discrepancy between the sanctions they can initiate and the objectionable behaviour they are charged with eliminating. If a sanction is too mild it will not deter, an illustration being a low fine; while if a sanction is too severe the agency will be reluctant to have it imposed.

On the other hand the establishment of a regulatory scheme without sufficient resources to enforce it may create greater problems than would occur if no regulatory action were taken. If there is no licensing of second-hand motor car dealers, members of the public are left to determine for themselves the reliability of the person they deal with. But, if licensing is in force, some persons may believe that they can assume that any dealer has no record for dishonesty. Yet the system may not be checking out that history. Furthermore, whatever checks are made, past history is a very approximate guide to future conduct. Members of the public may not be sophisticated enough to appreciate that whilst they can assume the dealer has no record for dishonesty they cannot assume he will act honestly in the future. Lack of such an appreciation is more forgivable because of statutory references to fit and proper persons.

The problem of the gap between regulatory commitments and resources to support those commitments is likely to increase as resistance to taxation and bureaucracy increases. Ongoing tasks are likely to be those which first suffer from resource constraints. For example, the check to see if an annual audit has been properly carried out can be performed perfunctorily with little evidence that the system is breaking down. Subsequent investors may be prejudiced by this failure. Default by a licensee may cause liability for a guarantee fund, but may also lead to liability in negligence for the licensing authority in the burgeoning field of torts liability of public authorities.²⁷

²⁶ *Consumers and the Law* (2nd edn 1983) 374.

²⁷ Baker, 'Maladministration and the Law of Torts' (1986) 10 *Adel LR* 207.

Conclusion

It is now widely perceived that participants in any particular industry have a concentrated interest in regulation affecting that industry, whilst articulation of the public interest is much more diffuse. Thus pressure for regulation in the interests of those participants tends to sweep aside opposition. One answer has been to set up a distinct regulatory body to evaluate submissions for occupational regulation. This answer seems to parallel the conclusion that judges should judge judges; here regulators are set up to regulate regulators.

If any force will impact upon the tendency to give way to pressures for regulation, it is the current pressure to restrict government spending. The dangers in retaining a regulatory scheme without the resources for proper implementation have been discussed. Pressures to restrict spending may give rise to a healthy re-evaluation of priorities. Schemes for occupational regulation set out to protect the public from some perceived potential detriment. Most schemes founder on the reality of that detriment or the ability of the regulation to offer real protection. If regulation is reduced, the likelihood of greater harms must be faced. If protection before the event is taken away, then availability of redress when harm eventuates becomes more important. Proscriptions against wrongdoing in the Trade Practices Act and the state Fair Trading Acts are extensive, have a range of enforcement mechanisms and carry substantial penalties. On the other hand, contractual rights through implied terms are comprehensively conferred only by the Trade Practices Act. At a state level too much reliance remains on the outdated provisions of the Sale of Goods Acts. The enforcement of civil rights also depends on such advances as small claims tribunals and representative actions. Attention to these matters would reduce the impact of any loss of occupational regulation.